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Vol. I
TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1949

No. 96

R. M. POWELL, ET AL., PETITIONERS,

vs.

THE UNITED STATES CARTRIDGE COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITION FOR CERTIORARI FILED JUNE 3, 1949.

CERTIORARI GRANTED OCTOBER 10, 1949.

RECORD.
Vol. I.

United States Circuit Court of Appeals,
EIGHTH CIRCUIT.

No. 13,663.
CIVIL.

THE UNITED STATES CARTRIDGE COMPANY,
A CORPORATION,
APPELLANT,

vs.

R. M. POWELL ET AL.,
APPELLEES.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF MISSOURI.

FILED NOVEMBER 19, 1947.

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Note

Throughout this Transcript of Record there are many blank pages which apparently have been assigned page numbers, These blank pages have not been microcarded, and the user of these cards will be so notified at each point where this occurs.

--Matthew Bender & Co.

Pleas and proceedings in the United States Court of Appeals for the Eighth Circuit, at the March Term, 1949, of said Court, before the Honorable Archibald K. Gardner, Chief Judge, and the Honorable John B. Sanborn, the Honorable Joseph W. Woodrough, the Honorable Seth Thomas, the Honorable Harvey M. Johnsen, the Honorable Walter G. Riddick and the Honorable John Caskie Collet, Circuit Judges.

Attest:

E. E. KOCH,
Clerk of the United States Court of Appeals for the Eighth Circuit.

(Seal)

Be it Remembered that heretofore, to-wit: on the 19th day of November, A. D. 1947, a transcript of record pursuant to an appeal taken from the District Court of the United States for the Eastern District of Missouri, was filed in the office of the Clerk of the United States Circuit Court of Appeals for the Eighth Circuit, in a certain cause wherein The United States Cartridge Company, a Corporation, was Appellant and R. M. Powell, et al., were Appellees.

Printed record on which the appeal was heard in the United States Court of Appeals for the Eighth Circuit, is in the words and figures following, to-wit:

[fol. 1] Notice of Appeal.

(Filed September 17, 1947.)

In the United States District Court for the Eastern Division of the Eastern Judicial District of Missouri.

R. M. Powell, et al., Plaintiffs,

vs.

The United States Cartridge Company, a corporation, Defendant.

Court Room No. 1
Civil Action No. 3597

Notice Is Hereby Given that The United States Cartridge Company, a corporation, the defendant in the above entitled cause, hereby appeals to the Circuit Court of Appeals for the Eighth Circuit from the final judgment and decree entered in this action on May 19, 1947, and from the order entered on September 2, 1947, denying and overruling Defendant's Motion for a New Trial.

RHODES E. CAVE,
R. H. McROBERTS,
W. C. CONNETT IV,
1630 Boatmen's Bank Building,
St. Louis 2, Missouri,
Attorneys for Defendant The United States Cartridge Company.

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1630 Boatmen's Bank Building,
St. Louis 2, Missouri,
Of Counsel.

[fol. 2] Docket entry showing filing of notice of appeal and mailing copy of such notice by the clerk of the court to attorney of record for plaintiffs.

(September 17, 1947.)

Notice of appeal of defendant to the United States Circuit Court of Appeals, 8th Circuit, from final judgment and decree heretofore entered herein May 19, 1947, denying and overruling defendant's motion for a new trial, filed and copy of aforesaid notice of appeal forthwith mailed by the Clerk of the Court to Thomas Bond, Esq., attorney of record for plaintiffs.

Docket entry showing filing of complaint by plaintiffs.

(May 4, 1945.)

Complaint filed and summons issued directed to defendant returnable within twenty days after service.

(Docket Entry of filing of First Amended Complaint.)

(April 5, 1946.)

On oral motion of plaintiffs, the persons named in Exhibit A to the complaint herein are [joinnd] as additional parties plaintiff. First amended complaint joining said persons as parties plaintiff, filed by leave.

[fol. 3] First Amended Complaint.

(Filed April 5, 1946.)

In the United States District Court for the Eastern Division of the Eastern Judicial District of Missouri

R. M. Powell, A. C. Kropp, F. N. Harris, J. M. Tyler, J. C. Marshall, A. W. McCluing, G. H. Bentine, Joe Reeves, Herbert Hahn, N. W. Myers, B. J. Ludwig, E. L. Stockho, William Niedringhaus, William Stutz, S. P. Coley, L. W. Trimble, R. M. Stewart, B. H. Hargate, J. S. Schneider, Walter Gorg, Jr., B. M. Casey, A. H. Erickson, Elmer Maher, Emmett Hoskins, F. P. Knight, R. A. Westra, D. F. Bateman, Al Herman, George Burmeister, G. B. Darby, R. E. Jenniches, J. J. Schwartz, A. C. Kemp, Byron Yancey, J. D. Cavanaugh, W. F. O'Meara, Roland Carbone, W. A. Broad, C. L. Valci, Mike Malloy, Russell Barnett, William Hirschberger, Frank Connell, Floy L. Jennings, Sterling Cook, Cliff Champion, Don Burke, W. C. Viehmann, F. M. Kercheval, Guy Burke, W. C. Viehmann, F. M. Kercheval, Guy Cruce, R. Baxter, N. C. Walther, George Gillen, James Vollbrecht, R. J. Peterson, Jack DeLargy, C. C. Brace, S. F. Peters, A. Lockhart,

Plaintiffs,

vs.

The United States Cartridge Company, a corporation,

Defendant.

Court No. 1
Civil Action
No. 3597.

I

Now comes the above named plaintiffs, by their attorney, and by leave of court, file this their first amended

complaint, and for cause of action state that defendant is a corporation duly organized and incorporated under the laws of the state of Maryland, duly licensed to do business in the state of Missouri, and having an office and agents for the transaction of its business at 4300 Goodfellow Avenue in the City of St. Louis, Missouri and in [fol. 4] the Eastern Judicial District of Missouri. That the above named plaintiffs, and each of them, were all employees of defendant and were and are similarly situated within the meaning of section 16 b of the Fair Labor Standards Act of 1938 (29 U. S. C. 216b).

II

Jurisdiction is conferred on this court by Sec. 41 (8), 28 U. S. C. A. (Judicial Code Sec. 24 (8),) giving the United States District Court original Jurisdiction of all suits and proceedings arising under any law regulating commerce without regard to the citizenship of the parties or the sum of money or value in controversy, and also by Sec. 16 b of the Fair Labor Standards Act of 1938 (Sec. 216 (b), Title 29 U. S. C.) hereinafter referred to as the Act.

III

That during all the times hereinafter mentioned defendant was engaged in the operation of a munitions plant in the City of St. Louis, Missouri and in the Eastern Judicial District of Missouri, wherein it manufactured small arms ammunition, particularly 30 or 50 or 60 calibre shells for use in rifles and machine guns, all intended for use by the military forces of the United States and its allies and all intended for transportation and use to and at points outside the state of Missouri. That defendant purchased a large part of the raw materials that entered into the manufacture of said ammunition at points outside of the state of Missouri and caused same to be transported in interstate commerce into the state of Missouri and delivered to defendant at its said plant. That the entire product of defendant's said munitions plant was destined for use by [fol. 5] the armed forces of the United States on the then existing battle fronts and military establishments and on

the seas and in the air, and to supply other munitions plants and contractors outside the state of Missouri, and that same were produced for interstate commerce and were sold, offered for transportation, transported, shipped and delivered in interstate commerce from defendant's plant at St. Louis, Missouri to various points outside the state of Missouri. That as a necessary part of the said manufacturing operations at said plant, defendant made use of means of interstate communication, to-wit: the telephone and telegraph, and in the transportation of the raw material into said plant and the finished product out of said plant, defendant made use of railroads, airplanes, steamships, automobiles, trucks and other means or instrumentalities of interstate commerce, and that at all times herein mentioned, defendant was engaged in interstate commerce, and in the production of goods for interstate commerce, and was subject to the provisions of the Fair Labor Standards Act of 1938. That plaintiffs, and each of them, while employed by defendant at said plant, were employed in interstate commerce and in the production of goods for interstate commerce within the meaning of the Fair Labor Standards Act of 1938. And that defendant was an "Employer" within the meaning of said Act.

IV

The plaintiffs, and each of them, were employed by the defendant at its said plant for the periods hereinafter stated in the production of goods for interstate commerce at agreed salaries for a 40 hour work week in the Safety Department at said plant in the capacity of safety men, of whom there were about eighty-five on defendant's pay-[fol. 6] roll who were assigned to each manufacturing unit, and to each special function of plant operation on each working shift. That plaintiffs were all similarly situated and performed similar duties and the regular duties assigned to them were as follows, to-wit:

After reporting the time, checking in and changing into working clothes, it was the duty of each man to patrol his unit and [made] inspections. These inspections included

the floors, machinery, tools, equipment, materials and the working practices of employes. When unsafe or unsanitary conditions of buildings or equipment were observed, and when unsafe practices of employes or their failure to use or wear safety devices were noted, the men were required to report same orally to the foremen for correction, and thereafter were required to make written reports on prescribed forms of said unsafe conditions or violations of safety rules. The men were also required to make written reports on all accidents and state therein the cause and extent of the injury.

In addition to the aforesaid regular duties, the men were required to attend meetings of the safety units and to attend plant drills and to be on hand during black-outs.

That the aforesaid services and duties performed by the plaintiffs were necessary to and interwoven with the interstate commerce business of the defendant, and were necessary and contributed to and were interwoven with the production of goods for interstate commerce by the defendant, and tended to and did prevent work stoppage and loss of man hours in production, and were and are an essential and necessary part of the manufacturing operations carried on by defendant, and were and are essential to the production of the ammunition produced by defend- [fol. 7] ant, and plaintiffs state that in rendering said services and in performing said duties plaintiffs were and are engaged in the production of goods for interstate commerce within the meaning of the Act, and were and are subject to the provisions, and entitled to the benefits and protection of the Act, and particularly Sections 6 and 7 thereof, and that plaintiffs were and are entitled to be paid for all overtime worked in excess of 40 hours per week at the rate of one and one-half time the regular rate at which they were employed.

V

That during the periods hereinafter stated defendant employed the plaintiffs, and each of them in interstate commerce and in the production of goods for interstate

commerce, as aforesaid, for work weeks longer than the applicable maximum number of hours under Section 7 of the Act, and defendant in violation of the Act, failed and refused to compensate them for such employment at rates not less than one and one-half times the regular rate at which they were employed, and that defendant is indebted to said plaintiffs, and each of them, for said overtime compensation, and for equal amounts in addition thereto for liquidated damages and for a reasonable attorney's fee. That plaintiffs do not have complete and accurate knowledge of the times and hours [or] labor, the time cards and other records showing the number of hours being in the possession of defendant. Plaintiffs are informed and believe and upon such information and belief state that same are approximately as stated in the following paragraph.

VI

1. The plaintiff, R. M. Powell, alleges that during the period from November 2, 1942 to March 31, 1944, he was [fol. 8] employed by defendant as a safety man at a base pay of $51.92 per week for a forty hour week to October 10, 1943, and $110.77 per two weeks to March 26, 1944, and $46.15 per week to April 9, 1944, and that his regular hourly rate was $1.30 per hour to October 10, 1943, and $1.38 per hour to April 9, 1944. That during all of said period he was required to work 640.8 hours overtime, that is to say, in excess of the applicable maximum under Section 7 of the Act, for which he was entitled to be paid overtime compensation at the rate of one and one-half times the aforesaid applicable regular hourly rate, amounting in all to the sum of $1,232.46.

2. The plaintiff, A. C. Kropp, Alleges that during the period from December 2, 1941 to April 7, 1945, he was employed by defendant as a safety man at a base pay of $46.15 per week for a forty hour week to January 24, 1943, and $51.92 per week to May 23, 1943, and $57.69 per week to October 16, 1943, and $120.00 per two weeks to February 13, 1943, and $129.23 per two weeks to March 11, 1944, and that his regular hourly rate was $1.15 per

hour to January 24, 1943, and $1.30 per hour to May 23, 1943, and $1.44 per hour to October 10, 1943, and $1.50 per hour to February 13, 1944, and $1.61 per hour to March 11, 1944. That during all of said periods he was required to work 1585.1 hours overtime, that is to say, in excess of the applicable maximum under Section 7 of the Act, for which he was entitled to be paid overtime compensation at the rate of one and one-half times the aforesaid applicable regular hourly rate, amounting in all to the sum of $3,296.51.

3. That plaintiff, F. N. Harris, alleges that during the period from May 31, 1942 to March 10, 1945, he was employed by defendant as a safety man at a base pay of $46.15 per week for a forty hour week to January 24, 1943, [fol. 9] and $51.92 per week to October 10, 1943, and $110.77 per two weeks to October 24, 1943, and $128.77 per two weeks to March 11, 1944, and that his regular hourly rate was $1.15 per hour to January 24, 1943, and $1.30 per hour to October 10, 1943, and $1.38 per hour to October 24, 1943, and $1.61 per hour to March 11, 1944. That during all of said periods he was required to work 1211.1 hours overtime, that is to say, in excess of the applicable maximum under Section 7 of the Act, for which he was entitled to be paid overtime compensation at the rate of one and one-half times the aforesaid regular hourly rate, amounting in all to the sum of $2,550.70.

4. That plaintiff, J. M. Tyler, alleges that during the period from April 14, 1942 to August 31, 1943, he was employed by defendant as a safety man at a base pay of $46.15 per week for a forty hour week to June 14, 1942, and $51.92 per week to June 6, 1943, and $57.69 per week to August 29, 1943, and that his regular hourly rate was $1.15 per hour to June 14, 1943, and $1.30 per hour to June 6, 1943, and $1.44 per hour to August 29, 1943. That during all of said periods he was required to work 742.8 hours overtime, that is to say, in excess of the applicable maximum under Section 7 of the Act, for which he was entitled to be paid overtime compensation at the rate of one and one-half times the aforesaid applicable regular hourly rate, amounting in all to the sum of $1,419.37.

5. That plaintiff, J. C. Marshall, alleges that during the period from January 25, 1943 to August 28, 1943, he was employed by defendant as a safety man at a base pay of $46.15 per week for a forty hour week to August 29, 1943, and that his regular hourly rate was $1.15 per hour to August 29, 1943. That during all of said periods he was [fol. 10] required to work 160.3 hours overtime, that is to say, in excess of the applicable maximum under Section 7 of the Act, for which he was entitled to be paid overtime compensation at the rate of one and one-half times the aforesaid applicable regular hourly rate, amounting in all to the sum of $279.86.

6. That plaintiff, A. W. McClung, alleges that during the period from November 21, 1943 to September 10, 1944, he was employed by defendant as a safety man at a base pay of $48.69 per week for a forty hour week to September 10, 1944, and that his regular hourly rate was $1.21 per hour to September 10, 1944. That during all of said periods he was required to work 487.8 hours overtime, that is to say, in excess of the applicable maximum under Section 7 of the Act, for which he was entitled to be paid overtime compensation at the rate of one and one-half times the aforesaid applicable regular hourly rate, amounting in all to the sum of $878.33.

7. That plaintiff, G. H. Bentine, alleges that during the period from March 1, 1943 to August 17 1945, he was employed by defendant as a safety man at a base pay of $51.92 per week for a forty hour week to October 3, 1943, and $55.38 per week to February 5, 1945, and that his regular hourly rate was $1.30 per hour to October 3, 1943, and $1.38 per hour to February 25, 1945. That during all of said periods he was required to work 1063.6 hours overtime, that is to say, in excess of the applicable maximum under Section 7 of the Act, for which he was entitled to be paid overtime compensation at the rate of one and one-half times the aforesaid applicable regular hourly rate, amounting in all to the sum of $2,064.87.

8. That plaintiff, Joe Reeves, alleges that during the period from June 14, 1942 to March 10, 1945, he was em-

[fol. 11] ployed by defendant as a safety man at a base pay of $46.15 per week for a forty hour week to January 24, 1943, and $51.92 per week to June 20, 1943, and $57.69 per week to October 3, 1943, and $60.00 per week to October 24, 1943, and $128.77 per two weeks to February 13, 1944, and $138.46 per two weeks to March 11, 1945, and that his regular hourly rate was $1.15 per hour to January 24, 1943, and $1.30 per hour to June 20, 1943, and $1.44 per hour to October 3, 1943, and $1.50 per hour to October 24, 1943, and $1.61 per hour to February 13, 1944, and $1.73 per hour to March 11, 1945. That during all of said periods he was required to work 1460.3 hours overtime, that is to say, in excess of the applicable maximum under Section 7 of the Act, for which he was entitled to be paid overtime compensation at the rate of one and one-half times the aforesaid applicable regular hourly rate, amounting in all to the sum of $3,078.05.

9. That plaintiff, Herbert Hahn, alleges that during the period from April 13, 1943 to October 28, 1944, he was employed by defendant as a safety man at a base pay of $51.92 per week for a forty hour week to March 14, 1943, and $57.69 per week to October 3, 1943, and $60.00 per week to March 12, 1944, and that his regular hourly rate was $1.30 per hour to March 14, 1943, and $1.44 per hour to October 3, 1943, and $1.50 per hour to March 12, 1944. That during all of said periods he was required to work 1136.4 hours overtime, that is to say, in excess of the applicable maximum under Section 7 of the Act, for which he was entitled to be paid overtime compensation at the rate of one and one-half times the aforesaid applicable regular hourly rate, amounting in all to the sum of $2,207.64.

10. That plaintiff, N. W. Myers, alleges, that during the period from April 22, 1942 to March 11, 1944, he was em- [fol. 12] ployed by defendant as a safety man at a base pay of $46.15 per week for a forty hour week to October 3, 1943, and $48.69 per week to October 24, 1943, and that his regular hourly rate was $1.15 per hour to October 3, 1943, and $1.21 per hour to October 24, 1943. That during all of said periods he was required to work 377.8 hours

overtime, that is to say, in excess of the applicable maximum under Section 7 of the Act, for which he was entitled to be paid overtime compensation at the rate of one and one-half times the applicable regular hourly rate, amounting in all to the sum of $687.39.

11. That plaintiff, B. J. Ludwig, alleges that during the period from November 1, 1941 to August 17, 1945, he was employed by defendant as a safety man at a base pay of $46.15 per week for a forty hour week to June 14, 1942, and $51.92 per week to February 14, 1943, and $57.69 per week to October 3, 1943, and $60.00 per week to October 24, 1943, and $128.77 per two weeks to April 23, 1944, and $138.46 per two weeks to August 26, 1945, and that his regular hourly rate was $1.15 per hour to June 14, 1942, and $1.30 per hour to February 14, 1943, and $1.44 per hour to October 3, 1943, and $1.50 per hour to October 24, 1943, and $1.61 per hour to April 23, 1944, and $1.73 per hour to August 26, 1945. That during all of said periods he was required to work 1984.7 hours overtime, that is to say, in excess of the applicable maximum under Section 7 of the Act, for which he was entitled to be paid overtime compensation at the rate of one and one-half times the aforesaid applicable regular hourly rate, amounting in all to the sum of $4,506.97.

12. That plaintiff, E. L. Stockho, alleges that during the period from March 31, 1943 to August 17, 1945, he was employed by defendant as a safety man at a base pay of $40.38 per week for a forty hour week to November 22, 1942, and $46.15 per week to February 21, 1943, and $51.92 [fol. 13] per week to July 4, 1943, and $57.69 per week to October 3, 1943, and $60.00 per week to October 24, 1943, and $128.77 per two weeks to May 7, 1944, and $133.85 per two weeks to August 12, 1945, and that his regular hourly rate was $1.01 per hour to November 22, 1942, and $1.15 per hour to February 21, 1943, and $1.30 per hour to July 4, 1943, and $1.44 per hour to October 3, 1943, and $1.50 per hour to October 24, 1943, and $1.61 per hour to May 7, 1944, and $1.67 per hour to August 12, 1945. That during all of said periods he was required to work 1860.6 hours overtime, that is to say, in excess of the applicable maxi-

imum under Section 7 of the Act, for which he was entitled to be paid overtime compensation at the rate of one and one-half times the aforesaid applicable regular hourly rate, amounting in all to the sum of $3,874.19.

13. That plaintiff, William Niedringhaus, alleges that during the period from April 20, 1942 to September 7, 1945, he was employed by defendant as a safety man at a base pay of $51.92 per week for a forty hour week to April 4, 1943, and $57.69 per week to October 3, 1943, and $60.00 per week to October 24, 1943, and $128.77 per two weeks to May 9, 1944, and $69.23 per week to September 9, 1945, and that his regular hourly rate was $1.30 per hour to April 4, 1943, and $1.44 per hour to October 3, 1943, and $1.50 per hour to October 24, 1943, and $1.61 per hour to May 9, 1944, and $1.73 per hour to September 9, 1945. That during all of said periods he was required to work 1859.2 hours overtime, that is to say, in excess of the applicable maximum under Section 7 of the Act, for which he was entitled to be paid overtime compensation at the rate of one and one-half times the aforesaid applicable regular hourly rate, amounting in all to the sum of $4,163.69.

[fol. 14] 14. That plaintiff, William Stutz, alleges that during the period from June 7, 1943 to March 1, 1945, he was employed by defendant as a safety man at a base pay of $126.92 per two weeks for a forty hour week to October 10, 1943, and $138.00 per two weeks to March 11, 1945, and that his regular hourly rate was $1.586 per hour to October 10, 1943, and $1.73 per hour to March 11, 1945. That during all of said period he was required to work 1348.1 hours overtime, that is to say, in excess of the applicable maximum under Section 7 of the Act, for which he was entitled to be paid overtime compensation at the rate of one and one-half times the aforesaid applicable regular hourly rate, amounting in all to the sum of $3,321.97.

15. That plaintiff, S. P. Coley, alleges that during the period from December 17, 1941, to February 27, 1945, he was employed by defendant as a safety man at a base pay of $51.92 per week for a forty hour week to October

10, 1943, and $110.77 per two weeks to November 19, 1944, and $127.85 per two weeks to March 11, 1945, and that his regular hourly rate was $1.30 per hour to October 10, 1943, and $1.38 per hour to November 19, 1944, and $1.60 per hour to March 11, 1945. That during all of said periods he was required to work 1118.6 hours overtime, that is to say, in excess of the applicable maximum under Section 7 of the Act, for which he was entitled to be paid overtime compensation at the rate of one and one-half times the aforesaid applicable regular hourly rate, amounting in all to the sum of $2,407.42.

16. That plaintiff, L. W. Trimble, alleges that during the period from March 23, 1942, to August 17, 1945, he was employed by defendant as a safety man at a base pay of $46.15 per week for a forty hour week to March 28, 1943, and $51.92 per week to October 3, 1943, and $110.77 per two weeks to January 2, 1944, and $117.69 per two weeks to August 26, 1945, and that his [fol. 15] regular hourly rate was $1.15 per hour to March 28, 1943, and $1.30 per hour to October 3, 1943, and $1.38 per hour to January 2, 1944, and $1.47 per hour to August 26, 1945. That during all of said periods he was required to work 1718.3 hours overtime, that is to say, in excess of the applicable maximum under Section 7 of the Act, for which he was entitled to be paid overtime compensation at the rate of one and one-half times the aforesaid applicable regular hourly rate, amounting in all to the sum of $3,423.95.

17. That plaintiff, R. M. Stewart, alleges that during the period from February 21, 1942, to September 23, 1944, he was employed by defendant as a safety man at a base pay of $46.15 per week for a forty hour week to June 14, 1942, and $51.92 per week to March 14, 1943, and $57.69 per week to October 3, 1943, and $60.00 per week to November 7, 1943, and $64.38 per week to February 6, 1944, and $69.23 per week to September 24, 1944, and that his regular hourly rate was $1.15 per hour to June 14, 1942, and $1.30 per hour to March 14, 1943, and $1.44 per hour to October 3, 1943, and $1.50 per hour to November 7, 1943, and $1.61 per hour to February 6, 1944, and $1.73 per hour to September 24, 1944. That during all of said

periods he was required to work 1465.9 hours overtime, that is to say, in excess of the applicable maximum under Section 7 of the Act, for which he was entitled to be paid overtime compensation at the rate of one and one-half times, the aforesaid applicable regular hourly rate, amounting in all to the sum of $3,082.48.

18. That plaintiff, B. H. Hargate, alleges that during the period from January 13, 1942, to August 31, 1945, he was employed by defendant as a safety man at a base pay of $46.15 per week for a forty hour week to January 24, 1943, and $51.92 per week to October 3, 1943, and $110.77 per two weeks to September 23, 1945, and that his regular [fol. 16] hourly rate was $1.09 per hour to June 14, 1942, and $1.15 per hour to January 24, 1943, and $1.30 per hour to October 3, 1943, and $1.38 per hour to September 23, 1945. That during all of said periods he was required to work 2074.2 hours overtime, that is to say, in excess of the applicable maximum under Section 7 of the Act, for which he was entitled to be paid overtime compensation at the rate of one and one-half times the aforesaid applicable regular hourly rate, amounting in all to the sum of $3,873.17.

19. That plaintiff, J. S. Schneider, alleges that during the period from June 20, 1943, to September 15, 1945, he was employed by defendant as a safety man at a base pay of $46.15 per week for a forty hour week to October 10, 1943, and $97.38 per two weeks to June 4, 1944, and $108.92 per two weeks to February 25, 1945, and $127.85 per two weeks to September 23, 1945, and that his regular hourly rate was $1.15 per hour to October 10, 1943, and $1.21 per hour to June 4, 1944, and $1.36 per hour to February 25, 1945, and $1.60 per hour to September 23, 1945. That during all of said periods he was required to work 955.3 hours overtime, that is to say, in excess of the applicable maximum under Section 7 of the Act, for which he was entitled to be paid overtime compensation at the rate of one and one-half times the aforesaid applicable regularly hourly date, amounting in all to the sum of $1,700.70.

20. That plaintiff, Walter Gorg, Jr., alleges that during the period from February 14, 1943, to January 3, 1944, he

was employed by defendant as a safety man at a base pay of $46.15 per week for a forty hour week to May 30, 1943, and $51.92 per week to October 3, 1943, and $55.38 per week to January 16, 1944, and that his regular hourly rate was $1.15 per hour to May 30, 1943, and $1.30 per hour to October 3, 1943, and $1.38 per hour to January 16, [fol. 17] 1944. That during all of said periods he was required to work 450.2 hours overtime, that is to say, in excess of the applicable maximum under Section 7 of the Act, for which he was entitled to be paid overtime compensation at the rate of one and one-half times the aforesaid applicable regular hourly rate, amounting in all to the sum of $871.67.

21. That plaintiff, B. M. Casey, alleges that during the period from July 4, 1943 to March 11, 1944, he was employed by defendant as a safety man at a base pay of $46.15 per week for a forty hour week to October 3, 1943, and $48.69 per week to October 24, 1943, and $104.77 per two weeks to March 12, 1944, and that his regular hourly rate was $1.15 per hour to October 3, 1943, and $1.21 per hour to October 24, 1943, and $1.31 per hour to March 12, 1944. That during all of said periods he was required to work 315.2 hours overtime, that is to say, in excess of the applicable maximum under Section 7 of the Act, for which he was entitled to be paid overtime compensation at the rate of one and one-half times the aforesaid applicable regular hourly rate, amounting in all to the sum of $544.01.

22. That plaintiff, A. H. Erickson, alleges that during the period from May 11, 1942 to March 13, 1943, he was employed by defendant as a safety man at a base pay of $46.15 per week for a forty hour week to June 14, 1942, and $51.92 per week to March 14, 1943, and that his regular hourly rate was $1.15 per hour to June 14, 1942, and $1.30 per hour to March 14, 1943. That during all of said periods he was required to work 530.2 hours overtime, that is to say, in excess of the applicable maximum under Section 7 of the Act, for which he was entitled to be paid overtime [fol. 18] compensation at the rate of one and one-half times the aforesaid applicable regular hourly rate, amounting in all to the sum of $1,027.74.

23. That plaintiff, Elmer Maher, alleges that during the period from December 17, 1941 to February 12, 1944, he was employed by defendant as a safety man at a base pay of $46.15 per week for a forty hour week to June 14, 1942, and $57.69 per week to June 6, 1943, and $126.92 per two weeks to October 10, 1943, and $138.00 per two weeks to February 13, 1944, and that his regular hourly rate was $1.15 per hour to June 14, 1942, and $1.44 per hour to June 6, 1943, and $1.58 per hour to October 10, 1943, and $1.72 per hour to February 13, 1944. That during all of said periods he was required to work 1271 hours overtime, that is to say, in excess of the applicable maximum under Section 7 of the Act, for which he was entitled to be paid overtime compensation at the rate of one and one-half times the aforesaid applicable regular hourly rate, amounting in all to the sum of $2,673.95.

24. That plaintiff, Emmett Hoskins, alleges that during the period from January 1, 1942 to January 28, 1944, he was employed by defendant as a safety man at a base pay of $46.15 per week for a forty hour week to June 14, 1942, and $54.92 per week to April 4, 1943, and $57.69 per week to October 3, 1943, and $60.00 per week to October 24, 1943, and $128.77 per two weeks to January 30, 1944, and that his regular hourly rate was $1.15 per hour to June 14, 1942, and $1.30 per hour to April 4, 1943, and $1.44 per hour to October 3, 1943, and $1.50 per hour to October 24, 1943, and $1.61 per hour to January 30, 1944. That during all of said periods he was required to work 1094.2 hours overtime, that is to say, in excess of the applicable maximum under Section 7 of the Act, for which he was entitled [fol. 19] to be paid overtime compensation at the rate of one and one-half times the aforesaid applicable regular hourly rate, amounting in all to $2,088.29.

25. That plaintiff, F. P. Knight, alleges that during the period from January 23, 1942 to September 12, 1943, he was employed by defendant as a safety man at a base pay of $46.15 per week for a forty hour week to June 14, 1942, and $51.92 per week to March 14, 1943, and $57.69 per week to September 12, 1943, and that his regular hourly rate was $1.15 per hour to June 14, 1942, and $1.30 per

hour to March 14, 1943, and $1.44 per hour to September 12, 1943. That during all of said periods he was required to work 919.6 hours overtime, that is to say, in excess of the applicable maximum under Section 7 of the Act, for which he was entitled to be paid overtime compensation at the rate of one and one-half times the aforesaid applicable regular hourly rate, amounting in all to the sum of $1,952.03.

26. That plaintiff, R. A. Westra, alleges that during the period from March 16, 1942 to February 26, 1943, he was employed by defendant as a safety man at a base pay of $46.15 per week for a forty hour week to June 14, 1942, and $51.92 per week to February 28, 1943, and that his regular hourly rate was $1.15 per hour to June 14, 1942, and $1.30 per hour to February 28, 1943. That during all of said periods he was required to work 603 hours overtime, that is to say, in excess of the applicable maximum under Section 7 of the Act, for which he was entitled to be paid overtime compensation at the rate of one and one-half times the aforesaid applicable regular hourly rate amounting in all to the sum of $1,138.59.

27. That plaintiff, D. F. Bateman, alleges that during the period from March 29, 1943 to June 1, 1944, he was em- [fol. 20] ployed by defendant as a safety man at a base pay of $46.15 per week for a forty hour week to October 10, 1943, and $97.38 per two weeks to January 1, 1944, and $101.07 per two weeks to June 4, 1944, and that his regular hourly rate was $1.15 per hour to October 10, 1943, and $1.21 per hour to January 2, 1944, and $1.31 per hour to June 4, 1944. That during all of said periods he was required to work 571.2 hours overtime, that is to say, in excess of the applicable maximum under Section 7 of the Act, for which he was entitled to be paid overtime compensation at the rate of one and one-half times the aforesaid applicable regular hourly rate, amounting in all to the sum of $926.40.

28. That plaintiff, Al Herman, alleges that during the period from January 1, 1943 to September 12, 1943, he was employed by defendant as a safety man at a base pay of

$46.15 per week for a forty hour week to April 4, 1943, and $51.92 per week to September 12, 1943, and that his regular hourly rate was $1.15 per hour to April 4, 1943, and $1.30 per hour to September 12, 1943. That during all of said periods he was required to work 351 hours overtime, that [fol. 21] is to say in excess of the applicable maximum under Section 7 of the Act, for which he was entitled to be paid overtime compensation at the rate of one and one-half times the aforesaid applicable regular hourly rate, amounting in all to the sum of $659.36.

29. The plaintiff, George Burmeister, alleges that during the period from May 15, 1942 to July 24, 1943, he was employed by defendant as a safety man at a base pay of $51.92 per week for a forty hour week to February 28, 1943, and $57.69 per week to July 25, 1943, and that his regular hourly rate was $1.30 per hour to February 28, 1943, and $1.44 per hour to July 25, 1943. That during all of said periods he was required to work 837.6 hours overtime, that is to say, in excess of the applicable maximum under Section 7 of the Act, for which he was entitled to be paid overtime compensation at the rate of one and one-half times the aforesaid applicable regular hourly rate, amounting in all to the sum of $1,690.10.

30. That plaintiff, G. B. Darby, alleges that during the period from March 20, 1943, to August 31, 1945, he was employed by defendant as a safety man at a base pay of $51.92 per week for a forty hour week to October 3, 1943, and $55.38 per week to November 7, 1943, and $120.00 per two weeks to August 9, 1945, and that his regular hourly rate was $1.30 per hour to October 3, 1943, and $1.38 per hour to November 7, 1943, and $1.50 per hour to August 9, 1945. That during all of said periods he was required to work 1246.2 hours overtime, that is to say, in excess of the applicable maximum under Section 7 of the Act, for which he was entitled to be paid overtime compensation at the rate of one and one-half times the aforesaid applicable regular hourly rate, amounting in all to the sum of $2,572.05.

[fol. 22] 31. That plaintiff, R. E. Jenniches, alleges that during the period from June 7, 1942 to December 28, 1942,

he was employed by defendant as a safety man at a base pay of $51.92 per week for a forty hour week to January 3, 1943, and that his regular hourly rate was $1.30 per hour to January 3, 1943. That during all of said period he was required to work 362.3 hours overtime, that is to say, in excess of the applicable maximum under Section 7 of the Act, for which he was entitled to be paid overtime compensation at the rate of one and one-half times the aforesaid applicable regular hourly rate, amounting in all to the sum of $703.93.

32. That plaintiff, J. J. Schwartz, alleges that during the period from January 1, 1942 to June 17, 1944, he was employed by defendant as a safety man at a base pay of $51.92 per week for a forty hour week to October 10, 1943, and $110.77 per two weeks to June 18, 1944, and that his regular hourly rate was $1.30 per hour to October 10, 1943, and $1.38 per hour to June 18, 1944. That during all of said periods he was required to work 802.7 hours overtime, that is to say, in excess of the applicable maximum under Section 7 of the Act, for which he was entitled to be paid overtime compensation at the rate of one and one-half times the aforesaid applicable regular hourly rate, amounting in all to the sum of $1,595.14.

33. That plaintiff, A. C. Kemp, alleges that during the period from December 23, 1941 to September 16, 1944, he was employed by defendant as a safety man at a base pay of $46.15 per week for a forty hour week to June 14, 1942, and $57.69 per week to January 10, 1943, and $126.92 per two weeks to April 25, 1943, and $138.46 per two weeks to September 24, 1944, and that his regular hourly rate was $1.15 per hour to June 14, 1942, and $1.44 per hour to January 10, 1943, and $1.585 per hour to April 25, 1943, [fol. 23] and $1.73 per hour to September 24, 1944. That during all of said periods he was required to work 1629.3 hours overtime, that is to say, in excess of the applicable maximum under Section 7 of the Act, for which he was entitled to be paid overtime compensation at the rate of one and one-half times the aforesaid applicable regular hourly rate, amounting in all to the sum of $3,713.28.

34. That plaintiff, Byron Yancey, alleges that during the period from July 3, 1942 to March 10, 1945, he was employed by defendant as a safety man at a base pay of $46.15 per week for a forty hour week to July 4, 1943, and $51.92 per week to November 7, 1943, and $128.77 per two weeks to July 16, 1944, and $138.46 per two weeks to March 11, 1945, and that his regular hourly rate was $1.15 per hour to July 4, 1943, and $1.30 per hour to November 7, 1943, and $1.61 per hour to July 16, 1944, and $1.73 per hour to March 11, 1945. That during all of said periods he was required to work 989.7 hours overtime, that is to say, in excess of the applicable maximum under Section 7 of the Act, for which he was entitled to be paid overtime compensation at the rate of one and one-half times the aforesaid applicable regular hourly rate, amounting in all to the sum of $2,082.05.

35. That plaintiff, J. D. Cavanaugh, alleges that during the period from May 7, 1942, to June 15, 1944, he was employed by defendant as a safety man at a base pay of $51.92 per week for a forty hour week to February 14, 1943, and $57.69 per week to October 10, 1943, and $120.00 per two weeks to October 24, 1943, and $128.77 per two weeks to June 18, 1944, and that his regular hourly rate was $1.30 per hour to February 14, 1943, and $1.44 per hour to October 10, 1943, and $1.50 per hour to October 24, 1943, and $1.61 per hour to June 18, 1944. That during all of said periods he was required to work 1251.3 hours overtime, that is to say, in excess of the applicable maximum [fol. 24] under Section 7 of the Act, for which he was entitled to be paid overtime compensation at the rate of one and one-half times the aforesaid applicable regular hourly rate, amounting in all to the sum of $2,629.64.

36. That plaintiff, W. F. O'Meara, alleges that during the period from May 2, 1942 to October 5, 1945, he was employed by defendant as a safety man at a base pay of $46.15 per week for a forty hour week to January 24, 1943, and $51.92 per week to March 21, 1943, and $57.69 per week to June 27, 1943, and $126.92 per two weeks to October 10, 1943, and $138.00 per two weeks to October 7, 1945, and that his regular hourly rate was $1.15 per hour

to January 24, 1943, and $1.30 per hour to March 21, 1943, and $1.44 per hour to June 27, 1943, and $1.585 per hour to October 10, 1943, and $1.725 per hour to October 7, 1945. That during all of said periods he was required to work 2224.2 hours overtime, that is to say, in excess of the applicable maximum under Section 7 of the Act, for which he was entitled to be paid overtime compensation at the rate of one and one-half times the aforesaid applicable regular hourly rate, amounting in all to the sum of $5,084.61.

[fol. 25] 37. That plaintiff, R. Carbone, alleges that during the period from March 29, 1943 to October 9, 1943, he was employed by defendant as a safety man at a base pay of $51.92 per week for a forty hour week to October 3, 1943, and $55.38 per week to October 10, 1943, and that his regular hourly rate was $1.30 per hour to October 3, 1943, and $1.38 per hour to October 10, 1943. That during all of said periods he was required to work 334.3 hours overtime, that is to say, in excess of the applicable maximum under Section 7 of the Act, for which he was entitled to be paid overtime compensation at the rate of one and one-half times the aforesaid applicable regular hourly rate, amounting in all to the sum of $651.83.

38. That plaintiff, W. A. Broad, alleges that during the period from June 23, 1943 to December 11, 1943, he was employed by defendant as a safety man at a base pay of $46.15 per week for a forty hour week to October 3, 1943, and $48.69 per week to December 19, 1943, and that his regular hourly rate was $1.15 per hour to October 3, 1943, and $1.21 per hour to December 19, 1943. That during all of said periods he was required to work 257.2 hours overtime, that is to say, in excess of the applicable maximum under Section 7 of the Act, for which he was entitled to be [apid] overtime compensation at the rate of one and one-half times the aforesaid applicable regular hourly rate, amounting in all to the sum of $466.94.

39. That plaintiff, C. L. Valci, alleges that during the period from July 16, 1942 to September 15, 1945, he was employed by defendant as a safety man at a base pay of $46.15 per week for a forty hour week to February 24, 1943, and $51.92 per week to October 10, 1943, and $128.77 per two weeks to May 6, 1945, and $138.46 per two weeks to

[fol. 26] Sept. 23, 1945, and that his regular hourly rate was $1.15 per hour to February 21, 1943, and $1.30 per hour to October 10, 1943, and $1.61 per hour to May 6, 1945, and $1.67 per hour to September 23, 1945. That during all of said periods he was required to work 1428.5 hours overtime, that is to say, in excess of the applicable maximum under Section 7 of the Act, for which he was entitled to be paid overtime compensation at the rate of one and one-half times the aforesaid applicable regular hourly rate, amounting in all to the sum of $3,230.80.

40. That plaintiff, Mike Malloy, alleged that during the period from December 27, 1942, to October 24, 1943, he was employed by defendant as a safety man at a base pay of $46.15 per week for a forty hour week to October 3, 1943, and $47.32 per week to October 24, 1943, and that his regular hourly rate was $1.15 per hour to October 3, 1943, and $1.21 per hour to October 24, 1943. That during all of said periods he was required to work 368.2 hours overtime, that is to say, in excess of the applicable maximum under Section 7 of the Act, for which he was entitled to be paid overtime compensation at the rate of one and one-half times the aforesaid applicable regular hourly rate, amounting in all to the sum of $640.47.

41. That plaintiff, Russell Barnett, alleges that during the period from April 28, 1942 to February 11, 1945, he was employed by defendant as a safety man at a base pay of $46.15 per week for a forty hour week to June 14, 1942, and $51.92 per week to April 4, 1943, and $57.69 per week to October 3, 1943, and $60.00 per week to October 24, 1943, and $128.77 per two weeks to February 13, 1944, and $120.00 per two weeks to February 11, 1945, and that his regular hourly rate was $1.15 per hour to June 14, 1942, and $1.30 per hour to April 4, 1943, and $1.44 per hour [fol. 27] to October 3, 1943, and $1.50 per hour to October 24, 1943, and $1.615 per hour to February 13, 1944, and $1.50 per hour to February 11, 1945. That during all of said periods he was required to work 1633.6 hours overtime, that is to say, in excess of the applicable maximum under Section 7 of the Act, for which he was entitled to be paid overtime compensation at the rate of one and one-half times the aforesaid applicable regular hourly rate, amounting in all to the sum of $3,385.72.

42. That plaintiff, William Hirschberger, alleges that during the period from August 10, 1942, to July 8, 1944, he was employed by defendant as a Safety man at a base pay of $51.92 per week for a forty hour week to April 4, 1943, and $57.69 per week to July 18, 1943, and $1.73 per hour to July 16, 1944. That during all of said periods he was required to work 979.3 hours overtime, that is to say, in excess of the applicable maximum under Section 7 of the Act, for which he was entitled to be paid overtime compensation at the rate of one and one-half times the aforesaid applicable regular hourly rate, amounting in all to the sum of $2,075.75.

43. That plaintiff, Frank Connell, alleges that during the period from June 22, 1942, to August 4, 1943, he was employed by defendant as a safety man at a base pay of $51.92 per week for a forty hour week to February 28, 1943, and $57.69 per week to August 1, 1943, and that his regular hourly rate was $1.30 per hour to February 28, 1943, and $1.44 per hour to August 1, 1943. That during all of said periods he was required to work 813.6 hours overtime, that is to say, in excess of the applicable maximum under Section 7 of the Act, for which he was entitled to be paid overtime compensation at the rate of one and one-half times the aforesaid applicable regular hourly rate, amounting in all to the sum of $1,644.28.

44. That plaintiff, Floy L. Jennings, alleges that during the period from April 6, 1942 to March 31, 1944, he was employed by defendant as a safety man at a base pay of $51.92 per week for a forty hour week to July 4, 1943, and $57.69 per week to October 24, 1943, and $120.00 per two [fol. 28] weeks to April 9, 1944, and that his regular hourly rate was $1.30 per hour to July 4, 1943, and $1.44 per hour to October 24, 1943, and $1.50 per hour to April 9, 1944. That during all of said periods he was required to work 1112 hours overtime, that is to say, in excess of the applicable maximum under Section 7 of the Act, for which he was entitled to be paid overtime compensation at the rate of one and one-half times the aforesaid applicable hourly rate, amounting in all to the sum of $2,246.11.

45. That plaintiff, Sterling Cook, alleges that during the period from February 10, 1942 to March 31, 1944, he was

employed by defendant as a safety man at a base pay of $45.15 per week for a forty hour week to June 14, 1942, and $51.92 per week to March 28, 1943, and $57.69 per week to October 10, 1943 and $120.00 per two weeks to October 24, 1943, and $128.77 per two weeks to April 9, 1944, and that his regular hourly rate was $1.15 per hour to June 14, 1942, and $1.30 per hour to March 28, 1943, and $1.44 per hour to October 10, 1943, and $1.50 per hour to October 24, 1943, and $1.61 per hour to April 9, 1944. That during all of said periods he was required to work 1283.7 hours over- [fol. 29] time, that is to say, in excess of the applicable maximum under Section 7 of the Act, for which he was entitled to be paid overtime compensation at the rate of one and one-half times the aforesaid applicable regular hourly rate, amounting in all to the sum of $2,693.49.

46. That plaintiff, Cliff Champion, alleges that during the period from April 21, 1942, to June 4, 1944, he was employed by defendant as a safety man at a base pay of $51.92 per week for a forty hour week to Feb. 7, 1943, and $57.69 per week to Sept. 12, 1943, and $126.92 per two weeks to October 10, 1943, and $138.00 per two weeks to June 4, 1944, and that his regular hourly rate was $1.30 per hour to February 7, 1943, and $1.44 per hour to September 12, 1943, and $1.585 per hour to October 10, 1943, and $1.73 per hour to June 4, 1944. That during all of said periods he was required to work 1414.1 hours overtime, that is to say, in excess of the applicable maximum under Section 7 of the Act, for which he was entitled to be paid overtime compensation at the rate of one and one-half times the aforesaid applicable regular hourly rate, amounting in all to the sum of $3,102.61.

47. That plaintiff Don Burke, alleges that during the period from April 16, 1942 to October 23, 1942 and from December 15, 1942 to April 29, 1943, he was employed by defendant as a safety man at a base pay of $46.15 per week for a forty hour week to April 25, 1943, and that his regular hourly rate was $1.15 per hour to April 25, 1943. That during all of said periods he was required to work 419.9 hours overtime, that is to say, in excess of the applicable maximum under Section 7 of the Act, for which he was entitled to be paid overtime compensation at the rate of

one and one-half times the aforesaid applicable regular hourly rate, amounting in all to the sum of $731.59.

[fol. 30] 48. That plaintiff, W. C. Viehmann, alleges that during the period from January 5, 1942 to April 23, 1945, he was employed by defendant as a safety man at a base pay of $51.92 per week for a forty hour week to October 3, 1943, and $110.77 per two weeks to April 22, 1945, and that his regular hourly rate was $1.30 per hour to October 3, 1943, and $1.38 per hour to April 22, 1945. That during all of said periods he was required to work 728.1 hours overtime, that is to say, in excess of the applicable maximum under Section 7 of the Act, for which he was entitled to be paid overtime compensation at the rate of one and one half times the aforesaid applicable regular hourly rate, amounting in all to the sum of $1,482.62.

49. That plaintiff, F. M. Kercheval, alleges that during the period from November 29, 1942 to August 7, 1945, he was employed by defendant as a safety man at a base pay of $46.15 per week for a forty hour week to February 21, 1943, and $51.92 per week to October 10, 1943, and $110.77 per two weeks to October 24, 1943, and $128.77 per two weeks to April 8, 1945, and $133.85 per two weeks to August 12, 1945, and that his regular hourly rate was $1.15 per hour to February 21, 1943, and $1.30 per hour to October 10, 1943, and $1.44 per hour to October 24, 1943, and $1.60 per hour to April 8, 1945, and $1.68 per hour to August 12, 1945. That during all of said periods he was required to work 1450 hours overtime, that is to say, in excess of the applicable maximum under Section 7 of the Act, for which he was entitled to be paid overtime compensation at the rate of one and one half times the aforesaid applicable regular hourly rate, amounting in all to the sum of $3,147.78.

50. That plaintiff, Guy Cruce, alleges that during the period from June 1, 1942 to March 10, 1943, he was em- [fol. 31] ployed by defendant as a safety man at a base pay of $51.92 per week for a forty hour week to March 14, 1943, and that his regular hourly rate was $1.30 per hour to March 14, 1943. That during all of said period he was required to work 402.5 hours overtime, that is to say, in

excess of the applicable maximum under Section 7 of the Act, for which he was entitled to be paid overtime compensation at the rate of one and one-half times the aforesaid applicable regular hourly rate, amounting in all to the sum of $792.55.

51. That plaintiff, R. Baxter, alleges that during the period from January 14, 1942 to October 19, 1943, he was employed by defendant as a safety man at a base pay of $46.15 per week for a forty hour week to June 20, 1943, and $51.92 per week to October 10, 1943, and $55.38 per week to October 24, 1943, and that his regular hourly rate was $1.15 per hour to June 20, 1943, and $1.30 per hour to October 10, 1943, and $1.38 per hour to October 24, 1943. That during all of said periods he was required to work 318.6 hours overtime, that is to say, in excess of the applicable maximum under Section 7 of the Act, for which he was entitled to be paid overtime compensation at the rate of one and one-half times the aforesaid applicable regular hourly rate, amounting in all to the sum of $579.18.

52. The plaintiff, N. C. Walther, alleges that during the period from April 12, 1942 to June 24, 1944, he was employed by defendant as a safety man at a base pay of $46.15 per week for a forty hour week to June 14, 1942, and $51.92 per week to June 6, 1943, and $57.69 per week to October 10, 1943, and $120.00 per two weeks to July 2, 1944, and that his regular hourly rate was $1.15 per hour to June 14, 1942, and $1.30 per hour to June 6, 1943, and $1.44 per hour to October 10, 1943, and $1.50 per hour to July 2, 1944. That during all of said periods he was required to work 1090.2 hours overtime, that is to say, in excess of the applicable maximum under Section 7 [fol. 32] of the Act, for which he was entitled to be paid overtime compensation at the rate of one and one-half times the aforesaid applicable regular hourly rate, amounting in all to the sum of $2,218.31.

53. That plaintiff, George Gillen, alleges that during the period from October 23, 1941 to October 3, 1943, he was employed by defendant as a safety man at a base pay of $46.15 per week for a forty hour week to January 24, 1943, and $51.92 per week to October 3, 1943, and that his

regular hourly rate was $1.15 per hour to January 24, 1943, and $1.30 per hour to October 3, 1943. That during all of said periods he was required to work 734.9 hours overtime, that is to say, in excess of the applicable maximum under Section 7 of the Act, for which he was entitled to be paid overtime compensation at the rate of one and one-half times the aforesaid applicable regular hourly rate, amounting in all to the sum of $1,346.58.

54. That plaintiff, James Vollbrecht, alleges that during the period from November 22, 1942 to December 30, 1943, he was employed by defendant as a safety man at a base pay of $46.15 per week for a forty hour week to February 21, 1942, and $51.92 per week to October 10, 1943, and $55.38 per week to January 2, 1944, and that his regular hourly rate was $1.15 per hour to February 21, 1942, and $1.30 per hour to October 10, 1943, and $1.38 per hour to January 2, 1944. That during all of said periods he was required to work 604.7 hours overtime, that is to say, in excess of the applicable maximum under Section 7 of the Act, for which he was entitled to be paid overtime compensation at the rate of one and one-half times the aforesaid applicable regular hourly rate, amounting in all to the sum of $1,104.53.

55. That plaintiff, R. J. Peterson, alleges that during the period from April 25, 1942 to August 18, 1945, he was employed by defendant as a safety man at a base pay of $46.15 per week for a forty hour week to February 21, 1943, and $51.92 per week to October 3, 1943, and $55.38 [fol. 33] per week to November 7, 1943, and $128.77 per two weeks to April 9, 1944, and $138.46 per two weeks to December 3, 1944, and $147.69 per two weeks to August 26, 1945, and that his regular hourly rate was $1.15 per hour to February 21, 1943 and $1.30 per hour to October 3, 1943, and $1.38 per hour to November 7, 1943, and $1.61 per hour to April 9, 1944, and $1.73 per hour to December 3, 1944, and $1.84 per hour to August 26, 1945. That during all of said periods he was required to work 1705.6 hours overtime, that is to say, in excess of the applicable maximum under Section 7 of the Act, for which he was entitled to be paid overtime compensation at the rate of one and one-

half times the aforesaid applicable regular hourly rate, amounting in all to the sum of $3,977.92.

56. That plaintiff, Jack DeLargy, alleges that during the period from December 3, 1941 to August 6, 1943, he was employed by defendant as a safety man at a base pay of $51.92 per week for a forty hour week to January 24, 1943, and $57.69 per week to August 8, 1943, and that his regular hourly rate was $1.30 per hour to January 24, 1943, and $1.44 per hour to August 8, 1943. That during all of said periods he was required to work 992.3 hours overtime, that is to say, in excess of the applicable maximum under Section 7 of the Act, for which he was entitled to be paid overtime compensation at the rate of one and one-half times the aforesaid applicable regular hourly rate, amounting in all to the sum of $2,006.87.

[fol. 34] 57. That plaintiff, C. C. Brace, alleges that during the period from April 5, 1943 to November 18, 1944, he was employed by defendant as a safety man at a base pay of $46.15 per week for a forty hour week to October 3, 1943, and $97.38 per two weeks to November 21, 1943, and $108.46 per two weeks to November 19, 1944, and that his regular hourly rate was $1.15 per hour to October 3, 1943, and $1.21 per hour to November 21, 1943, and $1.355 per hour to November 19, 1944. That during all of said periods he was required to work 740.1 hours overtime, that is to say, in excess of the applicable maximum under Section 7 of the Act, for which he was entitled to be paid overtime compensation at the rate of one and one-half times the aforesaid applicable regular hourly rate, amounting in all to the sum of $1,393.17.

58. That plaintiff, S. F. Peters, alleges that during the period from November 30, 1942 to June 20, 1943, he was employed by defendant as a safety man at a base pay of $57.69 per week for a forty hour week to June 20, 1943, and that his regular hourly rate was $1.44 per hour to June 20, 1943. That during all of said periods he was required to work 317.7 hours overtime, that is to say, in excess of the applicable maximum under Section 7 of the Act, for which he was entitled to be paid overtime compensation at the rate of one and one-half times the afore-

said applicable regular hourly rate, amounting in all to the sum of $689.24.

59. That plaintiff, A. Lockhart, alleges that during the period from May 15, 1942 to April 8, 1945, he was employed by defendant as a safety man at a base pay of $51.92 per week for a forty hour week to September 13, 1942, and $57.69 per week to June 6, 1943, and $126.92 per two weeks to October 10, 1943, and $138.00 per two weeks to April 8, 1945, and that his regular hourly rate $1.30 per hour to September 13, 1942, and $1.44 per hour [fol. 35] to June 6, 1943, and $1.58 per hour to October 10, 1943, and $1.725 per hour to April 8, 1945. That during all of said periods he was required to work 1557.6 hours overtime, that is to say, in excess of the applicable maximum under Section 7 of the Act, for which he was entitled to be paid overtime compensation at the rate of one and one-half times the aforesaid applicable regular hourly rate, amounting in all to the sum of $3,604.82.

VII.

Wherefore plaintiffs pray that an accounting be had and that the amounts due from defendant to each of the plaintiffs herein be ascertained and determined and that plaintiffs have judgments for the amounts thereof, and, in addition thereto, equal amounts as liquidated damages, and for a reasonable attorney's fee for the institution and prosecution of this suit, and for costs.

THOMAS BOND,
Attorney for Plaintiffs,
705 Olive Street,
St. Louis 1, Mo.

I hereby certify that I served the above First Amended Complaint upon defendant by mailing a copy thereof to Mr. Russell Vandivort, its attorney of record, this 3rd day of April, 1946.

THOMAS BOND,
Attorney for Plaintiffs.

[fol. 36] (Order granting leave to amend First Amended Complaint.)

July 10, 1946.

On oral application of plaintiffs, plaintiffs are granted leave to amend their first amended complaint by interlineation by adding the word "The" to the corporate title of defendant. Said complaint so amended.

Filed in U. S. District Court on July 10, 1946.

[fol. 37] Answer.

(Filed April 18, 1946.)

First Defense.

(1) The First Amended Complaint fails to state a claim against the defendant upon which relief can be granted.

Second Defense.

(2) Defendant Admits the allegations in section numbered I of the First Amended Complaint, except the allegation that the plaintiffs named in the caption, and each of them, were and are similarly situated within the meaning of section 16 b of the Fair Labor Standards Act of 1938 (29 U. S. C. 216b), which allegation defendant Denies; Admits the allegations in section numbered II of the said complaint; Denies the allegations in section numbered III [fol. 38] of the said complaint; Admits that plaintiffs, and each of them, were employed by the defendant for the periods stated, but Denies each and every other allegation contained in section numbered IV of said complaint; Admits that the time cards and other records showing the number of hours worked by plaintiffs are in the possession of defendant, but Denies each and every other allegation contained in section numbered V of said complaint; Admits that the plaintiffs were employed for the periods, and at

the base pay, as alleged in the several paragraphs of section VI of the said complaint, but Denies that the base pay was, in any case, for a forty-hour week, that the regular hourly rates were as alleged, and each and every other allegation contained in the several paragraphs of section numbered VI of the said complaint.

Third Defense.

(3) Each of the plaintiffs was employed in a bona fide administrative capacity, as such term is defined and delimited by the regulations of the Administrator of the Wage and Hour Division of the Department of Labor, and hence the provisions of the Fair Labor Standards Act of 1938 (29 U. S. C. 207) do not apply with respect to plaintiffs, or any of them.

Fourth Defense.

(4) None of the plaintiffs was engaged in commerce or in the production of goods for commerce within the meaning of the Fair Labor Standards Act of 1938, or the definitions of such terms contained in the said Act, and hence the provisions of the said Act do not apply to the plaintiffs, or any of them.

[fol. 39] Fifth Defense.

(5) The right of action, if any, set forth in the First Amended Complaint with respect to any employment of plaintiff A. C. Kropp in excess of forty hours in any work weeks prior to May 4th, 1942, did not accrue within three (3) years next before the commencement of this action, and hence any right of action with respect to any employment of said plaintiff prior to May 4th, 1942, is barred by the provisions of Sections 1012 and 1015 of the Revised Statutes of Missouri, 1939.

Sixth Defense.

(6) The right of action, if any, set forth in the First Amended Complaint with respect to any employment of

plaintiffs J. M. Tyler, J. C. Marshall, G. H. Bentine, Joe Reeves, N. W. Myers, B. J. Ludwig, William Niedringhaus, S. P. Coley, L. W. Trimble, R. M. Stewart, B. H. Hargate, Walter Gorg, Jr., A. H. Erickson, Elmer Maher, Emmett Hoskins, F. P. Knight, R. A. Westra, Al. Herman, George Burmeister, G. B. Darby, R. E. Jenniches, J. J. Schwartz, A. C. Kemp, Byron Yancey, J. D. Cavanaugh, W. F. O'Meara, L. Valei, Mike Malloy, Russell Barnett, William Hirschberger, Frank Connell, Floy L. Jennings, Sterling Cook, Cliff Champion, Don Burke, W. C. Vehmann, F. M. Kercheval, Guy Cruce, R. Baxter, N. C. Walther, George Gillen, James Vollbrecht, R. J. Peterson, Jack DeLargy, S. F. Peters and A. Lockhart in excess of forty hours in any work weeks prior to April 5, 1943, did not accrue within three (3) years next before the commencement of this action, and hence any right of action with respect to any employment of said plaintiffs, and each of them, prior to April 5, 1943, is barred by the provisions of Sections 1012 and 1015 of the Revised Statutes of Missouri, 1939.

[fol. 40] Wherefore, the defendant prays for judgment that the First Amended Complaint be dismissed with costs to the defendant.

RHODES E. CAVE,
R. H. McROBERTS,
W. C. CONNETT IV,
1630 Boatmen's Bank Building,
St. Louis 2, Missouri,
Attorneys for Defendant.

BRYAN, CAVE, McPHEETERS & McROBERTS,
1630 Boatmen's Bank Building,
St. Louis 2, Missouri,
Of Counsel.

[fol. 41] Amended and Additional Interrogatories Propounded by Plaintiffs Pursuant to Rule 33.

(Filed March 26, 1946.)

Now come plaintiffs and by leave of court withdraw the Interrogatories heretofore filed herein and in lieu thereof serve upon defendant and file herein the following Amended and Additional Interrogatories under Rule 33 and request that defendant answer same separately and fully and serve a copy of its Answer upon plaintiffs' attorney as provided in said Rule 33, to-wit:

1. Under the laws of what state is defendant incorporated, and when was it licensed to do business in Missouri?

2. Did defendant operate a manufacturing plant in St. Louis for the manufacture of ammunition and, if so, over what period of time did it operate same and where was the plant located?

3. Describe the product produced at this plant.

4. For what purpose was this product produced?

5. What raw materials were used by defendant in the manufacture of this product?

6. Where and from whom were these raw materials obtained?

7. What method of transportation or common carrier was used to deliver the raw materials to defendant's plant?

8. What facilities did defendant maintain on its premises for the receipt of materials and the shipment of its products?

9. Describe the switching facilities in use, particularly, where were the tracks located, who maintained them, whose crews operated them, with what railroads did they connect and at what points did they so connect?

[fol. 42] 10. Describe the loading and unloading facilities at said plant and state particularly where the platforms were located and who maintained them.

11. Whose employees loaded and unloaded out-going and in-coming freight?

12. Was all the ammunition produced at said plant shipped to points outside the State of Missouri? If not, state what percentage went to points outside of Missouri.

13. Name the individual or individuals who designated the points to which the product was to be shipped and give present address of such individual or individuals.

14. Who did the actual billing on out-bound shipments and by whom employed?

15. Who did the actual loading of out-bound shipments and by whom employed?

16. Did the defendant keep records of the hours worked by plaintiffs and the men named in said Exhibit A while they were in defendant's employ?

17. Did defendant keep records of the hours spent by plaintiffs and the men named in said Exhibit A in attending plant drills, blackouts and meetings?

18. Did the defendant keep records of the wages or salaries paid plaintiffs and the men named in said Exhibit A while said parties were in defendant's employ?

19. Did defendant keep records showing the destination of the ammunition shipped out of said plant?

20. Describe the records referred to in questions 16, 17, 18 and 19, supra, in such manner as to identify them and state where they are kept and who now has custody of them.

21. Did defendant cause to be published a certain booklet entitled "Your Job with the St. Louis Ordnance Plant"?

22. If so, when was this booklet published and how and to whom was it distributed?

23. Describe how the Safety Department was organized from January 1, 1942 to May 1, 1945, with the names of the top personnel, and attach an organization chart to your answer.

24. Defendant has heretofore delivered to plaintiffs' attorney certain information from its records, computed separately as to each plaintiff and each claimant herein, purporting to show name, badge number, dates of commencement and termination of employment, payroll periods, occupational code, total actual hours, rate, gross wages, cer-

tain deductions and net amount paid. State by whom these computations were made and give the name and present address of the person or persons under whose supervision they were prepared.

[fol. 43] 25. Do the columns headed "Total Actual Hours" show all the time that appears on the time cards?

26. Do such columns show all the time the employees referred to were required to be in attendance or on duty?

27. If answer is "no" state what time was not included.

28. Is it not true that for a certain period the employees referred to were required to report one-half hour ahead of shift?

29. If answer is "yes" state the period over which this requirement was in force.

30. Is it not true that all plaintiffs and claimants herein were required to report one-half hour ahead of shift from the commencement of their employment until about October 10, 1943?

31. Is it not true that defendant failed to include this one-half hour in the columns headed "Total Actual Hours" in the computations furnished plaintiffs' attorney as aforesaid?

32. State fully the facts in reference to this requirement whereby employees were made to report one-half hour ahead of shift.

THOMAS BOND,
Attorney for Plaintiffs,
705 Olive Street,
St. Louis 1, Mo.

Served as of March 26, 1946, by mailing copy of the above Amended and Additional Interrogatories to Mr. Russell Vandivort, Attorney of Record for Defendant.

THOMAS BOND,
Attorney for Plaintiffs.

[fol. 44] (Answers of Defendant to Interrogatories propounded by Plaintiffs.)

(Filed April 20, 1946.)

Eastern District of Missouri }
City of St. Louis } ss

Russell R. Casteel, being an officer of defendant competent to testify in its behalf, having been duly sworn, makes, upon information and belief, the following answers to the Amended and Additional Interrogatories Propounded by Plaintiffs Pursuant to Rule 33, in the above entitled cause:

Answer to Interrogatory No. 1:

Defendant is incorporated under the laws of the State of Maryland, and was licensed to do business in Missouri on September 11, 1941.

Answer to Interrogatory No. 2:

Defendant operated a manufacturing plant in St. Louis for the manufacture of ammunition, under the terms and [fol. 45] provisions of a certain contract between the defendant and the United States of America dated December 5, 1940, identified as Contract No. W-ORD-491, and various supplements thereto, over a period beginning in the month of December, 1941, and ending August 31, 1945. The plant was located at 4300 Goodfellow Boulevard, St. Louis, Missouri.

Answer to Interrogatory No. 3:

.30, .50 and .60 caliber, ball, tracer and armor piercing, small arms ammunition, all of which, including work in process, at all times belonged to The United States of America and not to defendant.

Answer to Interrogatory No. 4:

For the United States of America.

Answer to Interrogatory No. 5:

Brass, powder, lead, steel and various other raw materials, all of which, at all times upon and after their delivery to the premises by the various vendors, belonged to The United States of America and not to defendant.

Answer to Interrogatory No. 6:

From various places both in the State of Missouri and in other States of the United States; and from the United States Government, and more than two thousand other vendors.

Answer to Interrogatory No. 7:

Railroads, trucks, automobiles and airplanes.

Answer to Interrogatory No. 8:

Defendant had no premises, the entire manufacturing plant, including land, buildings, machinery and equipment, at all times belonging to and being in the possession of The United States of America and constituting a military reservation. On the said premises belonging to The United States of America and constituting a part of said plant there were various facilities for the receipt of material, including one (1) bulk receiving dock and approxi-[fol. 46] mately thirteen (13) individual receiving stations. On the said premises there were various facilities for the shipment of the products produced at this plant, including approximately thirteen (13) shipping docks located at the separate production units and storage warehouses. The said facilities were maintained by employees of defendant pursuant to the terms of said contract.

Answer to Interrogatory No. 9:

The switching facilities in use at the said manufacturing plant consisted of four (4) switch engines and various railroad tracks, all of which were, at all times, owned by The United States of America. The tracks were adjacent to all large production and storage warehouse units and connected with the lines of the Terminal Railroad Association at the West Belt Yards of the said Association. The tracks were maintained by employee of defendant and

the crews who operated said switch engines were also employees of defendant, pursuant to the terms of said contract.

Answer to Interrogatory No. 10:

There were three (3) covered loading and unloading docks for each large production unit, plus one (1) trucking dock, all used both for loading and unloading. At the bulk receiving dock and at the individual receiving stations referred to in the Answer to Interrogatory No. 8 there were maintained a supply of hi-lo lift tractors, and hand trucks, tractors, dollies, and at certain places overhead winches, and at the shipping docks referred to in the answer to Interrogatory No. 8 there were maintained the same type of facilities. All of these facilities were at all times owned by The United States Government and maintained by the defendant under the terms of the contract. The platforms which constituted the separate receiving and shipping stations or docks were located alongside of each of the eight (8) main production units and several storage warehouses.

[fol. 47] Answer to Interrogatory No. 11:

Employees of the defendant unloaded incoming freight, and under the direct supervision, directions and instructions of agents of The United States of America, loaded outgoing freight, all pursuant to the terms of said contract.

Answer to Interrogatory No. 12:

Defendant does not know where The United States of America shipped all of the ammunition produced at the said manufacturing plant.

Answer to Interrogatory No. 13:

Defendant does not know the names or addresses of the individual or individuals who designated the points to which the product was to be shipped.

Answer to Interrogatory No. 14:

Employees of The United States of America did the actual billing on out-bound shipments, the names of the individual employees being unknown to this defendant.

Answer to Interrogatory No. 15:

Employees of defendant, acting under the supervision, directions and instructions of employees or agents of The United States of America, all pursuant to the terms of the said contract.

Answer to Interrogatory No. 16:

Yes.

Answer to Interrogatory No. 17:

Yes, to the extent that employees were instructed when attending plant drills, blackouts and meetings outside of their regular shift to ring their time card upon reporting and upon leaving. Some employees apparently did not bother to ring in and out, and with respect to such employees the defendant has no record. In most instances these drills, blackouts and meetings were conducted on the employees' own shifts, and no separate record was kept.

[fol. 48] Answer to Interrogatory No. 18:

Yes.

Answer to Interrogatory No. 19:

No.

Answer to Interrogatory No. 20:

The records referred to in the Answer to Interrogatory No. 16 consisted of individual time cards.

The records referred to in the Answer to Interrogatory No. 17 consisted of individual time cards.

The records referred to in the Answer to Interrogatory No. 18 consisted of individual time cards and payroll checks.

There are no records referred to in the Answer to Interrogatory No. 19.

All such records are now kept at the St. Louis Administration Center, 4300 Goodfellow Boulevard, St. Louis,

Missouri, in the possession of the defendant, The United States Cartridge Company. The individual in whose custody they are kept is W. L. Schulte, Comptroller.

Answer to Interrogatory No. 21:

Yes, in four separate editions.

Answer to Interrogatory No. 22:

The different editions of the booklet were published in 1941, 1942, 1943 and 1944. A copy of the current booklet was handed to each employee immediately after completion of the details of employment.

Answer to Interrogatory No. 23:

The Safety Department was organized and set up under the supervision of the Personnel Director of the defendant. The Personnel Director employed a Chief Safety Engineer, who was placed in complete charge of the Safety Department. Under him he had an assistant and various sub-department heads, for fire fighting, sanitation, laundry, employee placement, explosive handling, etc. Under the various department heads there were safety engineers, who [fol. 49] were designated during approximately the first four months of operation as Safety Inspectors and thereafter as Safety Engineers. C. E. Strickland was Chief Safety Engineer from December 22, 1941, to May 21, 1944. J. T. McKittrick was Chief Safety Engineer from May 22, 1944, to March 24, 1946. S. F. Baedeker was Assistant Chief Safety Engineer from July 3, 1944, to October 5, 1945. An organization chart is attached hereto.

Answer to Interrogatory No. 24:

The computations were made under the supervision of W. L. Schulte, Comptroller, whose address is 449 Forestón Place, Webster Groves, Missouri, and J. L. Kelley, Payroll Supervisor, whose address is 5882 Cabanne Avenue, St. Louis, Missouri.

The names and addresses of the persons who actually made the computations are as follows:

C. H. Hobbs, 5447 Vera Avenue, St. Louis, Missouri

William McGuire, 2627a South 11th Street, St. Louis, Missouri.

E. F. Payne, 6910 Natural Bridge Road, St. Louis, Missouri

Louis H. Werner, Route 14, Affton, Missouri

H. B. Binnington, 6006 West Cabanne Place, St. Louis, Missouri

Answer to Interrogatory No. 25:

The information in the columns headed: "Total Actual Hours" on the computations heretofore delivered to plaintiffs' attorney does not show the time elapsed between the punching of the card and the beginning of the shift; otherwise it shows all the time that appears on the time cards.

Answer to Interrogatory No. 26:

Yes, and, in addition, reflect the one-half hour lunch time each day when they were not required to be in attendance or on duty.

Answer to Interrogatory No. 27:

Not applicable.

Answer to Interrogatory No. 28:

No. For a certain time the employees were requested to report one half hour ahead of shift, but were not required to do so and were not docked or penalized if they failed to do so.

Answer to Interrogatory No. 29:

Not applicable. The request referred to in the Answer to Interrogatory No. 28 was in force from the middle of June, 1943, until about the latter part of September, 1943.

[fol. 50] Answer to Interrogatory No. 30:

No.

Answer to Interrogatory No. 31:

Not applicable.

Answer to Interrogatory No. 32:

As stated in the answer to Interrogatory No. 28, there was no requirement whereby the plaintiffs were made to report one-half hour ahead of shift.

Dated April 19th, 1946.

RUSSELL R. CASTEEL.

Subscribed and sworn to before me this 19th day of April, 1946.

My commission expires July 20, 1949.

MARGARET M. MEYER,
Notary Public.

RHODES E. CAVE,
R. H. McROBERTS,
W. C. CONNETT IV,
1630 Boatmen's Bank Building,
St. Louis 2, Missouri,
Attorneys for Defendant The United States Cartridge Company.

BRYAN, CAVE, McPHEETERS & McROBERTS,
1630 Boatmen's Bank Building,
St. Louis 2, Missouri,
Of Counsel.

(This and subsequent missing or blank pages deleted as per stipulation, Record 1055.)

[fol. 52] (Request of Plaintiffs for Admissions by Defendant under Rule 36.)

(Filed April 24, 1946.)

To: The United States Cartridge Company, or Bryan, Cave, McPheeters & McRoberts, and Messrs. Rhodes E. Cave, R. H. McRoberts, and W. C. Connett, IV, Its Attorneys and Counsel of Record.

1. Plaintiffs state that shipping records of the outbound shipment of the ammunition produced at the plant operated by defendant herein were made at or about the time of said shipments and consist principally of bills of lading covering said shipments and that same are now located on the premises at which said plant was operated, to-wit, 4300 Goodfellow Avenue, in the City of Saint Louis, Missouri, and that the same are now under the control of either the defendant herein or the United States of America and are available to the defendant and are open to inspection by defendant. Plaintiffs also state that said bills of lading show the destination of said shipments and recite the route of movement of said shipments to said destinations, which is information relevant and material to the issues raised by the pleadings herein and which pleadings are now closed. That these records consist of a very large number of documents and in the aggregate are extremely voluminous and bulky, and to avoid the production and introduction in evidence of these excessive records, and to avoid burdening the record in this case with same, plaintiffs desire to introduce the following statement of matters contained therein as an admission and now request under the provisions of Rule 36 of the new federal rules that defendant admit the truth of the following statement, to-wit:

[fol. 53] That said bills of lading contain recitals and statements showing that at least the greater part of the ammunition produced at the manufacturing plant located at 4300 Goodfellow Avenue, St. Louis, Missouri, while same was being operated by defendant and during the time plaintiffs were employed therein was billed and shipped out of said plant by railroad or other form of transportation to destinations outside the state of Missouri.

Plaintiffs further state that unless the truthfullness of the foregoing statement is admitted they will introduce secondary evidence as to the contents of said bills of lading in proof thereof.

Plaintiffs further state that copies of the foregoing said bills of lading are not attached hereto for the reason that same are available to and open to the inspection of defendant at the place where they are now located, and further, because plaintiffs do not have copies thereof and because of the great number and size of said records it would be impractical to attach copies hereto.

2. Plaintiffs state that at their request and in order to avoid the production and introduction in evidence of a great quantity of time cards and other payroll records defendant has heretofore prepared and delivered to plaintiffs' attorney a voluminous set of computations showing in substance the name, badge number, dates of commencement and termination of employment, payroll periods, occupational code, total actual hours, rate, gross wages, certain deductions and net amount paid, computed as to each of the fifty-nine (59) plaintiffs herein and entitled "Safety Inspectors Earnings Summary".

Now, therefore, in order that there may be no question of plaintiffs' right to offer these computations in evidence and use them as admissions of the facts and figures therein recited, plaintiffs under the provisions of Rule 36 of the new federal rules request of defendant an admission of the genuineness thereof, and an admission that the said [fol. 54] computations as prepared by the defendant as aforesaid are correct and that they truthfully reflect what is contained in the defendant's records.

Plaintiffs state that copies of said computations are not attached hereto because defendant and its attorneys and counsel are [all ready] in possession of copies and also because defendant only supplied plaintiffs with one set of copies and that by reason of their size the making and attaching of additional copies is impractical and plaintiffs state that the copies furnished it by defendant are available and open to the inspection of defendant or its representatives in the office of plaintiffs' attorney at any time.

3. Admission is requested as to each and all of the foregoing matters by Monday, May 6, 1946.

THOMAS BOND,
Attorney for Plaintiffs,
705 Olive Street,
St. Louis 1, Mo.

I hereby certify that I served the above and foregoing Request for Admissions Under Rule 36 upon defendant and its attorneys of record by mailing a copy thereof to Messrs. Bryan, Cave, McPheeters and McRoberts, at their last known address, to-wit: 1630 Boatmen's Bank Building, St. Louis, Missouri, marked for the attention of Mr. Rhodes E. Cave, Mr. R. H. McRoberts and Mr. W. C. Connett, IV., on the 24th day of April, 1946.

THOMAS BOND,
Attorney for Plaintiffs.

[fol. 55] (Reply of Defendant to Request of Plaintiffs for Admissions under Rule 36.)

(Filed May 6, 1946.)

Comes now defendant in the above entitled cause, and for reply to the request for admissions under Rule 36, states as follows:

1. With respect to the first request for an admission, defendant says that the shipping records alleged to consist principally of bills of lading are not now under the control of defendant, and are not available to the defendant, and are not open to inspection by defendant; that defendant does not know where the said records are located, and that the defendant has never seen such records and does not know the contents thereof.

Wherefore, defendant states that it cannot truthfully either admit or deny the statement:

"That said bills of lading contain recitals and statements showing that at least the greater part of the

ammunition produced at the manufacturing plant located at 4300 Goodfellow Avenue, St. Louis, Missouri, while same was being operated by defendant and during the time plaintiffs were employed therein was billed and shipped out of said plant by railroad or other form of transportation to destinations outside the state of Missouri."

2. With respect to the second request for an admission, defendant says that the defendant admits the genuineness of the set of computations referred to in said request; admits that the said computations are correct, and that they truthfully reflect what is contained in the defendant's records—

except that defendant states that the said computations do not reflect a deduction which should be made [fol. 56] for the one-half hour lunch period each day when each of the employees covered by such computations were off duty, and to that extent the computations include one-half hour's time each day for each employee when each such employee did not work, and which time should be deducted in computing hours worked in excess of forty hours per week; and except, further, that all computations showing time beyond the employees' regular shifts were computed on the basis of full six minute periods or multiples thereof, i. e., any number of minutes less than six minutes were disregarded.

RHODES E. CAVE,
R. H. McROBERTS,
W. C. CONNETT IV,
1630 Boatmen's Bank Building,
St. Louis 2, Missouri,
Attorneys for Defendant
The United States Cartridge Company.

BRYAN, CAVE, McPHEETERS & McROBERTS,
1630 Boatmen's Bank Building,
St. Louis 2, Missouri,
Of Counsel.

Eastern District of Missouri }
City of St. Louis } ss.

R. H. McRoberts, agent and attorney for defendant, having been duly sworn, states upon information and belief that the foregoing Reply to Request for Admissions Under Rule 36 is true and correct.

R. H. McROBERTS.

Subscribed and sworn to before me this 6th day of May, 1946.

My commission expires July 4, 1949.

RUTH F. WEAKLY,
Notary Public.

[fol. 57] (Memorandum relating to filing of Amended Answer of Defendant to Interrogatory No. 22.)

By leave, def't. files amended answer to Interrogatory No. 22.

WILLIAM C. CONNETT IV,
Atty. for Deft.

May 15
Approved
R. M. H.

Filed, May 15, 1946.

[fol. 58] (Amended Answer of Defendant to [Interrogatory] No. 22).

(Filed May 15, 1946.)

Eastern District of Missouri }
City of St. Louis } ss.

Russell R. Casteel, being an officer of defendant competent to testify in its behalf, having been duly sworn, makes, upon information and belief, the following amended

answer to Interrogatory No. 22 propounded by plaintiffs in the above entitled cause:

Amended Answer to Interrogatory No. 22:

The first edition of the booklet was published in 1941, and was distributed during the period from some time in August, 1941, to some time in November, 1941; the second edition of the booklet was published in 1941, and was distributed during the period from some time in November 1941, to some time in April, 1942; the third edition of the booklet was published in 1942, and was distributed during the period from some time in April, 1942, to some time in December, 1942; the fourth edition of the booklet was published in 1942, and was distributed during the period from some time in December, 1942, to some time in February, 1944. A copy of the current booklet was handed to each employee immediately after completion of the details of employment.

Dated May 13th, 1946.

RUSSELL R. CASTEEL.

Subscribed and sworn to before me this 13th day of May, 1946.

My commission expires July 20, 1949.

MARGARET M. MEYER,
Notary Public.

[fol. 59]

RHODES E. CAVE,
R. H. McROBERTS,
W. C. CONNETT IV,
1630 Boatmen's Bank Building,
St. Louis 2, Missouri,
Attorneys for Defendant
The United States Cartridge
Company.

BRYAN, CAVE, McPHEETERS & McROBERTS,
1630 Boatmen's Bank Building,
St. Louis 2, Missouri.
Of Counsel.

Copy of the foregoing amended answer to Interrogatory No. 22 served upon plaintiffs' attorney by forwarding a copy in the United States mails on this 14th day of May, 1946.

W. C. CONNETT IV.

[fol. 60] (Transcript of Testimony and Proceedings.)

(Filed October 29, 1947.)

District Court of the United States for the Eastern Division of the Eastern Judicial District of Missouri.

R. M. Powell, et al., Plaintiffs,
vs.
The United States Cartridge Company, Defendant.
No. 3597.

Be It Remembered, that beginning on the 8th day of July, 1946, this matter was called for hearing in the United States District Court in above District and Division, New Federal Building, St. Louis, Missouri, before Hon. George H. Moore, Judge Court No. One. Whereupon, the following proceedings were had:

Appearances:

For the Plaintiffs:

Thomas Bond, Esq.

For the Defendant:

Robert H. McRoberts, Esq.,
John L. Donnell Esq.

Counsel Present Listening to the Evidence:

Samuel P. McChesney, Esq.,
Joseph I. Nachman, Esq.

[fol. 61] Proceedings:

The Court: I will call today's docket. R. M. Powell vs. United States Cartridge Company.

Mr. Bond: We are ready, Your Honor.

Mr. McRoberts: We are ready, Your Honor, with these slight qualifications: I find in some computation which I furnished to Judge Bond earlier in this case there were some errors. I called them to the attention of Judge Bond last Friday, as soon as I discovered them, and we are going to have some new computations made. They are not ready today, but I assume we will be given time to make these computations before the matter is finally disposed of.

The Court: Very well.

Mr. Bond: I believe Mr. McChesney wants to introduce his associate Mr. Nachman.

Mr. McChesney: It is for the purpose of sitting in and listening to the evidence in this case, not as an appearance.

Mr. Nachman: Your Honor please, there are a number of issues that could be raised in this case which the Administrator is interested in, and during the course of the day we would like to ask an order from you giving us leave to file a brief.

Judge Bond: We would be glad to have his brief, Your Honor.

[fol. 62] Mr. McRoberts: Before we commence in this case I would like to ask leave to file an amended answer to Interrogatory No. 25. And in that connection I might state that some months ago we furnished to Judge Bond some rather lengthy computations showing the number of hours worked by the different claimants in this case as shown by the time-cards. And in this Interrogatory 25 the question is asked whether or not those computations show all of the hours that are reflected on the time-cards. And we made the answer before that we had showed all of the hours, with certain exceptions. Judge Bond subpoenaed certain of these time-cards to be brought into Court, and they were brought to my desk last Friday

and on comparing the time-cards against the computations furnished to Judge Bond, and the explanation which we had given as to the method of making these computations we discovered that the figures were correct but the explanation was erroneous. I immediately advised Judge Bond, first by telephone and then by letter, and now ask leave to file an amended answer which sets forth the correct theory of the computation as we now understand. I have just furnished Judge Bond with a copy of this.

Mr. Bond: I have to object to that, if Your Honor please, for the reason that I have prepared this case on the faith or fact I would be entitled to admissions which were made in answer to my interrogatories. And now he comes in [fol. 63] by application this morning, preceded by telephone call last Friday, in which he wants to clarify one of these admissions. It seems that when he gave me these pay roll summaries that he told you about, last January, containing the pay roll information necessary to support the claim of the plaintiffs my people advised me that it didn't include certain half hours which they were required to report to the plant before the shift started. To be sure of that I asked him in my interrogatories if he included all the time. And he said "Yes, with the exception of that half hour," which he admitted was not included. And then these figures have to be translated to hourly rates. And then we computed it at great trouble and expense. I have made my computation relying on the information then furnished, which I am still informed is correct. Now, he comes in at the last minute and wants to amend that out of time. The time in which to answer the interrogatories has long expired. It would carry no extension of time. And he comes in and wants to modify that answer which includes not all of it, but less than that. And he says, later on, he will give us the figures.

I think the purpose of these rules in asking interrogatories and getting answers is that you can get admissions you can rely on in preparing your case and shorten the proof. If he can come in the last minute and say, "I was wrong about one," he can withdraw all and put me in [fol. 64] utter confusion. I submit I am entitled, for the

benefit of this case, to that admission which I thought was the fact until this morning. And no doubt, if there is some explanation that would have a bearing on his defense in that admission, I have no doubt the Court would hear it and consider it along with the admission. If there is any inaccuracy in that admission it would be up to him to show correct computations based on the correct facts. But I do not think he can come in here and amend his answers to the interrogatories and disturb the admissions that have been of record for months and that I have relied on in drawing my case. I object to it.

Mr. McRoberts: There can be no real dispute as to the ultimate facts because it is purely a matter of arithmetic or computation. In other words, we have the time-card only for each employee for each week, and there are some ten thousand of those involved in this lawsuit. The figures are there and we cannot deny nor can Judge Bond deny what those figures show. There was furnished to Judge Bond, at his request, certain computations which were made from these time-cards for Judge Bond's convenience, and the only question in here is as to how these computations were made. Once the original documents are in evidence there can be no dispute as to what they show and what the computations are. But the figures furnished to Judge Bond are misleading and I think that the [fol. 65] Court would want and everyone would want to have the actual facts in this case.

(Counsel and the Court confer at Court's Bench.)

The Court: Do you not suggest that the Court might reserve its ruling.

Mr. McRoberts: I think that would be all right.

The Court: All right, the Court will reserve its ruling.

Mr. Bond: May I proceed, Your Honor?

The Court: Proceed.

Mr. Bond: I believe since the proceedings are very voluminous it would clarify and focus the matter if I made a brief statement of the facts:

I want to prove this is a group action under 16b of the Fair Labor Standards Act to measure the overtime compensation provided in Section 7a of the Act by a group of employees of the defendant. The answer admits the incorporation, the jurisdiction of the Court, the employment of the plaintiffs for the periods and at the base pay averred, and denies specifically other averments, but pleads affirmatively that those employees were exempted from the benefits of the act under the Administrator's definition of administratives.

Second, that they were not engaged in the production of goods for commerce within the meaning of the act. And, third, that as to certain plaintiffs prior to certain dates the claims are barred by the Statute of Limitation.

[fol. 66] Now the facts are in general, Your Honor, that this defendant United States Cartridge Company operated what was known as the St. Louis Ordnance Plant. That was an ammunitions plant built as part of the preparedness program back in 1941, and after Pearl Harbor was used as a vast ammunitions undertaking operated by the United States Cartridge Company for the production of military ammunition—thirty, fifty and sixty tracer bullets for the use of rifles and machine guns, and was a great big industrial layout out here on Goodfellow Avenue comprising a great many very extensive buildings and employing over forty thousand employees. And during the period of this operation it operated what the evidence will show were literally billions of bullets that were shipped to every part of the world. Now then, at that plant it was equipped with loading docks and receiving stations, and switch tracks and sub-stations, and loading facilities, all of which were maintained for defendant's employees. In the production of this military equipment and ammunition it was engaged in interstate commerce in that it imported into Missouri vast quantities of raw materials which it bought from industries outside of Missouri and shipped into Missouri, principally brass, steel, lead and powder, most of which was produced by the defendant and some by the United States Ordnance Department, but the greater amount of the volume of all of this principally raw materials, with the possi-

[fol. 67] ble exception of powder, was shipped in by the instrumentality of interstate commerce from points outside

of Missouri to points in Missouri. Records illustrative of that will be produced. Now then, the manufactured product was shipped from the plant to the armed forces and supply depots and to other contractors for transshipment to the armed forces on the battle fronts. The theory was that upon manufacture being completed and acceptance by the United States Army Ordnance, the defendant's employees would load crates and move them down to the loading docks, put them into the cars, seal and brace and block them, and they would then be sealed under the supervision of the Army Ordnance and moved out to the destinations designated by the Army Ordnance. All of the work of that loading and bracing and so forth was done by employees of the defendant, and defendant's employees or yardmasters out there checked the billing for quantity and [routeing] before turning it over to the Terminal agent. Records disclose and those facts will be produced. And so we will say that the proof will show that the defendant was engaged in interstate commerce, the goods produced were produced for interstate commerce, and that they were being produced for interstate commerce.

The plaintiffs' evidence will show they had reason to believe that such was the fact at the time of production. [fol. 68] The surrounding circumstances will warrant that inference, and there will be written documents introduced or publications at the plant showing actual knowledge that all of this ammunition was destined for transshipment out of Missouri. Now, in connection with that ammunitions effort that I described they have as an integral part of that an organized Safety Department. It was not only for the humanitarian purpose of protecting the employee but it had a very important connection with production, in that the organization and operation of the Safety Department prevented accidents, prevented [breakdowns], and prevented absenteeism, and had an effect on production and was interwoven with production. That Safety Department was under the direction of a director who had sometimes as many as three directors, generally one or two, that had supervision over about one hundred safety men, called at times Safety Inspectors, at other times Safety Engineers. They included the plaintiffs in this case. Those hundred or so safety men were assigned three to each

operating unit, one for each shift. And one of the three was designated as foreman or supervisor over the others, but he had no authority over the others and did the same work that the others did, and the only thing that differed from the others in the main was to include the reports to him and transmit them in his reports to the director and [fol. 69] director's assistant. But the evidence will show that the policy-making authority, the exercise of independent judgment and discretion, did not go below the director and his assistant. Now then, the duties of these plaintiffs, as the evidence will show, the regular duties were to patrol, to inspect and report. They were just routine inspectors. They patrolled buildings and determined things like the existence of slippery floors, or what is called bad housekeeping. They patrolled the machines and noted the presence of guards and other safety equipment. And they noted the employees to indicate the wearing of safety equipment, such as hair nets and goggles, and observation of safety practices. When in the performance of that patrol and inspection duty the hundred men forming that routine duty noted any infractions. And then the further duty remained upon them to do two things: They first reported evidence of infractions of the safety rules, which were dangerous safety practices of employees, to the Foreman of Supervision for correction. Note that it was the production employees' foreman to which they made the report for correction, and it was his responsibility to correct, not the Safety Department's. The report for correction was made to the supervising personnel over the employee who was not observing the safety practices. Then at the end of the day in their daily report to their own foreman or supervisor, they reported the occurrence for investigation, and he relayed that report in his report [fol. 70] to the director's office. But, as above stated, no authority. Oh, I forgot to state that in connection with these infractions the safety men had no authority to take any corrective action himself. He couldn't speak to or reprimand an employee, nor even speak to him. The orders on that were very explicit, and violations entailed dismissal. So the evidence will show clearly that there was no actual authority below the Director's office.

Now then, as to the employment of these plaintiffs, if I

may get a sip of water. They were employed at stated salaries for a 40-hour week. At the time of their employment a little booklet was given in which forty hours was stated to be the regular nonovertime work week at the plant, and that work in excess of 40 hours would be compensated and was according to the provisions of the Fair Labor Standards Act. Notwithstanding they were employed at stated salaries for a nonovertime 40-hour work week and required to work overtime, this group was not compensated in accordance with Section 7 of the Fair Labor Standards Act, which says they must be paid at one and a half times the regular rate. Section 10c of the Act requires the defendant to keep pay roll records, and he has at my request given me summaries containing the pay roll information as to these fifty-nine plaintiffs. It will be introduced in evidence. It contains the work week, the actual hours worked, and gives the weekly wages.

[fol. 71] I should mention here that while that act, the Fair Labor Standards Act, uses the words "hourly rates," the courts have uniformly held from the Supreme Court down that it does not exclude employees whose compensation is measured by other standards, such as piece-workers or salaried workers, that in such cases as in cases of salary worker the gross weekly wage must be translated into an hourly rate. I have, therefore, translated these gross wages which they reported to me into similar computations whereby I have broken them down to the hourly rate. For example, if the gross wage was fifty-one ninety-two as the first item I see here, and the work week was 40 hours per week, the hourly rate would be fifty-one ninety-two divided by forty, or one thirty, which was the regular hourly rate at which he was employed. Then applying one fifty per cent of one thirty for overtime they report each week I get the overtime compensation due that employee for each week. For example, if the employee worked 48.3/10 hours, applying one thirty one and a half, and the one ninety-five to the extra, you get $16.18 as the overtime due the employee for that week. Now, totalling that on the adding machine gives the total claim of each plaintiff. So if Your Honor after hearing the case agrees that the method of computation is correct then the record will show in these two sets of exhibits, which are numbered to

correspond, the exact amount due each plaintiff on the defendants' own figures.

[fol. 72] That I believe in a general way states the case.

Mr. McRoberts: Your Honor please, I don't believe we would care to make a statement at this time, but I would like to raise the question as to the procedure to be followed in this trial. There are fifty-nine separate plaintiffs, each plaintiff has a separate claim, but no one plaintiff is bound by another's claim. It is obvious that the testimony as to certain facts will be the same in each case, the business or what the defendant is doing and how the defendant conducted its business, that will be the same, but the testimony with respect to each individual will be different. The testimony as to his duties, his occupation, the exercise of judgment and discretion, whether he is or is not an exempt employee, in general that will be different, although I can well understand why some would be grouped together and being about the same types of work, but there are substantial differences between the various plaintiffs. But of course, with respect to the employment of the different plaintiffs, it varies. They were employed at different times at different rates of pay, some employed on an hourly basis, other jobs, and ultimately transferred into the Safety Department. Some were employed directly in the Safety Department. And some were teachers, some instructors, some supervisors, some plain safety engineers, [fol. 73] and so forth. Now, if we have to try each one of these cases separately we are in for a very long, tedious trial. I don't know what Judge Bond's course of procedure is going to be, or what Your Honor's thoughts are. I do know this: that in one of these cases that was tried in St. Paul last year which involved the Federal Cartridge Company, another company operating a plant identical with this only smaller, and operating it under the same principle and same contract, they had 160 some odd plaintiffs, and the Court there made an order directing the plaintiff to select out of the group some twelve plaintiffs' cases for trial and set them aside, the claims of the other plaintiffs, for further action of the Court. And those twelve cases were tried and I am informed it took twenty-four trial days to try those cases. I think possibly some consideration as to the procedure here would be in order.

Mr. Bond: I don't follow you as to the burden on the plaintiff at all. The Fair Labor Standards Act, the main purpose is presumed to include all employees engaged in the production of goods for commerce, which they admit in their answer these men were employed by them for the periods they say they were employed. We expect to prove that they were engaged in the production of goods for commerce. They are, therefore, presumed to be under the Act and the burden is upon you to plead and prove exemp-[fol. 74] tion and whatever is necessary to be heard on that will have to come as part of the defense. I don't expect to put anything like fifty-nine men on the witness stand. I intend to put a few men on to prove the general features of this case, and that the [other] were similarly situated. I intend to prove the exact amount due them by computations which are mere arithmetic made from figures they have given me. I can't see that what I have here and expect to put in can take more than a full couple of days' testimony. That would seem to me to be all the time I would need. Now, if he thinks he is going to have to take more we will have to see when we get to it.

The Court: I do not know that I understand the case as followed in Minnesota. They had 160 defendants and the Court made an order only twelve cases be heard.

Mr. McRoberts: Your Honor, the opinion of the Court starts out with the statement—

The Court: What judge was that before?

Mr. McRoberts: That was tried before Judge Joyce, and the opening paragraph says: "This is an action by Frode Anderson and eleven other plaintiffs for recovery of varying amounts of overtime compensation, liquidated damages, attorneys' fees and costs under the Fair Labor Standards Act of 1938. The action is in the nature of a class suit in which there are some 164 individual plaintiffs, employ-[fol. 75] ees and former employees of defendant, but pursuant to order of court plaintiff's counsel has selected these twelve individual plaintiffs for trial. The remainder will be held until the determination here."

Now, I telephoned to one of the Counsel, Mr. Hammond, whose name appeared here and asked him about the order.

how it happened to be made. And he told me in substance that either at a pre-trial conference or at the opening of the trial that when it appeared that each of these claims was a separate claim and that the plaintiffs did different work and that it was going to be a very long-winded, tedious trial, that the Court entered this sort of an order and these twelve cases were selected and tried. They are not res adjudicata as to the other cases, but it was felt that the disposition of these twelve cases, being typical would guide the Court and parties in the disposition of the remaining cases. And it was tried that way. And he told me, incidentally, that an appeal was taken and just argued last month, I believe, in the Court of Appeals.

Mr. Bond: I know nothing in a general way about the case. I do not think it is in shape where Your Honor could find any precedent in what was done. I heard about it not long ago, and I got a copy of the brief, and the thing was prepared and briefed in the most remarkable fashion in the world. I got the impression that the Judge and a great number of people who were of different classifications—

[fol. 76] The Court: I wonder if each one of the twelve were in a different classification?

Mr. Bond: It was all by stipulation. I got the impression if there was an order made I think it was in pursuance of an agreement of counsel in chambers to meet the exigencies of that particular case. But my point is here, we have a right to bring a group action on behalf of all people similarly situated. They can join in the same petition. I expect to prove fifty-nine men were similarly situated. I will prove the duties, that they had similar duties, and the testimony I will give as to what the duties were will be that they were the same as to the whole fifty-nine. And it seems to me it is purely a matter of defense to pick some fellow out and show he was not, Your Honor.

Mr. McRoberts: We will object strenuously to one witness getting on the witness stand and saying such and such a thing and the others did a certain thing. In some instances I believe the duties were identical but you will

find quite a variation in the duties of these plaintiffs, they differed at different times. I think we are entitled to have the plaintiff, if he is going to make a claim, get on the witness stand and say what his duties were, to permit us to cross examine.

Mr. Bond: I don't have to go any further than to prove [fol. 77] they were employed at the plant and engaged in the production of goods for commerce, and then the law is presumed to cover them and it is up to the defendant to make an affirmative proof. I only say that for the purpose of showing work was interwoven with production.

Mr. McRoberts: Witnesses have to get upon the witness stand and show, the burden is on the plaintiff to show that they in their work did produce goods for commerce. And I do not see how any plaintiff can make that proof without going on the witness stand.

Mr. Bond: Well, we will show you.

The Court: All right, proceed.

Thereupon, plaintiffs to sustain the issues in their behalf, offered and presented the following evidence:

FRANK N. HARRIS,

of lawful age, produced, sworn and examined, testified on behalf of plaintiffs as follows:

Direct Examination by Mr. Bond:

Q. Will you state your full name, Mr. Harris?
A. Frank N. Harris.
Q. And where do you live?
A. I live at #6 Lakeview Court, Ferguson, Missouri.
[fol. 78] Q. What is your present occupation?
A. I am office Manager St. Louis County Bus Company.
Q. What is your age? A. Forty-three.
Q. Are you the F. N. Harris, one of the plaintiffs in this case? A. I am.

Q. Were you employed during the World War during the period mentioned in this complaint, with the United States Cartridge Company? A. Yes, sir.

Q. When did you go to work for them?

A. My original employment with the Cartridge Company was in February, I think the 13th, 1942.

Q. Where did you go to get your job?

A. I went to 3000 Locust.

Q. And what occurred there?

A. Well, I was interviewed by a so-called interviewer, and at that time was told that the only thing they could consider me for was the position of—in the lobby of the Administration Building. I think the title of the job was—I can't recall the name of the title, but my purpose was to greet the people that came to the Administration Office to see the management and to see that they were introduced to the management.

[fol. 79] Q. Did you go to work in that capacity? A. I did.

Q. And how long did you continue in that capacity, what did you receive as pay in that capacity?

A. One hundred and fifty dollars a month.

The Court: What capacity is that?

A. I recall the name, it was Receptionist.

Q. And were you later or did you later transfer into the Safety Department? A. I did.

Q. What was the date of that?

A. I think it was the 31st of May.

Q. 1942? A. That is correct.

Q. And in what capacity? A. As a safety inspector.

Q. And what were the employment terms?

Mr. McRoberts: Just a moment. Object to that, it calls for an opinion of the witness.

Q. (Mr. Bond) State the facts in reference to it?

A. I was employed at a salary of $200 a month.

Q. Now, at or about the time of your employment, were you given a little booklet entitled, "Your Job at the St. Louis Ordnance Plant?" A. Yes, sir, I was.

[fol. 80] Q. I hand you there what purports to be, four of them, which would be in the editions for 1941, 1942, 1943

and 1944. Do you recognize those as the booklets that were handed to you and other employees?

A. Yes, sir, I do.

Q. Now, describe in a general way this plant out there when you went to work in this Safety Department.

A. It consisted of an Administration Building, and I believe there were eight production units. The plant was divided into two sections, one known as the restricted area, and the other was a general productive area. There were two power units in the area, and the entire plant was covered with railroad tracks and also concrete driveways.

Q. About how many employees were out there, do you know?

A. I don't know exactly, but I believe the company claimed at the peak of their production there were in excess of 40,000 people employed.

Q. What was produced at the plant?

A. Small arms and ammunition.

Q. Now then, when you entered this safety department on May 31, 1942, what duties were assigned to you?

A. I was told that I would be assigned to an inspector by the name of Burke, who at that time had been assigned to a certain area which consisted of all of the loading, primer insert buildings in the plant of which there were [fol. 81] eight of each. I was told to stay with that man until told otherwise, observe everything there and by observation learn what my duties were.

Q. And what did those duties turn out to be?

A. We patrolled this given area which consisted of eight loading and primer insert buildings and the powder magazine, which were part of the operations. We patrolled and inspected or looked with regard to the powder magazines, and checked and determined that the amount of powder in storage there did not exceed the maximum set by the Ordnance Safety Department. And the buildings were checked for good housekeeping to see that all employees wore the required safety equipment, such as safety shoes and safety goggles; and check the machines to see they were properly guarded, that there were no accumulations of excessive powder or primers in the Primer Building, and checked for the same conditions, and in addition thereto to determine whether there were any excessive

storage of primers in the magazines, and finally to determine [whather] or not people were observing safe practices.

Q. Now then, can you give us an example of what you did out there from the time you went out there until you checked in in the morning until you checked out at night, in a general way from recollection? This would be in the Production Department unit, that you are talking about now, wouldn't it?

A. They were Production units, yes, sir. Although the [fol. 82] particular buildings were part of the production of the Cartridge. On the day shift they arrived at a little prior to 7:30, which was our time on that shift to be there and be ready for duty. We arrived a little before that time and went downstairs where we had lockers to keep our clothes which were furnished us by the company. We were required, of course, to wear special duty clothing or uniform, either one. The first job, of course, was to change clothes and get in this uniform. Then at approximately a quarter of the hour, or a quarter of eight in this case, we were supposed to leave the unit and travel to our certain area to which we were assigned, where we were supposed to meet the inspector who had been on duty the preceding eight hours and who was about to go off duty. We conferred with him and determined what conditions he found, if any, that hadn't yet been corrected and needed correction. And by that time, of course the change of shifts occurred, and we then proceeded to our daily duty of the day which, as I stated before, required us to patrol, inspect, and, in the event they found a violation or condition that needed correction, we were instructed to not contact the employee who was in violation but to report the occurrence to his foreman, and if we failed to get any cooperation there, to go to his superintendent.

Q. That foreman or superintendent, would he be a Safety Department foreman or be the employees' foreman?

[fol. 83] A. No, sir, he was the employees' foreman, no connection with the Safety Department.

Q. Go ahead.

A. Then an added duty, we kept a log in which we kept a record of the infractions we discovered or conditions we discovered that needed correcting. We also kept a rec-

ord of what we did to get the situation corrected. And at the end of the day, of course, we were required to file a written report with our own foreman or supervisor who then in turn transmitted it to the director. In addition to these other duties that I recited before in each one of the eight production units in each of these eight buildings was a first-aid room and worked three shifts. They employed a nurse, and it was our job of course to keep in touch with these first-aid units and pick out the report that the nurses had written on all these first aid cases. We were then required to take those slips out, find the employee who had sought first aid, get a description from him or her of the accident, how it occurred, what caused it, and if it was something that could be corrected we were supposed to instruct the employee how to avoid a similar occurrence in the future. And they had a form that we completed on each one of the occurrences and filed with our supervisor or foreman at the end of the day.

Q. Now then, these buildings that you speak of that you patrolled, these machines that you inspected, these em- [fol. 84] ployees that you observed, were they the buildings, the machines and employees who were engaged in producing the ammunition at the plant? A. They were.

Q. Now then, who was there at the head of the Safety Department? A. A man by the name of Strickland.

Q. What was his title? A. Safety Director.

Q. Did he have any men under him?

A. Yes, sir, originally he had I believe three assistants.

Q. And these assistants, who were they? Who came?

A. Well, one was a man by the name of McKitrick, another by the name of Hurtling. And he had several, of course, during the time that I was there. Another was a man by the name of Hirchburger.

Q. You didn't understand my question. You are giving me the director and his assistants? A. That is right.

Q. Now over whom did they have supervision? That is what I want to know—and authority.

A. That director and his assistants and supervisors, the large group of men of which I was one?

Q. That is the point. And that large group of men of which you were one, did they have any title or designation? [fol. 85] A. Yes, sir.

Q. What were they called out there?
A. Safety Inspectors at that time.
Q. And later was that title changed?
A. To Safety Engineer.
Q. Attendant on that change in title was there any change in duties?

Mr. McRoberts: Just a moment. Limit that to this witness, the change in duty.

Q. As to yourself? A. None whatever.
Q. Now then, did the defendant get out, or did the safety director get out any general instructions out there, in typewritten form, to be observed by the safety engineers?
A. Yes, sir.
Q. I show you here a blank book and ask you what it is?
A. This is a set of general instructions.
Q. The first two pages, limiting yourself to a set of general instructions which were issued to all safety inspectors or safety engineers, by whom were they issued?
A. They were issued by the Safety Department through the Educational Division of the Safety Department.
Q. To whom were they issued?
A. To the safety inspectors.
Q. And whom did the safety inspectors include?
[fol. 86] A. Myself.
Q. And did it include all other safety inspectors?
A. It did.
Q. Whether they were engaged in that unit or some other unit or all the units, these are the general instructions under which they acted? A. They were—

Mr. McRoberts: Just a moment.

The Court: Wait a minute. When you see Counsel getting up, don't answer.

Mr. McRoberts: Object to this witness testifying as to what instructions were issued to all other safety engineers unless he was present at the time the instructions were issued to all of them.

Mr. Bond: He was working at that plant for four years in that department. He knows to whom general instructions were issued. He is bound to know it.

Mr. McRoberts: If he was present when all of them were issued, I have no objection.

Q. What do you know about the book and its issuance?

A. As I told you, this book was issued by the Educational Division of the Safety Department. And when I entered the department as a safety inspector they set up a provision whereby we were required to attend a meeting once each week. And I can only talk with reference to men [fol. 87] who attended the meeting and on the same shift I was, of which there were perhaps some 30 or 35 on my shift, and the majority of these men attended these meetings weekly. And the first meeting we attended we were given, all of us, this book and told these were the general instructions for the safety engineers, and they outlined the duties of the safety engineers briefly.

Mr. Bond: I ask that be marked—in arranging my procedure I have got some other exhibits that come, A, B, C, D and E—I will ask this be marked "Plaintiff's Exhibit F". (The book is marked as requested) And I now offer in evidence all that part of pages 1 and 2 commencing with the title, "The Duties of the Safety Engineers Shall Be As Follows," and ending with the words "this section."

Mr. McRoberts: Your Honor please, I think the entire exhibit should be offered in evidence, since the witness has testified that the entire exhibit constituted the instructions given them.

Mr. Bond: Now, if Your Honor please, I don't regard this entire book as being necessary or material to anything in the case. I have identified the book. If he does, it is up to him to introduce it.

The Court: It will be offered subject to the defendant's objection.

[fol. 88] Plaintiffs' Exhibit F.

General Instructions

The Safety Engineer:

One Safety Engineer will be assigned to each unit or special function of plant operation.

The Supervising Safety Engineer on each shift is responsible and will answer for the Safety Engineers, who are working on the shift of which he is in charge, all questions and problems which occur during the shift and cannot be handled within the unit.

Once weekly, or at any other time he deems it necessary to do so, the Supervising Safety Engineer shall have a meeting with all of the Safety Engineers over whom he has supervision. At each meeting all problems incidental to the units will be discussed, as well as Instructions incidental to training or departmental procedure.

The Duties of the Safety Engineers shall be as follows:

1. To see that the proper Safety Equipment is provided for and worn by employees at all times.

A. Violations of the rules pertaining to the use of personal protective equipment, such as the failure to wear glasses, the failure to wear the approved types of hair coverings; the failure to wear safety shoes; the wearing of jewelry; the operation of machinery that is defective or unguarded or inadequately guarded will be reported to the Supervising Safety Engineers by the Engineer in each unit on each shift. The procedure to be followed in making this report and the corrective action to be taken on these infractions of rules is as follows:

1. Upon noting infractions of Safety Rules the Safety Engineer will procure the badge number and the department number of the person or persons who are violating the Safety Rules.

2. He will then report the badge number and the nature of the violation to the offender's foreman or supervisor.

3. At the end of each working shift, each Safety Engineer will submit a report to his supervisor in regard to these violations.

This report will be made on the Safety Inspection Report form, IRS-25 and will embody the following information:

1. The badge number of the person who violated the Safety Rule.

2. The number of the department in which the violator is employed.

[fol. 89] 3. The nature of the violation.

4. The name and badge number of the foreman or supervisor of the department in which the violator is employed.

5. The reaction of the supervisors upon receiving the reports of these violations will be noted by the Safety Engineer, and he will incorporate in his report his comments on the supervisor's attitude.

6. The Safety Engineer will not attempt any correction of these violations by contacting the individuals who are guilty of these violations. In all cases he will contact the supervisors of the individual concerned and will leave corrective action to the supervisor.

7. This report will state the working shift during which these incidents occurred. The shift check in the upper right hand corner will not be used in making this report. Instead, each Safety Engineer will write the date and the time of his working shift at the top of the report page in this manner—

January

8 A. M.	—	4 p. m.
4 P. M.	—	12 Midnight
12 Midnight	—	8 A. M.

Should not violations exist during the working shift, a report of such condition will be made in the manner as is outlined above. Consult sample report which is included in this manual.

An exception to this rule will be made where an employee is engaged in some operation, whereby death or serious injury may result. Should this condition exist the Safety Engineer will stop the hazardous operation and will immediately seek the supervisor of the person who was performing such act and will report the incident to him and will explain in detail why he caused such operation to be stopped.

2. To observe and correct unsafe methods and conditions and to observe and correct any unsanitary or unhealthful condition.

These observations will be incorporated in the daily log. Items of major importance will be covered by a separate report. In obtaining corrective action on unsatisfactory conditions which may be found, the same flow will be followed as is outlined in item 1 of this section.

[fol. 90] B. (Check list of mechanical items)

1. Machines and equipment, belts, oiling devices, tools, and appliances.

2. Guards and Safety Devices.

3. Ropes, tackles, chains, all hoisting equipment.

4. Conveyors, trucks, overhead cranes, motor vehicles.

5. Electric motors, switches, wiring, etc.

6. Ventilation; dust protective equipment; fans; exhaust systems.

7. Acids, caustics, chemicals, gases, their storing methods of supply, explosives, cutting oils and compounds.

8. Heating and power equipment, boilers, engines, power line shafts and all accessories, full storing and firing equipment.

9. Material in storage, piled material, space between materials, safe floor load, etc.

10. Lighting—adequacy of illumination.

11. Housekeeping, sanitation, hygiene.

C. (Check list of unsafe practices)

1. Do employees operate tools, appliances, or other equipment without authority?

2. Do employees work or operate at unsafe speeds?

3. Have guards been removed, or have guards or other Safety Devices been rendered ineffective?

4. Do employees use defective tools or equipment or use tools or equipment in unsafe ways, or use hands or body instead of tools?

5. Do they overload, crowd, or arrange or handle objects unsafely?

6. Do men stand or work under suspended loads, open latches, or shafts or scaffolds or ride loads or get on or off equipment or vehicles in motion, etc.?

7. Do employees repair or adjust machinery in motion, under pressure, electrically charged, etc.?

[fol. 91] 8. Does anyone distract the attention of or startle workers?

9. Is there any failure to use Safety Devices?

10. Are there any other unsafe acts of persons?

3. To see that any injured employee, no matter how slight the injury may be, is given First Aid immediately.

If it is necessary to summon an ambulance call Sta. 400, then notify the Supervising Safety Engineer of the accident, giving the following information:

(a) The name of the injured person.

(b) The badge number of the injured person.

(c) The place of the occurrence of the accident.

4. To make out the proper reports on all accidents.

5. To report to the Supervising Safety Engineer once each hour during the working shift. (Sta. 763)

6. To turn in a daily log. This log will be written on the Form IRS5, and will embody a report of all accomplishments, and will report any conditions that have been noted that are inherently or potentially hazardous.

(a) In addition to the daily log it is often necessary that a special report covering some hazardous condition be submitted by the Safety Engineer. This report like the daily log is to be written in narrative form and will contain a clear and concise report of the condition that exists and will include the suggestion or recommendation that will reduce or eliminate the hazard.

(b) Special check list forms covering various phases of plant operation will be issued to the Safety Engineers from time to time. The Safety Engineer will make the necessary investigations and will make his report according to the instructions that are issued for that particular investigation.

7. To write all reports legibly and to make all statements clear and concise.

(a) The telegraphic style of writing should be avoided.

(b) All statements should be in the form of complete sentences. (A sentence must express a complete thought.)

(c) In writing a report no detail should be omitted.

[fol. 92] Purpose

The purpose of this bulletin is to outline the procedure to be followed by the Safety Inspection Section of the Safety Department for the Prevention and reporting of Accidents.

Accident Prevention

Assigned to each manufacturing unit and to each special function of plant operation on each working shift is a Safety Engineer whose duty it is to make inspection in every department of the unit to which he is assigned. These inspections are made of the building structure, the machinery used in the manufacturing process, tools, equipment and materials and the working methods of personnel, in an effort to discover and eliminate any existing or potential hazard that may exist by the development and application of corrective measures.

Special investigations are made by the Safety Engineer in the event of fire or accident, for the purpose of determining the reason for the occurrence of such an event, in order that this information may form the basis for corrective action which will prevent the occurrence of a similar event.

In like manner, especial studies are made of cases of occupational illness in order that the facts obtained may be made applicable to the prevention of the illness of other employees.

[fol. 93] The rehabilitation of employees who are partially disabled is another function of the Safety Engineer, when such an employee returns to work the Safety Engineer will contact the Supervisor of the unit to which

the injured person is assigned, and will assist in placing the disabled person in some type of productive operation which will not further the person's disability.

In striving for the prevention of accidents, the Safety Engineers will watch particularly for the following:

1. Failure of employees to wear proper clothing, and failure to use Safety Equipment.

2. Unsafe conduct on the part of the employee.

3. Any unsafe condition that might possibly cause an accident or injury to an employee or damage to material and equipment.

Correction of Unsafe Conditions & unsafe acts.

When a Safety Engineer observes an unsafe condition or an unsafe act that presents no immediate danger, he will call it to the attention of the foreman and will enter such infraction or condition on the daily report form IRS 25, which in turn will be submitted to his Supervisor.

Use of Form IRS 25

Form IRS 25 will show information pertaining to the unsafe act or unsafe condition, viz.

[fol. 94] 1. The number of the department in which the infraction occurred.

2. Badge number of the person who was performing the unsafe act.

3. The name and badge number of the foreman who is responsible for the person committing the violation, or who is responsible for the existence of the hazardous condition.

4. Remarks, relative to the correction of the unsafe act or unsafe condition, such as disciplinary action,

process revision and other information pertinent to the case.

5. A recapitulation of the report of each Safety Engineer will be made and copies will be sent to

(1) Management.

(2) The Building Superintendent of each Operating Unit.

(3) All Safety Engineers.

Correction of Hazardous Conditions

When a Safety Engineer discovers what he considers to be, the existence of an extremely hazardous condition, he is authorized to take immediate direct action to eliminate the hazard. Any unsafe condition in the restricted areas will also fall under this category. The Safety Engineer will use discretion in the exercise of this authority so that there will be no unnecessary interruption of production. A report of [fol. 95] the circumstances and of the action taken will be promptly made to the foreman or supervisor in charge. Cases of this type will also be reported on Form IRS 25—(Rev. 243)

[fol. 96]

The United States Cartridge Co.
St. Louis, Missouri

Report of Violations of Safety Regulations

Copies to: John Doe

Date: 3-9-43
Unit 1

Dept. No.	Badge No.	Infraction	Foreman's Name & Badge No.	Remarks
123	22145	Wearing incomplete equipment at the Baird Barrels. Had only rubber boots, no apron shield or rubber gloves on.	Elkin	Foreman will instruct employee.
155	5639	Work bench between first floor elevator 5-A and pier G-31 too close to elevator.	Smith	Foreman will ask for permission to move the work bench.

Safety Engineer's Signature.....

Form IRS-25 (Rev. 2/43)

[fol. 97] Instruction Sheet

Form IRS-5

Used for:

1. Accident Investigation

1. Lost Time Accidents

The report is to be completed and turned in to the Supervising Safety Engineer as soon as possible.

2. All first aid cases that are sent to the hospital.

3. Dermatitis cases--A complete investigation is required for each case of Dermatitis.

A. Information required on accident investigations.

(a) Name of the injured person.

(b) Badge number of the injured person.

(c) Time—The time of the occurrence of the injury.

(d) Occupation—The occupation of the injured person.

1. Department number.

2. Machine number.

(e) The nature and extent of the injury.

(f) The treatment of the injury.

(g) How did the accident occur?

(h) Had the employee previously been instructed as to safe methods of operation?

(i) What physical or mental condition of the employee may have contributed to the accident?

(j) What safeguards were in use at the time the injury occurred?

(k) What steps have been taken to prevent recurrence of the accident?

II. Safety Suggestions

1. Complete

A report of the completion of the elimination of any hazardous or unsafe condition.

[fol. 98] 2. Incomplete

A report of condition or hazards that cannot be eliminated within the production unit or within the designated territory to which the Safety Engineer is assigned.

III. Daily Log

A daily report which will contain a record of all accomplishments and will contain a report of any conditions or practices that have been noted that are inherently or potentially hazardous.

Form IRS 39

Used for:

I. A detailed description of all accidents that occur during the hours of operation.

II. To supply the information that is necessary for compensation and statistical reports.

To fill out the form accurately the following information must appear:

1. Give a simple and exact account of the accident as is received from the injured employee.
2. The nature of the injury.
3. What has been done to prevent the recurrence of such an accident.

After the above information is completed you will find eight schedules which are to be checked according to the information that is shown. You will find attached to this instruction sheet a complete explanation of the schedules four to seven. The rest are self-explanatory. Consult the sample report attached to this instruction sheet.

[fol. 99] The United States Cartridge Co.
St. Louis, Missouri

Date: 3-15-43
Shift: 1

Safety Inspection Report

Accident Investigation—Lost Time

Report:

Name: Doe, John

Badge: #2000

Occupation: Operator

Time: 10-21-42 at 9:35 P. M.

Location: Bldg. 204, 2nd floor, section D, Gage & Weigh, Machine #13.

Injury: Fracture and laceration of left third finger.

Treatment: Employee reported to the First Aid Station where mercresin and D. D. were applied and was then referred to the Plant Hospital.

Details: Employee was placing cartridges in the feed slide, a cartridge slipped from his grasp and rolled down the top of the feed slide. Mr. Doe reached to catch it and his left third finger was caught between the inserting finger and the indexing dial.

Correction: It is a human trait to try to retrieve something that dropped. This known hazard has been recognized and a suitable guard has been designed. A sample guard has been installed on Gage and Weigh Machine #1 for the past week. Guards for the balance of the machines are now being fabricated in the sheetmetal shop and will be installed as soon as received.

Inspectors Signature.....

Form IRS-5 Rev. (5-42)

Note

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Note

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[fol. 101] *Accident Type*

Type of Accident #4

Striking Against

Refers generally to contacts with sharp or rough objects, resulting in cuts, slivers, punctures, etc., due to striking against, kneeling on or slipping on objects.

Struck By

Falling, flying, sliding or moving objects

Caught in, or Between

Fall Same Level

Fall to Different Level

Slip (Not Fall) or Overexertion

Resulting in strain, hernia, etc.

Contact With Temperature Extremes

Resulting in burning, scalding, freezing, heat exhaustion, sunstroke, frostbite, etc.

Inhalation, Absorption, Ingestion

Asphyxiation, poisoning, drowning, etc., but excluding contact with temperature extremes

Contact With Electric Current

Such as results in electrocution, shock, etc.

Accident Type, N. e. c.

Unclassified, insufficient data

[fol. 102] *The Unsafe Mechanical or Physical Conditions*

Unsafe Condition, #5

Improperly Guarded Agencies

Unguarded
Inadequately guarded

Lack of, or improper, shoring in mining, construction excavating, etc.
Not otherwise classified.

Defects of Agencies

Rough
Slippery
Sharp-edged
Poorly designed
Low material strength
Poorly constructed
Inferior composition
Decayed, aged, worn, frayed, cracked, etc.
N. e. c.—(including hidden defects)

Hazardous Arrangement, Procedure, Etc., in, on, or, Around the Selected Agency

Unsafely stored or piled tools, materials, etc.
Congestion of working spaces
Inadequate aisle space, exits, etc.
Unsafe planning and/or layout of traffic or process operations
Unsafe processes
Overloading
Misaligning
N. E. C.

Improper Illumination

Insufficient light
Glare
Unsuitable location or arrangement (producing shadows or contrasts)
N. E. C.

Improper Ventilation

Insufficient air changes
Unsuitable capacity, location, or arrangement of system
Impure air source
N. E. C.

[fol. 103] Unsafe Dress or Apparel

No goggles
Goggles defective, unsafe, or unsuited for work
No gloves
Gloves defective, unsafe, or unsuited for work
No apron
Apron defective, unsafe, or unsuited for work
No shoes
Shoes defective, unsafe, or unsuited for work
No respirator
Respirator defective, unsafe, or unsuited for work
High heels
Loose hair
Loose clothing
Inadequately clothed, n. e. c.
N. e. c.

Unsafe Mechanical or Physical Condition, N. e. c.

Unclassified—Insufficient data

No Unsafe Mechanical or Physical Condition

[fol. 104] Unsafe Personal Factor, #6

Unsafe Personal Factor

Improper Attitude

Willful disregard of instruction
Violent temper
Absentmindedness
Willful intent to injure
Nervous, excitable, etc.
Failure to understand instructions
Improper attitude, N. e. c.

Lack of Knowledge or Skill

Unaware of safe practice
Unpracticed or unskilled
Lack of knowledge or skill, N. e. c.

Bodily Defects
- Defective eyesight
- Defective hearing
- Muscular weakness
- Fatigue
- Existing hernia
- Crippled
- Existing heart or other organic weakness
- Intoxicated
- Bodily defects, N. e. c.

Unsafe Personal Factors, N. e. c.

Unclassified—Insufficient data

No Unsafe Personal Factor

[fol. 105] *The Unsafe Act*

Unsafe Act, #7

Operating Without Authority, Failure to Secure or Warn
- Starting, stopping, using, operating, firing, moving, etc. without authority
- without giving proper signal
- Failing to lock, block, or secure vehicles, switches, valves, press rams, other tools, materials and equipment against unexpected motion, flow of electric current, steam, etc.
- Failing to shut off equipment not in use.
- Releasing or moving loads, etc., without giving warning.
- Failure to place warning signs, signals, tags, etc.
- Not elsewhere classified.

Operating or Working at Unsafe Speed
- Running.
- Feeding or supplying too rapidly.
- Driving too rapidly.
- Driving too slowly.
- Throwing material instead of carrying or passing it.
- Jumping from vehicles, platforms, etc.
- N. e. c.

Making Safety Devices In-Operative

Removing Safety Devices.
Blocking, plugging, tying, etc., of safety devices.
Replacing safety devices with those of improper capacity (high amperage electricity fuses, low capacity safety valves, etc.)
Misadjusting safety devices.
Disconnecting safety devices.
N. e. c.

Using Unsafe Equipment, Hands Instead of Equipment or Equipment Unsafely

Using defective equipment (mushroom head chisels, etc.)
Unsafe use of equipment (e. g. iron bars for tamping explosives, operation pressure valves at unsafe pressures, etc.)
Using hands instead of hand tools (to feed, adjust, clean, repair, etc.) N. e. c.
Gripping objects insecurely; taking wrong hold of objects.
N. e. c.

[fol. 106] Unsafe Loading, Placing, Mixing, Combining, etc.

Overloading
Crowding
Lifting or carrying too heavy loads
Arranging or placing objects or materials unsafely. (parking, placing, stopping, or leaving vehicles, elevators and conveying apparatus) in unsafe position for loading and unloading)
Injecting, mixing, or combining one substance with another so that explosion, fire or other hazards are created (injecting cold water into hot boilers, pouring water into acid, etc.)
Introducing objects or materials unsafely (portable electric lights inside of boilers or in spaces containing, inflammables or explosives; moving equipment in congested workplaces, smoking where explosives or inflammables are kept, etc.)

Taking Unsafe Position or Posture

Exposure under suspended loads
Putting body or its parts into shaftways or openings; standing too close to openings.
Entering vessel or enclosure when unsafe because of temperature, gases, electric, or other exposures.
Lifting with bent back, while in awkward position, etc.
Working on high tension conductors from above instead of below.
Riding in unsafe position (on platforms, tailboards, and running boards of vehicles; tailing on or stealing rides; riding on apparatus designed only for materials, etc.)
Exposure to falling or sliding objects
N. e. c.

Working on Moving or Dangerous Equipment

Getting on or off moving equipment (vehicles, conveyors, elevators, animals, etc.)
Cleaning, oiling, adjusting, etc., of moving equipment
Caulking, packing, etc., of equipment under pressure (pressure vessels, valves, joints, pipes, fitting, etc.)
Working on electrically charged equipment (motors, generators, lines, and other electrical equipment)
Welding, repairing, etc., of equipment containing dangerous chemical substances.
N. e. c.

[fol. 107] Distracting, Teasing, Abusing, Startling, Etc.

Calling, talking, or making unnecessary noise
Throwing material
Teasing, abusing, startling, horseplay
Practical joking, etc.
Quarreling
N. e. c.

Failure to Use Safe Attire or Personal Protective Devices

Failing to wear goggles, gloves, masks, aprons, shoes, leggings, etc.

Wearing high heels, loose hair, long sleeves, loose clothing, etc.
N. e. c.

Unsafe Acts, N. e. c.

Unclassified—Insufficient data

No Unsafe Act

[fol. 108] The purpose of this Bulletin is to outline the procedure to be followed by the Safety Department in the event of an explosion, air raid or other disaster.

Turning in an Alarm

The discoverer will turn in an alarm in the usual manner for a fire, by pulling a fire alarm box or by telephoning the fire protection unit.

Fire Protection Unit

The fire protection unit upon receiving the alarm will take the following action—

1. Proceed immediately to the scene of the disaster and combat any fire that may be present. In the event no fire is apparent they will stand by and make available all rescue equipment.

2. Immediately upon arrival, the fire protection officer in charge will have a member of the unit call Plant Protection headquarters to make sure they have received proper notification.

3. If additional fire fighting equipment is necessary, the fire protection officer in charge will immediately call fire protection headquarters and order additional equipment sent to the scene.

4. If the disaster warrants the use of Safety Engineers as rescue workers and stretcher bearers, the fire protection officer in charge will give this information to the control board at fire protection headquarters and

it immediately will be relayed to the Chief Safety Engineer or, in his absence to the Supervising Safety Engineer on duty.

It will be the responsibility of the fire protection officer in charge at the scene of the disaster to determine [fol. 109] whether or not it is safe for rescue workers to enter the area to evacuate all persons remaining in the disaster area.

Setting Up
Casualty Station

If a casualty station is to be set up near the scene of the disaster, the Medical Department will inform the Protection Department of its location and the Plant Protection control office immediately will notify—

1. The fire protection unit which will dispatch the disaster equipment and Safety Personnel to the designated casualty station. This will consist of—

A. Disaster equipment.

B. Ambulances.

C. Safety Engineers.

Safety Engineers

The Chief Safety Engineer or, in his absence, the Supervising Safety Engineer on duty, upon being notified of the location of the disaster and the need of the assistance of Safety Engineers will immediately call Plant Protection headquarters and request that the disaster signal be placed on the aut-o-call. This signal will be, giving four (4) long intermittent signals on the aut-o-call bell followed by four (4) short signals. Upon hearing the disaster signal each Safety Engineer will immediately call the Supervising Safety Engineers office, (Station 763) or (Station 792), and will be dispatched to the scene of the disaster, where they will be assigned duties. These duties will be as follows:

[fol. 110] Duties of the Safety Engineer

1. Act as stretcher-bearers and rescue workers.

2. Help drivers load the ambulances with stretchers.

3. Assist nurses and clerical workers in establishing the identification of injured persons.

4. Cooperate with guards in searching debris and ruins for casualties and removing them to the nearest possible point of safety.

Identification of the Injured

The Safety Department will aid the Medical Department in establishing the identity of the injured. Such information as is gathered in the casualty station will be entered on a serially numbered "Identification of Injured Persons" (Form IRM-18) Prepared in triplicate for each injured person. The original and duplicate copies of IRM-18 will show:

1. Date and time.

2. Employees' name and badge number.

3. The destination to which the person is to be taken.

4. The type of emergency treatment given.

The triplicate copy will be in the form of a tag to be attached to the injured person, and will show the same information. After preparation Form IRM-18 will be distributed as follows:

[fol. 111] Original—Retained by Medical Department.

Duplicate—Forwarded to Plant Protection Headquarters.

Triplicate—Attached to the person of the injured individual.

Individuals who cannot be identified and who are to be taken to the plant hospital or outside hospital will be accompanied by a Safety Engineer or a person designated by the Safety Department.

Calling in Outside Facilities

If the disaster is serious enough to warrant calling in outside facilities, the Chief Safety Engineer, the Director of the Medical Department or the Chief of Plant Protection, or their authorized representatives will issue the order to call in outside facilities. This order must be given to Plant Protection headquarters by one of the above mentioned persons who will identify himself by giving his name, title and photo-identification badge number.

Release of Information

All incoming calls from news gathering agencies, will be referred to the Public Relations office, and all information released to the public will be through the Public Relations Department.

Notification to Family or Relatives

It will be the responsibility of the Safety Department to report the following to the Public Relations Department:

1. Details concerning the disaster.

2. Casualties as soon as the extent of the injuries are known.

3. A copy of such reports will be sent to the Plant Protection Department.

[fol. 112] Casualty Stations Plant No. 1

If the disaster is in Building 102, the injured persons will be moved to the cafeteria on the first floor of Building 103.

With disaster in Building 111 or 110, the injured persons will be removed to the canteen on the first floor of Building 103.

If disaster occurs in Building 101, the injured persons will be removed to Building 107, squad room.

If a disaster occurs in Building 107, the injured will be removed to the canteen in Building 101.

If a disaster occurs in plant number 1, restricted area including Building 117, all injured will be removed to canteen on the first floor of Building 105.

If the disaster is in Building 103, injured persons will be removed to the cafeteria on the first floor of Building 102.

If the disaster is in Building 105, injured persons will be removed to the cafeteria on the first floor of Building 103.

If the disaster occurs in Building 104, the injured persons will be moved to the canteen on the first floor of Building 102.

If the disaster is in Building 102, the injured persons will be moved to the cafeteria on the first floor of Building 103.

If the disaster is in Building 111 or 110, the injured persons will be removed to the canteen on the first floor of Building 103.

If disaster occurs in Building 101, the injured persons will be removed to Building 107, squad room.

If disaster ocurs in Building 107, the injured will be removed to the canteen in Building 101.

[fol. 113] Casualty Stations Plant No. 2.

If a disaster occurs in the restricted area of plant number 2, and the viaduct is intact, the injured will be taken to the cafeteria on the first floor of Building 203. If the viaduct is not passable the injured will be taken out of the southeast gate of the restricted area to the squad room in Building 107 and use the cafeteria on the first floor of Building 102 for the overflow.

If the disaster occurs in Building 202, the injured will be removed to the cafeteria on the first floor of Building 203.

If the disaster occurs in Building 203, the injured will be removed to the cafeteria in Building 204.

If the disaster occurs in Building 204, the injured will be removed to the class rooms in Building 222B.

If the disaster occurs in Building 205, the injured will be taken to the class rooms in Building 222B.

If the disaster occurs in Building 211, the injured will be taken to the class rooms in Building 222B.

If the disaster occurs in Building 222B, the injured will be removed to the cafeteria in Building 204.

Form Discussed

The following form was discussed in this procedure:

Form IRM-18 "Identification of Injured Person"

Note

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[fol. 115] Non-Productive Departments

I. Manufacturing Administrative—G. A. Gilbertson

300 Manufacturing Administrative
302 Bldg. 102
303 Bldg. 103
304 Bldg. 104
305 Bldg. 105
306 Chemical Units, Plant I
312 Bldg. 202
313 Bldg. 203
314 Bldg. 204
315 Bldg. 205
316 Chemical Units, Plant II

II. Inspection—M. Hurley

320 Administrative Chief Inspector, his staff, men and clerical help
321 Chemical Units Plant I including lead shop
322 Bldg. 102
323 Bldg. 103
324 Bldg. 104
325 Bldg. 105
326 Metallurgy
327 Ballistics

III. Engineering Department—V. Haag

340 Engineering Administrative
342 Mechanical Engineering
343 Experimental Engineering
344 Methods Engineering
345 Tool Inspection

IV. Tool and Gage Dept.—A. C. Krus

350 Tool Production (Supt., Gen. and clerical help in addition to tool mfg.)
351 Gage Shop
352 Mechanical Maintenance
353 Heat Treating

V. Plant Maintenance Engineering—J. C. Stewart

359 Plant Maint. Engr. Adm. Plant Engr., his staff and clerical help
360 Electrical
361 Carpenters and Painters
362 Plumbers and Steamfitters
363 Power Plant
364 Sanitary
365 Special Equipment Serv.
367 Bldg. and Grounds Maintenance
369 Sheet Metal
371 Powder Farm Maintenance

VI. Production Control—A. E. Allen

380 Production Control Administrative Manager, Asst's Supt. of Stores Staff men and clerical help
381 Statistics and Reports
383 Material Handling and Brass reclamation
384 Garage and Transportation
385 Stores—General
386 Shipping and Traffic
387 Receiving
388 Explosives and Power Farm
389 General Salvage—Burning Grounds
390 Production Scheduling
391 Tool and Machine Parts Control
392 Steel Control
393 Tool and Gage Shop Scheduling

VII. General—B. E. Bassett

400 General Administrative
402 Legal
403 Purchasing
404 Expediting
405 Office Service
407 Tool Coordinating Committee
408 Philadelphia Office
470 Plant Protection

VIII. Industrial Relations—O. W. Roberts.

419 Industrial Relations Administrative
420 Employment
421 Personnel
422 Medical
423 Public Relations
434 Safety
435 Training School.
480 Ordnance Department

IX. Comptrollers—H. J. Meyn

440 Comptrollers Administrative Comptrollers Mgrs., General and Factory Acct., their staff men and clerical help
441 Stationery Stores
442 Auditing and Procedure
[fol. 116] 443 General Accounting
444 Addressograph
445 Factory Accounting
446 Payroll
447 Tabulating
448 Timekeeper
449 Property Records
450 Disbursements
451 Reimbursements

The Non-Productive Departmental Code has been changed to numerical order, so as to expedite its use by the Safety Engineers. It is not intended to change the flow of authority which the above arrangement does not mention.

Departmental Code

	.30 Cal. Unit 102	.30 Cal. Unit 103	.50 Cal, Unit 104	.50 Cal. Unit 105
Case Draw	120	130	140	150
Bump, Pocket & Heading	121	131	141	151
Case Finishing	122	132	142	152
Anneal, Pickle & Wash	123	133	143	153
Jacket Draw, Trim	124	134	144	154
Bullet Assembly	125	135	145	155
Primer Insert	126	136	146	156
Cartridge Loading	127	137	147	157
Gage and Weigh	128	138	148	158
Packing	129	139	149	159
Lead Shop		180		
Primer Mix .30 & .50 Cal.		181		
Cup and Anvil		182		
Primer Mfg. A		183		
Primer Mfg. B		184		
Tracer Charge .30 Cal		185		
Tracer Charge .50 Cal		186		

The Department Code numbers of Plant #2 are identical with those of Plant #1, except for the first number of the series which is prefixed with a two instead of a one.

WAR DEPARTMENT
Office of the Chief of Ordnance
Washington, D. C.

September 4, 1942

SUBJECT: Injury Incurred by Female Machine Operator.

TO: Safety Officer,
St. Louis Core Plant,
St. Louis, Missouri

1. Attention is directed to the following report of a recent serious accident:

A female milling machine operator with three months experience was being instructed in the operation of a barrel chambering machine by another employee who was operating the machine. The injured employee was leaning over the barrel which was being chambered, to stamp barrels in a rack just beyond the turning barrel, when a few strands of her hair as well as the hair net she was wearing became entangled in the turning barrel. Her hair was torn away from her head.



2. Investigation disclosed the following factors:

a. The machine had not been stopped before stamping the barrels.

b. The injured employee was not wearing her hair net properly.

c. The employee was inexperienced.

3. Safe practice requires that:

a. Barrels shall not be stamped or checked for stamping until the machine is stopped.

b. Female employees shall be instructed to wear a head covering which will cover the head completely to avoid any loose strands of hair coming in contact with a moving machine.

4. All establishments employing female machine operators are directed to observe the above safety precautions.

By order of the Chief of Ordnance:

A.B. Johnson
Col., Ord. Dept.
Assistant.

LP

[fol. 118] Date: October 16, 1942

To: Messrs: G. A. Gilbertson
V. Haag, M. Hurley,
J. C. Stewart,
A. E. Allen

From: Mr. D. C. Storms

It is the responsibility of the Supervisory Personnel to enforce all safety rules of this Company whether they apply to flywheels, mechanical guards, goggles, hair nets, uniforms, safety shoes, conductive shoes, etc. I ask that you so instruct all general foremen and foremen accordingly.

May I further emphasize that Supervisory Personnel are themselves to comply with all of the Safety rules. It is to them that the other employees must look for an example. Any accident prevention program to be successful must have the cooperation of Supervision.

D. C. STORMS.

JCS:mw;mw

[fol. 119]

Safety Equipment List

August 10, 1942

Male and Female

It will be required that all persons entering production areas shall wear goggles at all times, excepting in canteens, locker room, and offices.

Department	Coverall (E—Employee Furnish) (C—Company Furnish)	Type of Shoe (S—Safety) (C—Conductive)	Safety Goggles (Rx Goggles to be furnished by employee & plain goggles will be supplied by the Company)
Lead Shop	Yes C	Yes S	Yes
Chemical Area	Yes C	Yes C	Yes
Male	Opt. E	Yes S	Yes
Receiving Stores			
Female	Yes E	Yes S	Yes
Male	Opt. E	Yes S	Yes
Shipping			
Female	Yes E	Yes S	Yes
Male	Opt. E	Yes S	Yes
Metallurgists			
Female	Yes E	Yes S	Yes
Case			
Male	Yes C	Yes S	Yes
Cup			
Female	Yes C	Yes S	Yes
Male	Opt. E	Yes S	Yes
Draws			
Female	Yes E	Yes S	Yes
Male	Opt. E	Yes S	Yes
Bump, Pocket & Head			
Female	Yes E	Yes S	Yes
Male	Opt. E	Yes S	Yes

Department	Coverall (E—Employee Furnish) (C—Company Furnish)	Type of Shoe (S—Safety) (C—Conductive)	Safety Goggles (Rx Goggles to be furnished by employee & plain goggles will be supplied by the Company)
Trim			
Female	Yes E	Sensible*	Yes
Male	Opt. E	Yes S	Yes
Head Turn			
Female	Yes E	Sensible*	Yes
[fol. 120] Male	Opt. E	Yes S	Yes
Taper & Plug			
Female	Yes E	Sensible*	Yes
Male	Opt. E	Yes S	Yes
Finish Trim			
Female	Yes E	Sensible*	Yes
Male	Yes C	Yes S	Yes
Wash and Anneal			
Female	Yes C	Yes S	Yes
Male	Opt. E	Yes S	Special
Body, Mouth & Neck Anneal			
Female	Yes E	Sensible*	Special
Male	Yes C	Yes S & Boots	Yes
Pickling			
Female	Yes C	Yes S	Yes
Male	Opt. E	Yes S	Yes
Sort After Trim			
Female	Yes E	Sensible*	Yes
Male	Opt. E	Yes S	Yes
Head Gage			
Female	Yes E	Sensible*	Yes
Male	Opt. E	Yes S	Yes
Visual Inspection			
Female	Yes E	Sensible*	Yes
Bullet			
Male	Opt. E	Yes S	Yes

Department	Coverall (E—Employee Furnish) (C—Company Furnish)	Type of Shoe (S—Safety) (C—Conductive)	Safety Goggles (Rx Goggles to be furnished by employee & plain goggles will be supplied by the Company)
All Draws			
Female	Yes E	Yes S	Yes
Male	Opt. E	Yes S	Yes
Trim			
Female	Yes E	Sensible*	Yes
Male	Opt. E	Yes S	Yes
Assembly			
Female	Yes E	Sensible*	Yes
Male	Opt. E	Yes S	Yes
Polish and Inspect			
Female	Yes E	Sensible*	Yes
Male	Opt. E	Yes S	Yes
Cannelure			
Female	Yes E	Sensible*	Yes
[fol. 121] Male	Opt. E	Yes S	Yes
Visual Inspection			
Female	Yes E	Sensible*	Yes
Load and Primer Insert	Yes C	Yes C	Yes
Inspection	Yes C	Yes C	Yes
Canning and Magazine	Yes C	Yes C	Yes
Male	Opt. E	Yes S	Yes
Gage and Weigh			
Female	Yes E	Sensible*	Yes
Male	Opt. E	Yes S	Yes
Inspection			
Female	Yes E	Sensible*	Yes
Male	Opt. E	Yes S	Yes
Soldering and Test			
Female	Yes E	Yes S	Yes
Male	Opt. E	Yes S	Yes

Department	Coverall (E—Employee Furnish) (C—Company Furnish).	Type of Shoe (S—Safety) (C—Conductive)	Safety Goggles (Rx Goggles to be furnished by employee & plain goggles will be supplied by the Company)
Packing			
Female	Yes E	Yes S	Yes
Repair			
Male	Opt. E	Yes S	Yes
Boiler House	Opt. E	Yes S	Yes
Battery Chargers	Opt. E	Yes S	Yes
Drop Test	Yes C	Yes C	Yes
Powder Handling Manufacturing	Yes C	Yes C	Yes
Powder Handling—Non-Mfg.	Opt. E	Yes C	Yes
Garage (Mechanics) Male.	Yes C	Yes S	Yes
Tunnels Male	Opt. E	Yes S	Yes
Tool and Gage—All Operations			
Male	Opt. E	Yes S	Yes
Female	Yes E	Yes S	Yes
Male	Opt. E	Yes C	Yes
Proof House			
Female	Yes E	Yes C	Yes
Male	Yes E	Yes S	Yes
Tool Crib			
Female	Yes E	Yes S	Yes
Scrap Baler Male	Opt. E	Yes S	Yes
[fol. 122] *Hopper Men*	Opt. E	Yes S	Yes
Powder Movemen (Restricted)			
Male	Yes C	Yes C	Yes
Machine Shop Male	Opt. E	Yes S	Yes

Department	Coverall (E—Employee Furnish) (C—Company Furnish)	Type of Shoe (S—Safety) (C—Conductive)	Safety Goggles (Rx Goggles to be furnished by employee & plain goggles will be supplied by the Company)
Heat Treat Male	Opt. E	Yes S	Yes
Material Handlers Male	Opt. E	Yes S	Yes
Utility Men (Steel Warehouse)	Yes C	Yes S	Yes
Acid Handlers Male	Yes C	Yes S	Yes
Timekeepers	Opt. E	Yes S	Yes
Timekeepers (Restricted)	Opt. E	Yes C	Yes

*Sensible—A sensible shoe for the female employee is to embody the following characteristics: A good sole to consist of preferably a moderate weight leather, and must be kept in good repair. The heel is to be equivalent to that on a nurse's oxford—of either rubber or leather. Under no condition will rubber or crepe rubber sole shoes, high heel, toeless or heelless shoes of any description be permitted in the Production Area.

Hair Nets All women working in the production areas will be required to wear hair nets. They may be purchased in the Safety Stores.

Uniforms The management requests that all employees in the production areas wear a uniform of a type that has been approved, which consists of a suntan coverall for the women, and a suntan coverall, suntan pants and shirt for the men. These uniforms are available and may be purchased on payroll deduction through the Company. They may also be furnished by the employees themselves from

outside sources, providing they meet with the specifications of the uniforms made available by the Company.

Maintenance All maintenance employees will be governed by the foregoing job specifications, except electricians and welders, who shall wear insulated safety shoes instead of powder shoes.

Jewelry Under no condition will the wearing of jewelry such as rings, bracelets, watches, necklaces, etc., be permitted during working hours.

[fol. 123] Approved:

CLYDE E. STRICKLAND,
Director of Safety.

D. C. STORMS,
General Superintendent.

G. A. GILBERTSON,
Superintendent of Plant Manufacturing.

A. E. ALLEN,
Production Control Manager.

M. M. HURLEY,
Chief Inspector.

A. C. KRUS,
Superintendent, Tool & Gage Department.

J. C. STEWART,
Superintendent of Plant Engineering.

F. LINCOLN LUKE,
Chief of Plant Protection.

HENRY J. MEYN,
Comptroller.

DR. R. C. SUNDEMAN,
Medical Director.

(End of Plaintiffs' Exhibit F)

[fol. 124] Mr. Bond: The duties of the safety engineers would be as follows:

"1. To see that the proper safety equipment is provided and worn by the employees at all times. (a) Violations of the rules pertaining to use of personal protective equipment such as the failure to wear glasses; the failure to wear the approved types of hair covering; the failure to wear safety shoes, the wearing of jewelry, the operation of machinery that is defective or unguarded or inadequately guarded, will be reported to the supervisory safety engineers by the engineer in each unit on each shift. Procedure to be followed in making the report and the corrective action to be taken on these infractions of the rules is as follows: (1) Upon noting infractions of safety rules the safety engineer will procure the badge number and the department number of the person or persons who are violating the safety rules. (2) He will then report the badge number and the nature of the violation to the offender's foreman or supervisor. (3) At the end of each working shift each safety engineer will submit a report to his supervisor in regard to these violations.

"This report will be made on the safety inspection report Form IRS-25, and will embody the following information (1) The badge number of the person who violated the safety rule. (2) the number of the de-
[fol. 125] partment in which the violator is employed. (3) the nature of the violation. (4) The name and badge number of the foreman or supervisor of the department in which the violator is employed. (5) The reaction of the supervisor upon receiving the reports of these violations will be noted by the safety engineer, and he will incorporate in his report his comments on the supervisor's attitude. (6) The safety engineer will not attempt any correction of these violations by contacting the individuals who are guilty of these violations. In all cases he will contact the supervisors of the individual concerned and will leave corrective action to the supervisor. This report will state the working shift during which these incidents occurred.

The shift check in the upper right-hand corner will not be used in making this report. Instead, each safety engineer will write the date and the time of his working shift at the top of the report page in this manner:

"Should the violations exist during the working shift a report of such condition will be made in the manner as outlined above. Consult sample report which is included in this Manual. An exception to this rule will be made when an employee is engaged in some operation whereby death or serious injury may result. Should this condition exist the safety engineer will stop the hazardous operation and will immediately seek the supervisor of the person who was performing such act and will report the incident [fol. 126] to him and will explain in detail why he caused such operation to be stopped.

"2. To observe and correct unsafe methods and conditions, and observe and correct any unsanitary or unhealthful condition. These observations will be incorporated in the daily log. Items of major importance will be covered by a separate report. The same method will be followed as outlined in Item one."

Q. (Mr. Bond) Now then, I am asking you to tell us from your knowledge out there as a member of that safety department for nearly four years if you recognize those as the instructions that went to all safety engineers?

Mr. McRoberts: Object unless the witness knows what instructions went to all safety engineers and will so testify.

Mr. Bond: I am asking him if he knows, Your Honor.

The Court: He may state how he knows.

A. As I said before, I can only speak with reference to the group of my own shift.

The Court: Thirty or thirty-five in your shift.

Q. (Mr. Bond) Were those the general instructions under which you operated? A. They were.

Q. Did you ever hear of any different instructions to any other safety engineer?

Mr. McRoberts: Just a moment. Object to that, Your [fol. 127] Honor, please, what he may have heard with respect to other instructions to other safety engineers. The fact he didn't hear of if would prove nothing.

The Court: Sustained.

Q. Now, in performing those duties tell us whether or not you came in contact with other safety engineers, and if so, how, and how extensive?

A. Well I, of course, being assigned to cover sixteen buildings which were—which these sixteen buildings, two of which were part of the large production building, Judge, these large production buildings, a safety inspector was assigned to each one of the large production buildings. And, of course, to get the first aid reports on accidents which occurred in the sixteen buildings that I was assigned to cover, I had to go into the First Aid Station in the main production building, and it was very unusual if I didn't bump into the safety inspectors who were assigned to the large production unit.

Q. In that way would you see them in the performance of their duties? A. I would.

Q. Tell us whether or not the duties they performed were the same as yours?

Mr. McRoberts: Object. That calls for an opinion and conclusion of the witness.

The Court: Sustained.

[fol. 128] Q. State whether or not you saw them performing duties of the kind that you have here outlined?

Mr. McRoberts: Same objection, if Your Honor please.

The Court: Objection sustained.

Q. Now this safety department that we are talking about, tell us whether or not it was plant—was that a plantwide set up? A. Yes, sir.

Q. The safety department of the United States Cartridge Company was plantwide in its functions, is that right?

A. That is right.

Q. And you have told us who the personnel consisted of, I believe the directors and assistants and inspectors and engineers? A. Yes, sir.

Q. And tell us how those engineers were assigned, to what unit and what different plant functions were they assigned?

A. Well, there were, of course, eight men to a shift. They were assigned to the main production unit. One man to the Primer Buildings, one man to the large storage magazine, two men, I believe, to each of the restricted area sections, one man to tunnels, two men to sanitation, and of course one was assigned to the farm where the large concentration was stored, one man to transportation, one [fol. 129] man to burning ground, and that is all.

Q. Now in reference to reports that these men made, tell us whether or not you were all given the same forms.

Mr. McRoberts: Object unless you know what every man was given.

Mr. Bond: I think a man who is part of a department and knows what kind of documents are issued out for certain purposes, he doesn't have to see it actually handed to every man in the department in order to say "this is the form used in that department for that purpose." That is all I am asking him.

The Court: He may answer.

A. Well, with respect to the forms I can only talk in reference to men with whom I associated on my shift. The forms that were used were all stored in our building and we all drew our supplies from this same source.

Q. Whom do you mean by "all"?

A. All of the men on my shift.

Q. Where would the men on the other shifts get their forms?

Mr. McRoberts: If you know.

A. I can only presume that it is the same source.

Mr. McRoberts: I move the presumption be stricken out, Your Honor.

The Court: Sustained.

The Court: Announce a 5-minute recess.

[fol. 130] Thereupon, at 11:41 A. M., July 8, 1946, a brief recess was taken. The proceedings then were resumed as follows:

Q. (Mr. Bond) Mr. Harris, tell me did you work in any other departments besides this primer and loading that you have been talking about? A. Yes, sir, I did.

Q. Which other ones? Tell us.

A. Well, Sanitation, temporarily, and main production building quite a long time, the large storage magazines for a short time as a roving inspector. In fact, I believe I covered almost all the various units of the safety inspector work with the possible exception of the powder farm and burning ground and restricted area.

Q. Powder what? A. Powder farm.

Q. What was the other one?

A. Burning ground and restricted area.

Q. Except for those three, then, you worked as an inspector in all units of the plant?

A. I did, I served on occasions temporarily for one shift, worked the restricted area.

Q. This whole description that you have given us of your duties, does that apply to other units as well as to the one you are talking about? A. Yes, sir.

[fol. 131] Q. And were the other safety inspectors with you on shifts in these other buildings.

A. I don't understand the question.

Q. Now, there was only one inspector to a shift?

A. That is right.

Mr. Bond: I will withdraw the question.

Q. Now, Mr. Harris, I want to question you now about two sets of computations that you handled. I am going to later have these—wait. I show you a group of papers and ask you what they are?

A. These are summaries that were prepared as I understand it by the United States Cartridge Company and submitted to you in response to your request.

Mr. Bond: Their genuineness is admitted, Your Honor.

Mr. McRoberts: If your Honor please, I think the documents speak for themselves as to what they show.

Q. I want to direct your attention to certain features. And I see no harm in his stating certain things he prepared to be shown under certain—.

Mr. McRoberts: The witness has been given papers with respect to 59 separate employees. There is one that refers to the witness and his hours, and I think his testimony should be limited to those things.

Mr. Bond: The fact is, Your Honor, these are their figures, their genuineness has been admitted, they are [fol. 132] verified truths for the purpose of this record. Now, what I am going to prove by this witness is that using these as a basis he made some mathematical computations which I will later come to.

Mr. McRoberts: I have no objection to that.

Q. Now then, calling your attention to the headings, the gross wages, total actual hours and pay periods. The first column is pay periods. Those are a series of weeks, are they not? A. They are.

Q. And the total actual hours, purporting to be figures showing hours worked? Isn't that it? A. Yes, sir.

Mr. McRoberts: Just a moment. This witness doesn't know what those hours are. All this witness knows is what is stated on the top of the column.

The Court: Objection sustained.

Mr. Bond: It is admitted what they show.

Mr. McRoberts: That is not admitted, that is the very thing that is in issue in this case.

The Court: It is an issue in this case, I understand.

Mr. Bond: Well, it is admitted, as I understand it, that the hours are the actual hours of each employee as they appear from the pay roll records?

Mr. McRoberts: I don't admit those are the hours they worked or the hours for which they are entitled to com- [fol. 133] pensation.

Mr. Bond: You don't admit they are entitled to compensation, but you admit those are the hours worked.

Mr. McRoberts: I don't admit it. I prefer to make my own admissions.

Mr. Bond: In the first place, I can state because I have correspondence in my file that I can back it up with, that at my request Mr. McRoberts handed me those computations. Now then, I asked you for an admission under Rule 36. "Plaintiffs state that at their request in order to avoid the production and introducing in evidence of a great quantity of time-cards and other pay roll records, defendant has heretofore prepared and delivered to the plaintiffs' attorney a voluminous set of computations showing in substance the name, badge number, dates of commencement and termination of employment, pay roll periods, occupational code, total actual hours, rate, gross wages, certain deductions and net amount paid, computed as to each of the 59 plaintiffs herein and entitled Safety Inspectors' Earning Summary. Now, therefore, in order that there may be no question of the plaintiffs' right to offer these computations in evidence and use them as admissions of the facts and figures therein recited, plaintiffs under the provisions of Rule 36 of the new Federal Rules request of defendant an admission of the genuineness thereof and an admission that the said computations as prepared by defendant as aforesaid are correct and that they truthfully reflect what is contained in the defend-[fol. 134] ant's records."

Now, then, there was an answer to that. Have you got it there, answer to my request of admissions? No, sir, that was an additional request.

> "With respect to the second request for an admission, defendant states that the defendant admits the genuineness of the set of computations referred to in said request, admits that the said computations are correct and that they truthfully reflect what is contained in the defendant's record, except that defendant states that the said computations do not reflect a deduction which should be made for the one-half hour lunch period each day when each of the employees covered by said computations were off duty. And to that extent the computations include one-half

hour's time each day for each employee when each such employee did not work and such time should be deducted in computing the hours worked in excess of forty hours. In computing the hours worked in excess all computations showing time beyond the regular employee shift were computed on the basis of full six-minute periods or multiples thereof, and minutes less than six were disregarded."

Now then, except for the half hour for lunch, which I contend they are employed for and he says they are not. We did this in order to avoid producing ten thousand time-cards into this court-room. He admits that is a correct [fol. 135] reflection of the hours worked by these employees, shown on the time-card, and gross pay they received and the period over which they worked. And why can't we assume those facts in the questions put to the witness?

Mr. McRoberts: That is the very thing we attempted to clear. These computations correctly show the figures are extended out on the time-card. They do not correctly show the method, they have not correctly stated the method which was used in making these extensions, and that is the matter which we attempted to correct by the answer to the interrogatory filed.

Mr. Bond: That is an entirely different matter. I am not talking about that now at all. That is an extra half hour which I have handled separately in my computations. What I am talking about now is the total actual hours reported. I say I certainly, in view of the fact that he gave them to me to avoid the production of the records, the fact that at my request he admits they correctly reflect the records as to the hours worked and time paid, and period worked, I have a right to assume these facts in evidence at the trial. Now, what he is talking about is, after he gave me those I asked him if they included an additional half hour before shift. He said first in his answer that he gave me that they didn't include that half hour, that the half hour was extra. And so in making my computations I have treated a half hour in a separate column but at the same time, in order not to confuse it, I have

[fol. 136] made the computations on the actual figures he reported. He admits they worked that much, the only question is whether it includes or does not include another half hour.

Mr. McRoberts: I do not admit the witnesses worked the number of hours shown on the computations. That is just the point in issue.

Mr. Bond: I disagree with him and I say that the record sustains me and not him, that the whole idea was to have admitted here the hours these men worked, and he has admitted that Mr. R. M. Powell—which one have you, Your Honor?

The Court: A. C. Kropp.

Mr. Bond: He admitted Mr. A. C. Kropp having this badge number started to work on that day and ended on that. That for this period ending he had this occupational code, whatever he was down here, that the total actual hourly work was thirty-six, that is hourly rate—that was while he was on hourly rate, and his gross wages were 31, that these deductions were made and the net amount paid. Now I do not know how you can get away from that.

Mr. McRoberts: Perhaps I can explain.

Mr. Bond: That has nothing to do with that, that is merely confusing Your Honor. In that very letter he mailed to Your Honor he said, "I do not deny the figures are correct as to the hours worked" but he discusses with me whether that includes an extra half hour that I say it [fol. 137] does. Now in these computations which I have prepared here I have shown that half hour separately and so if you find we are not entitled to it you can disagree with the column; but I have based that entirely on his figures as shown in defendant's summary. And I do not see how he can say now, in view of the fact that he has given me the figures, admitted they are genuine, that the man did not work, that he didn't get paid that much.

Mr. McRoberts: I think I can show you just what the difficulty is. Here is a double time-card. Under the column where he punches the clock in and punches out,

no employee gets in and out on the exact hour, unless the shift is changed, he naturally will punch the clock anywhere from two minutes to a half hour before the start. Sometimes he will punch it after the shift ends. Here is a man hit it at 12:01 instead of 12:02. He was there ready to go. But when you go to extending time shown out here in these pencil figures, certain rules or principles were followed by the Pay Roll Department. They would exclude certain minutes and include certain other time.

The Court: Some small number they ignored?

Mr. McRoberts: Yes, sir, part of the time this half-hour lunch period is omitted and in the figures for the rest of the time the half-hour lunch time is included. In other words, the total extended there includes the half-hour lunch period. Now the figures which Mr. Harris has before him and which Judge Bond is talking about here [fol. 138] are merely reproductions of this pencil figure which adds up to so many hours shown on the time-card. We admit those are the number of hours shown by our record.

The Court: The time the men checked in and out?

Mr. McRoberts: According to the different form that was used. But those figures do not reflect necessarily the hours which the man worked and for which he is entitled to pay. And those are the things which require, I believe, a recomputation according to whatever is the proper principle to be applied. And I think possibly it is a matter that can wait until the case is disposed of. If Your Honor agrees with us on the principle no overtime is due, then the computation is immaterial. If the computations are needed then you can fix the new principle upon which the computations can be made and new ones can be furnished according to the actual facts.

Mr. Bond: Meantime, I am making my computations on the actual hours that appear on the time-card and that they report as shown on the time-card.

Q. (Mr. Bond) Now then, these computations here, I believe I was asking you if I had handed you this sum-

mary for the purpose of having some further computations made for them? A. That is right.

Q. Now then, did you make some computations from these salaries, and what computations did you make?

A. I made computations from these salaries, with the [fol. 139] assistance of some of the other men, based them, of course, on a 40-hour week. And they claim, for instance, if a man worked 52-1/10 hours in a week, we took his monthly rate and divided by 40 and determined what the hourly rate was. All hours in excess of 52-1/10 we [caneulated] at the rate of time and a half.

Q. Did you do that as to each claim? A. We did.

Q. Are those your computations? A. They are.

Mr. Bond: I now offer in evidence defendant's summaries and ask that they be marked "Plaintiffs' Exhibits A-1 to A-59." I have numbered them in pencil that way. I think it can be done later because I have numbered them in pencil 1 to 59. And I have also offered in evidence the computations made therefrom, and I will ask they be numbered B-1 to B-59. The copy I am giving you is exactly as I have introduced excepting it hasn't got the adding machine tape on it. I don't have copies of them. They are numbered just as your summaries are numbered.

Note

Blank Pages at this Point

[fol. 520] Mr. McRoberts: Your Honor please, I would like an opportunity to examine, if I may, before being required to make an objection. I do object at this time for the reasons heretofore stated that the papers Exhibit A-1 to A-59 do not show and there has been no proper evidence [fol. 521] offered to show that the hours actually worked by the employees are reflected in that exhibit. If that is true, then all of these other computations are erroneous. But I would like an opportunity to examine these a little more carefully and, if necessary, make a further objection.

Mr. Bond: There will be no objection to that.

Q. (Mr. Bond) I might ask you to state in detail just how the computations were made and what they purport to show.

A. Well, they carry similar headings in many instances to those in defendant's summary. The first column shows the pay period ending. In column 2a are the number of hours as shown on the defendant's summary.

Mr. McRoberts: That is Exhibit A you are referring to, isn't it?

Mr. Bond: Use the "Exhibit A" when you refer to defendant's summary.

A. [Columb] 2b is the hours as per the time-card, plus an additional 3 hours.

Q. Now then, what is that additional three hours?

A. Well, on their figures they have failed to credit us for an additional half hour each day we were required to be there and be on duty.

Mr. McRoberts: Just a minute. You are talking about yourself and your shift now, I take it?

A. No, I am talking about them all now.

[fol. 522] Mr. McRoberts: Do you know what all of them were required to do, of your own personal knowledge?

A. I do, yes, sir.

Mr. McRoberts: What is the source of your knowledge?

A. The source of the knowledge is that I in the three or four years that I was in that department, I shifted around and worked with practically every man in the department on the same shift. And I know personally that we were not only verbally told but were told by bulletin that we

were required to be there one-half hour before the shift to change our clothes and to be on the job and confer with the engineer we relieved before the shift changed. We were on duty eight and a half hours a day, every minute of the day.

Mr. McRoberts: If Your Honor please, to the extent the answer is based on a bulletin, it appears that this testimony is not the best evidence and the bulletin or written order would be the best evidence.

The Witness: We have them.

Mr. McRoberts: Then I ask the answer be stricken out and the bulletin itself be offered as the best evidence.

The Court: Objection sustained.

Q. (Mr. Bond) Is this the bulletin that you referred to? "All safety engineers;" or have I the right paper?

A. No, sir, that is wrong.

Q. Well, I was going to take up that question of our [fol. 523] right to the half hour later. I was just going to prove now this applies on these computations, that is all. I want the computations explained to the Court as to what it purports to show, and then we will go into whether it rightfully shows things later.

A. We have taken into consideration this extra half hour for six days a week, would make an additional three hours. And in the summary that I have in my hand at the moment, which happens to be R. M. Powell, as an example in the week of November 8, 1942, according to Defendant's Exhibit A, Mr. Powell was credited with 43 hours. We added an additional three hours under column 2b, making a total of 46½ hours. Under column 3, on the basis of the weekly wage paid by the defendant, and as indicated on the Exhibit A it was $51.92. We determined that Mr. Powell's hourly rate was 1.30 per hour. Under column 5, which shows the excess hours as per column 2a, which is the hours as reported on defendant's summary, it shows an excess over 40 hours of 3½ hours. Column 6 is overtime due for the excess hours as per 2a, or as shown on Defendant's Exhibit A, we calculated at time and a half. Or in this instance, based on the rate of 1.30 an hour we calculated it 3½ hours at the rate of 1.95 per hour, or $6.82. Under column 7, additional overtime due one-half

hour per day per column 2b, which you will note is three [fol. 524] hours in excess of the time indicated on Defendant's Exhibit A, at 1.95 per hour it figures $4.87.

Q. Then you totalled those two columns 6 and 7 on the adding machine, didn't you?

A. Yes, sir. We took column 6 which is the overtime due for excess hours over 40 per week, as indicated by the hours submitted on Defendant's Exhibit A, and in Mr. Powell's case we calculated that he was due $963.62.

Q. That is, as overtime for the hours spent in excess of 40 as appear on the time-card as set out in defendant's summary? Is that it? A. In Defendant's Exhibit A.

Q. And then in column 7 you have computed what is due if he is entitled to the extra half hour?

A. That is right. And in this instance it amounts to $268.84.

Q. And you have added the two together to make the total claimed?

A. At the foot of the page we show column 6 plus column 7, which reflects the total overtime claimed of $1232.46. And in addition thereto we have indicated that on the last page certain irregularities that we discovered, we indicate how we calculated certain claims with a star, each deduction. I find that on March 7th in the case of Mr. Powell, Defendant's Exhibit A, indicates that Mr. Powell worked only 29-9/10 hours that particular week.

[fol. 525] Q. Was that March 7th? A. March 7, 1942.

The Court: Worked what?

Mr. McRoberts: Forty-three, isn't that?

Mr. Bond: Forty-three, that deduction is forty-three.

A. I am looking at March 7, 1942.

Mr. Bond: Yes, but if you are looking at the end note deduction you have an asterisk. Where do you find that? A. March 7, 1942.

Mr. McRoberts: I think you will find that is forty-three.

A. I believe that is correct, that is 43. Mr. Powell according to Defendant's Exhibit A worked 29.9 hours that week. Therefore, since it was not in excess of forty there was no overtime calculated except under column 7 on the

basis that for 18 hours he worked he was entitled to an additional 30 minutes. We have under column 2b added the three half-hour periods. Or rather I cut it to two in this case which developed an hour for which he was not compensated, and we have added 1.95 plus. Then if you will note again on the last page indicated by a capital A, on page 2 or sheet 2, in the period of 11/21/43. And I may state that at that time the policy of the company to change the pay period from a weekly basis to a semi-monthly basis, Defendant's Exhibit A set the pay periods by indicating the hours worked in each weekly period. And on the pay period ending 11/21/43 Mr. Powell worked [fol. 526] 49.8 hours the week of that period. The second week he worked only 32.4 hours. So on the basis of our computation Mr. Powell was entitled to 9.8 hours at the overtime rate on the first week, and on the second week since he failed to work 40 hours or in excess thereof, he was entitled to a rate basis at the regular rate. So we computed his 32.4 hours at the regular rate of pay. And you will [noticed] under column 5, excess hours as per 2a, we have inserted the abbreviated word ADJ, and under the column 6, overtime due for excess hours as per 2a, we have shown the amount of $10.47. If you will again refer to sheet 3 you will note a capital letter B which indicates again by referring to sheet, third last item on the sheet, for the period of April 9, 1944, according to Defendant's Exhibit A Mr. Powell worked 40 hours, and although he had been regularly receiving $110.77 every two weeks, the company paid him under column 4 gross wages only $46.15 for 40 hours' work, which resulted in an underpayment of 9.23, which is reflected in column 6. In other words, it was an incorrect payment and should have been one-half of $110.77, or $55.38.

Q. Now I call your attention to page 2, or sheet 2, of plaintiff's claim, second pay period from the top, 6/13 with a star after it. A. All right.

Q. Does that indicate a deduction for absenteeism?

A. It indicates a deduction for something, and ap- [fol. 527] parently he was charged with one-tenth of an hour because he failed to put in forty hours.

Q. It shows in the second column 39.9 hours, which is one-tenth of an hour short. A. That is correct.

Q. Was there any deduction made in his gross pay?

A. There was.

Q. How much? Wasn't it 13 cents?

A. He didn't receive $51.92 on this date, he received only $51.79.

Q. And is $51.79 13 cents less than $51.92?

A. Yes, sir, it is; but I might also refer you to sheet 1.

Q. Let's get through this first. A. All right.

Q. And the hourly rate, as you computed it, was 1.30?

A. Yes, sir.

Q. And 13 cents is one-tenth of that? A. Yes, sir.

Q. What does that indicate?

Mr. McRoberts: Just a moment. Object because that is an opinion and conclusion of the witness.

Mr. Bond: It is not, it is mathematics.

Mr. McRoberts: Well, if it speaks for itself, why have the witness testify on mathematical matters.

The Court: He may answer.

[fol. 528] A. I think as a mathematical proposition it indicates the man was docked 13 cents because he failed to put in 40 hours.

Mr. McRoberts: Ask the answer be stricken as an opinion and conclusions of the witness.

The [illegible] stained.

Mr. Bond: I would like to call your attention to these figures, then. I would like to call your attention to the fact the pay period ended 6 13 43. Mr. Powell is shown on Exhibit A as having put in 39.9 hours' work. He is shown as having received a gross pay of $51.79. The week before he is shown as having put in 40 hours even and he had a gross pay of $51.92. I call your attention to the fact that the difference is 13 cents. He got 13 cents less the week he worked one-tenth of an hour less, and one-tenth of 1.30 is 13 cents. And I argue from that that the defendant used exactly the same method of computing the hourly rate to make a deduction against a man's pay that he used in computing the overtime on his pay.

Q. Are there any other instances like that?

A. Yes, sir, there are.

Q. Call attention to a few, please.

Mr. McRoberts: Is it necessary to go through all of these things? Can't you do that on argument at the end of the case or on brief rather than have the witness point out things?

Mr. Bond: Yes, if I may ask him the general question.

Q. You have gone carefully over this summary? [fol. 529] A. I have.

Q. Does that same situation occur frequently? A. It does.

The Court: It is the usual time of recess. Announce a recess until 2 o'clock.

Thereupon, at 12:30 P. M., July 8, 1946, a recess was taken until 2 P. M. The proceedings were then resumed as follows:

(Four pamphlets are marked "Plaintiffs' Exhibits C-1, C-2, C-3 and C-4, respectively.)

Mr. Bond: At this point, if the Court please, I desire to introduce in evidence certain extracts from this pamphlet entitled "Your job with the St. Louis Ordnance Plant," which have been marked by the reporter "Plaintiffs' Exhibits C-1, C-2, C-3 and C-4. I will say that the defendant's interrogatories admit that it was issued to the employees by defendant in four editions. And they also admit under Rule 36 the genuineness of the copies I have. I only wish to offer the following from page 23 of the Third Edition, and the same or substantially the same language appears in each of the other three.

> "Standard Hours of Work. There will be eight hours in any working day, and forty hours will constitute a working week."

Mr. McRoberts: Let me make an objection to this. We object, if Your Honor please, to the statement which [fol. 530] Judge Bond is offering in evidence is merely a statement that they will be paid the rate under the legal overtime rate as provided under the Fair Labor Standards' act. Now, if the act applies they will have to pay. If the act does not apply, and we contend it doesn't apply, it is not an admission against interest on the part of the defendant.

Mr. Bond: I think it is, Your Honor.

The Court: Admitted subject to the objection.

Mr. Bond: The title of the paragraph is "Standard Hours of Work," and the body of the paragraph:

> "There will be eight hours in any working day, and forty hours will constitute a working week. To meet the schedule required of us by the National Defense program, it will be necessary to employ three shifts on production operations. When production demands require a longer work day or longer work week, the company will pay the legal overtime rate as provided under the Walsh-Healy Act and the Fair Labor Standards Act. When three shifts are operating there will be rotation of first, second and third shifts every two weeks. A lunch period will be allowed on each shift, and will be paid for by the company. That is, no deduction will be made for this lunch period."

Another paragraph headed "Payment of Overtime:"

[fol. 531] "Time and a half will be paid in excess of eight hours per day or forty hours per week."

Q. (Mr. Bond) Now, Mr. Harris, in telling about the half hour you were required to appear before shift you said there was a bulletin issued on the subject.

A. That is right.

Judge Bond: I will identify that as "Plaintiffs' Exhibit C-3". That is the one I read from. The same language appears on the same page, I think, in all the other editions.

[fol. 591a] (Plaintiffs' Exhibit C-3)

Your Job with the St. Louis Ordnance Plant.

Third

[fol. 592] Foreword.

Every prospective employee of United States Cartridge Company should read this booklet describing the Company's policy and procedure.

Every regular employee *should re-read this booklet* from time to time, in a wholehearted spirit of co-operation

with the entire organization and particularly, with a firm determination to assist the United States Government in the objective set for this important undertaking in support of the National Defense.

Any prospective employee who cannot subscribe to the basic principles outlined in this booklet should not accept a job with the Saint Louis Ordnance Plant, since he or she will feel distinctly out of place in this great congregation of men and women pledged to true American ideals and the fulfillment of a patriotic duty to our great Nation.

[fol. 593]

Part I.

Your Job . . .
And the United States Government.

The Saint Louis Ordnance Plant is an important part of the National Defense program.

It has been charged with a great responsibility in the nationwide effort to prepare our country against the possible encroachment of foreign enemies upon our sacred soil.

No man or woman should accept employment with the Saint Louis Ordnance Plant unless he or she is willing to accept the full obligations of good citizenship, and subscribe to the rules and regulations laid down by our Government for the operation of industrial plants of this character.

Our basic task is to produce large quantities of high quality ammunition for our Government. This production of high quality ammunition is a fundamental responsibility of every man and woman in our organization. We have been supplied with the finest of buildings and equipment, and it is the obligation of each and every employee to perform the duties assigned to him as if he alone were responsible for the perfect functioning of the cartridges he has help to manufacture.

One jammed machine gun, caused by defective ammunition, may cost the life of a gallant pilot, or the lives of companies or detachments through similar failure to function in the weapons of ground troops. Let not one of us ever feel that a little more care here, or a little more [fol. 594] concentration there, would have saved the life of

the pilot in the air, or the lives or liberty of the ground detachment. Ours is truly a sacred responsibility—a responsibility for the lives as well as the ultimate victory of any American Army which may be called upon to use our products in time of war.

The Saint Louis Ordnance Plant is wholly owned by the United States Government. The United States Cartridge Company is the operating agent. The plant is being equipped at the out-set to produce .30 caliber and .50 caliber ammunition for small arms and machine guns. It is one of the very largest manufacturing operations being undertaken by the Government in connection with the National Defense program, and its establishment and continued successful operation have been made possible only by the sincere co-operation of Metropolitan Saint Louis and its cooperating agencies. Thus, there are four separate and distinct interests in the successful operation of this plant, each from its respective viewpoint:

1. The United States Government, which is relying upon us for an unbroken flow of millions of cartridges each working day.

2. Metropolitan Saint Louis, which is the home of most of our employees, and which is gladly assisting us in the maintenance of police protection, fire protection, et cetera.

3. Our Employees—who owe an obligation of good citizenship both to the United States Government and to Saint Louis, as well as their sincere loyalty to the Company as their employer.

4. The Company—which is responsible to the United States Government for ammunition production, to the City of St. Louis in maintaining a successful civic enterprise, [fol. 595] and to our employees, for the establishment of working conditions conducive to the health and happiness of each man and woman employed in the plant.

Even if we were not engaged in the production of ammunition for the United States Government, plant protection is a greater necessity in our industry than in most other lines of manufacture. Not only must we look to the high quality of our product from the National Defense standpoint, but it is unfortunately true that careless manufacturing practices on the part of either the company or its

employees can lead to serious consequences. Thus, the Company must not only enforce the regulations issued by the Ordnance Department of the United States Army for the protection of National Defense industries, but must also safeguard the plant and its equipment from the serious effects of fire, accident, et cetera.

Many of you who have worked in other plants not engaged in the manufacture of ammunition or similar products may find it difficult to understand why unusual precautions are necessary to prevent fire, mechanical breakdowns, and similar interruptions of normal operations. We feel that once you have entered into the spirit of our undertaking, you will soon realize that all our precautions are for *your* protection. Whatever protects the plant, protects you. It is primarily to *your* interest to see that interruptions of production, due to sabotage or carelessness, do not occur. Each employee is urged to call the attention of the management immediately to any condition, involving men or machinery, which should be investigated and adjusted in the common interests of the workers in our organization.

Discipline.

The only possible manner in which the Company can insure proper protection of the plant and its employees is to enforce organizational discipline. This is not the kind of [fol. 596] discipline which exists in the dictator nations. It is, rather, discipline under the American system—a cooperative pledge on the part of each and every employee to achieve a common objective and conform to the regulations imposed by the War Department and the rules established by the Company. Restraint of undesirable traits in the individual must be exercised to protect the entire organization from the thoughtless actions of a possible irresponsible few. In effect, the discipline the Company will require simply amounts to each employee's doing his job in an orderly manner according to the best known method for protecting himself and his fellow workers, thus insuring the establishment of pleasant working conditions for all concerned.

Investigation.

It is conceivable that a potential enemy of our country might attempt to obtain employment and circulate among us in the guise of a fellow worker. Because of this ever present danger, applicants for employment with United States Cartridge Company are subjected to a much more rigid investigation than are applicants in most other industries. We again call your attention to the fact that this inconvenience to the many is necessary for the elimination of a very few, and good humored compliance with our requirements in the investigation of applicants is absolutely essential if you are to fit successfully into our organization. No new employee is considered a part of the regular force until all references have been checked and found satisfactory. Under a temporary arrangement a new employee may be permitted to go to work pending the completion of the investigation.

Identification.

As a matter of identification, each employee is finger printed and photographed to conform with the military [fol. 597] regulations provided for all ammunition manufacturing plants by the War Department. A badge containing the employee's photograph, number and location designation must be worn at all times when the employee is in the plant. Should you lose your badge report at once to the Employment Office for a pass and file a request for a duplicate. Your first badge is provided for you free. Replacements will cost you One dollar, ($1.00). Take good care of your badge.

The Sabotage Law.

There is a United States federal law, Title 18, Section 82, of the Criminal Code, setting forth punishment and penalties for purloining, stealing or injuring property of the United States or property manufactured under contract for the War Department. A copy of this law in its entirety is posted on the Bulletin Board at the main gate and should be read by our entire employee force.

Espionage Act.

Another federal law, Title 50—War Chapter 4—Espionage, Sections 31 and 41, inclusive, of the above Chapter, United States Statutes, define and prohibit acts of Espionage, and prescribe severe punishment for violations of their provisions. Those statutes apply to the business and all operations conducted by this Company. Your attention is directed to the full text of these Statutes posted on the bulletin board at the main gate. You are requested to read and familiarize yourself with the provisions of the Espionage Act.

[fol. 598]

Part II.

Your Job....
And the Company.

This Company has pledged its word to the United States Government to conform to the standards set up by the Ordinance Department for National Defense plants.

This pledge carries with it the establishment of the most pleasant working conditions consistent with the character of our operations. In brief, working conditions in our plant include the following primary considerations:

(1) The physical surroundings in which the employee works.

(2) The relationship between the Company and its employees.

(3) The general control of manufacturing processes.

(4) The observance of policies and rules.

In consideration of these subjects of mutual interest to both the Company and its employees, the Company takes the position that its own success as a manufacturer of ammunition is definitely tied in with the success of its employees. Each individual employee who cares to continue with the Company should be vitally interested in the success of the Company. Neither can long endure or succeed without the other, since we are all a vital part of the Defense Program. Our Government needs our help,

as we need the protection of our Government. As free men in a Democratic Nation, there must be co-operation between all parties.

[fol. 599] Department Of Industrial Relations.

As a means of insuring this co-operation, there has been established a Department of Industrial Relations, which has a double function. It represents the wishes of the employees to the management, and the policies of the management to the employees.

This department is not responsible for production, nor the quality of the product, but is especially charged with the duty of giving first consideration to employment, safety, health, sanitation, education and training, and the items of human interest to both the workers and their supervisors. The Director of Industrial Relations is a specialist in friendly counsel to every employee, executive or worker, who cares to call on him. His staff assistants keep a careful record of your work and your interest in that work. Should you acquire some new skill, tell the Director of Industrial Relations so that it may be made a part of your permanent record.

Handling Of Grievances.

If you are dissatisfied, or have any misunderstanding, do not brood over it. Get it cleared up by talking with your supervisor, who is never too busy to discuss your problems with you. Then, if you are not satisfied, you are free to talk it over with the Superintendent of your Division, or the Department of Industrial Relations. You need not hesitate for any reason in following this practice. Accumulation of unspoken, unanswered grievances results in dissatisfaction. Dissatisfaction destroys what otherwise can be a pleasant work relationship. Consequently, for our mutual benefit your supervisor will appreciate your questions and will be glad to give explanations.

Employees are encouraged to talk over with their foreman any problem they may have. Should they not get full satisfaction from their foreman, they may discuss their [fol. 600] problems with the general foreman, or with the

Director of Industrial Relations. It is the sincere desire of the Company to grant each employee a full hearing in the case of a conflict of opinion, since mutual confidence and frankness will solve practically any problem that may arise.

The Health Of Employees.

Each employee's health is a matter of concern to the management, and fellow workers. Our medical facilities are available to each employee to treat accidents and minor ailments occurring in the line of duty or on company premises. It is the obligation of all employees to protect their health by using the facilities provided, as well as in their own activities outside the plant.

Treatment Of Injuries.

In addition to the Medical Department in the Employment Office, there are First Aid Stations in each of the manufacturing units. All injuries, no matter how slight, should receive immediate treatment. In case of injury, notify your foreman at once and he will send you to the nearest First Aid Station.

Outside Medical Bills.

The Company will not be responsible for any bills of outside medical attention unless proper written order giving permission to call upon such doctor or doctors is obtained in advance at the office of the Medical Director in Building 107.

Safety From Accidents.

Safeguarding our employees from accidents is the greatest and most important task before us at all times. Safety signs and safety rules are posted in central locations for your guidance and your protection. The management never expects an employee to risk injury by taking [fol. 601] chances. Common sense is always the best safety measure. A temporary lapse in safety consciousness is the primary cause of injuries and accidents. Train yourself to think and act safely. Furthermore, when you see a safety hazard, do not hesitate to draw it to the attention

of your supervisor. This might prevent an accident, even prevent the injury of a fellow worker. *Don't leave it to the other fellow—he might be leaving it to you.*

The safety rules established throughout our plants are the result of careful research, and they are intended to maintain every safety factor with regard to your job. Thus, their rigid enforcement is necessary to protect you from all hazards. When these rules are applied and observed ammunition manufacturing is not a hazardous industry. It does deal with explosives, however, which in themselves are extremely dangerous if they are carelessly handled. This fact must not be lost sight of at any time, and the safety rules must be strictly observed to avoid accidents and injuries.

Canteens for Employees.

Canteens are provided in each of the manufacturing units for the convenience of all the employees in each respective unit. Smoking is permissible in each canteen. Employees may bring their own lunches or they may purchase their meals at the canteen counter. All lunches are to be eaten in the lunch room and not in the plants. No refreshments may be taken into the plants, but must be consumed in the canteens. There can be no exception to this rule, since its primary object is to prevent the distracting of attention from normal mechanical operations.

Lockers for Employees.

Separate locker rooms for men and women employees are provided in each manufacturing unit for each employee in that unit. Lockers are assigned to new em- [fol. 602] ployees. Employees are expected to be responsible for the locks and keys which are issued to them. In the event keys are lost, however, new ones can be obtained by applying at the Employment Office and paying the cost of replacement. Locks and keys are to be returned in the event of termination of service. If they are not returned a charge of One dollar, ($1.00) will be deducted from the final pay. Only Company locks are to be used on lockers. Smoking is permissible in each locker room only during shift changes.

Smoking Privileges.

As has been previously stated, ammunition manufacturing can become a hazardous operation through carelessness, especially in the explosive division. Therefore, for your safety, it must be a recognized rule that no matches or lighters will be allowed on your person when inside the plant gate. It will be the duty of the patrolman at the gates to inquire of you in this respect. Leave your matches at the main gate. Smoking will be allowed in the canteens and in the locker rooms, and smoking must not be done anywhere else on the plant property. For your convenience, electric lighters will be provided in these smoking stations. Strict observance of these smoking rules is necessary for your individual safety and the safety of your fellow workers. Violators will be subject to disciplinary action, which may include immediate dismissal for serious infractions of the rules.

Unemployment Compensation.

The Saint Louis Ordnance Plant is governed by the laws of Missouri. The Company contributes an amount equal to 3% of the annual wage of each employee—not exceeding $30.00 per employee—to this fund. In case of unemployment, you are entitled to the benefits as a matter of legal right. Consult the Employment Manager for details, and help in securing the benefits as provided by law in Missouri.

[fol. 603] Workmen's Compensation.

Employees of the Saint Louis Ordnance Plant are protected in the case of certain accidents under the laws of Missouri. It is our sincere hope that none of our employees will need the compensation, yet the Department of Industrial Relations will advise you as to your rights should you be the victim of a lost time accident for which compensation is provided.

Social Security.

Deductions are made from the pay of each employee of the Saint Louis Ordnance Plant for the Social Security fund, as required by law. The Company makes a like

contribution to the fund for the employee's benefit. Until 1943 the deduction from the employee's pay will be *one per cent* (1%) and the Company will contribute *one per cent* (1%) of the amount of the employee's pay subject to a maximum deduction of $30.00 from the pay of each employee during any one year. The *one per cent* (1%) contributed by the employee is a part of the employee's total compensation for work. The employee should guard carefully his Social Security Card, as this is important to his later pension.

Recreation.

It is not the policy of the Saint Louis Ordnance Plant to take the lead in providing for the recreation and social life of its employees. It believes that the employees prefer to initiate these things themselves. Besides, there are very few recreational activities in which all employees of all departments could participate due to the variations in working hours, and other conditions. The Director of Industrial Relations stands ready to help in any recreational program in which large groups of our employees would take part or indicate interest.

[fol. 604]

Politics.

The Saint Louis Ordnance Plant hopes each employee will register and will vote at all elections. It is a grand American privilege. How you vote and for whom you vote is your own business. If anyone in this Company, from office boy to manager, implies knowingly or unknowingly, directly or indirectly, that you as an employee should vote a certain way, ignore it, and use your own good judgment. Any political activity on the Company property is in direct violation of Company rules, and is subject to disciplinary measures in proportion to the gravity of the offense.

Solicitation of Employees.

The Company believes employees should be solicited, by the various charities, at their homes on the same basis as other citizens. Therefore, solicitation is not allowed on Company property during working hours either by Company Employees or by outside solicitors. Neither does

it allow the payrolls to be used for the accumulation of funds for charitable or political purposes through the medium of payroll deductions.

Bulletin Boards.

Read your bulletin boards from time to time. Bulletin Boards are located throughout the plant for notices of interest to Employees but in particular for safety posters. They will be displayed to encourage your safety consciousness. These boards are maintained by the Industrial Relations Department. Nothing will be allowed posted on these boards without the approval of that Department.

War Service.

Any employee who enters Military service of the United States Government, and who upon completion of this [fol. 605] training furnishes a certificate of completion of service, and who is qualified and physically able to do available work and makes application for re-employment within thirty (30) days after he is released from such service, will be re-employed on available work similar to that which he was doing before he left, at the then current rate of pay.

[fol. 606]

Part III.

Your Working Conditions.

The management of the Saint Louis Ordnance Plant recognizes that there are certain conditions surrounding your employment which must remain fixed and inflexible regardless of what changes the company or its employees might desire to make.

Some of these fixed conditions arise from legal considerations. Others are imposed by the United States Government, while still others have been evolved by the company out of its long experience in the ammunition business.

The company considers it a responsibility of the management to enforce all Rules and Regulations, regardless of their source. Thus, in its relations with so many thousands of employees the company has established a fair and

impartial system for the enforcement of its Rules and Regulations.

When a foreman and his immediate superior deem it necessary to discipline an employee, the foreman must prepare a written statement of the reasons on a form provided for that purpose. The statement will also contain his recommendation of the penalty to be applied under the published Rules and Regulations. It will also have the indorsement and comments of his immediate superior. A copy of this statement will be given to the employee, and the original will be sent to the Department of Industrial Relations.

The employee may discuss the matter with his superior, and shall be afforded the opportunity of discussion with the Department of Industrial Relations without the presence of the foreman, or anyone else having anything [fol. 607] to do with the complaint. The written statement must contain all facts concerning the complaint, a memorandum of the employee's statement regarding it, and a record of the final disposition, all of which become a part of the employee's personnel record.

Physical Requirements.

Employees are expected to be physically able to perform the work required of them at the time of hiring. They are responsible for exercising reasonable care so that they will continue to be able to carry on their work.

(a) A physical examination is given to each employee at the time of hiring.

(b) A physical examination is required when an employee returns to work from an absence extending beyond the period of one week.

(c) Periodic physical examinations will be given to any employee engaged in work that might possibly influence his or her health.

(d) These examinations are not for the purpose of exclusion of employees but to assist in properly placing them on jobs and to protect them against possible dangers.

Requisitions for Help.

Employees can be added to the payroll only by the Employment Department and then only when it has been presented with a requisition authorizing the addition.

The Employment Dept.

The Employment Department has the final authority to hire, when it receives formal requisitions from those authorized to issue them. The Employment Department and the Department of Industrial Relations have as their responsibilities the establishing and carrying out of policies [fol. 608] that are mutually beneficial to the employees and to the company. Their functions are not to replace the foreman, but to aid both the foreman and the individual worker. Either the foreman or workers may feel free to come to the Director of Industrial Relations or his representatives with any problem. The Department of Industrial Relations will try sincerely to be of service. It serves the plant as a whole and at times can get a clearer picture than an individual or a single department.

Age of Employees.

The Saint Louis Ordnance Plant has no special age limits for employees, and has no intention of establishing any, except that minors must have reached their nineteenth (19th) year. Each individual's employment is conditional only on his or her ability to perform the required tasks.

Status of Employees.

Each worker is considered an employee in the classification or occupational group for which he or she has been selected, and in the plant unit to which he or she has been assigned.

(a) Employees may be transferred from one classification to another classification, or from one plant unit to another plant unit, when production requirements make it necessary. As far as possible, the wishes of each individual employee will be considered in such transfers.

(b) Promotion may be made from one classification to another classification having a higher rate of pay, such promotion to be based primarily upon the qualifications of the individual; and in those promotions, the best employee will be sought, regardless of influences other than merit.

[fol. 609]

Clock Cards.

Each employee when hired will be assigned a clock number and given a clock card by the Employment Department. This card number will correspond to the employee's badge number. The new employees will then report to the foreman for instructions before ringing the card. Clock card must be registered at starting time and quitting time, and also when working overtime on the regular shift as indicated. For timekeeping purposes, a tenth of an hour, (six minutes), will be a time unit.

The ringing of a clock card other than employee's own will be construed as an act of dishonesty, subjecting the employee to disciplinary action. If, through error, you have accidentally rung a clock card, other than your own, report this matter immediately to your timekeeper. Failure to ring your clock card either at starting time or quitting time will require your foreman's signature to qualify the time, and for every instance of such nature, two tenths of an hour, (twelve minutes) will be deducted.

You must *not ring* in earlier than fifteen minutes before the normal starting time of your shift and you must also *ring out* within fifteen minutes following the normal closing time of your shift. If authorized to work overtime by your foreman, he will give you an overtime card and you must ring in on such card when starting the overtime work and also ring out on it when the overtime period is ended.

Wages of Employees.

It is the policy of the Saint Louis Ordnance Plant to pay each employee a wage in keeping with the rates determined by the Ordnance Department of the United States Army for ammunition production. Since our product is for our United States Government, and since each em-

ployee is a part of our government, it is naturally expected [fol. 610] that each employee will strive diligently to turn out an honest day's work for a fair wage.

The company pays you your wages but it is immediately repaid by the United States Government.

In the final analysis, your wages come from the United States Government, whose only source of income is taxes collected from you and all other citizens.

The United States Cartridge Company is merely managing the plant for the Federal Government.

An employee's remuneration consists not only of the money he receives each payday, but also the Company's contribution to the Social Security, Workmen's Compensation for accident protection, and Unemployment Compensation funds.

Rates for Men Employees.

Male production employees will be hired at a starting rate for their respective classifications. They will work for that rate for thirty days, then if continued in that job classification, their rate will be automatically increased five cents an hour. At the expiration of the succeeding sixty days of employment, their rate again will be raised automatically five cents an hour. At the end of the following sixty day period, representing a total continuous employment of five months, they will receive automatically another five cents an hour increase in their hourly rate, and with this third increase their rate will reach the maximum pay in their respective classification.

Rates for Women Employees.

Female production employees will be hired at the starting rate for their respective classifications. They will work at that rate for thirty days, then if continued in that job [fol. 611] classification, their rate automatically will be increased two cents an hour. At the expiration of the succeeding sixty days of employment, again their rate will be raised automatically two cents an hour. At the end of the following sixty day period, representing a total continuous employment of five months, they automatically

will receive another two cents an hour increase in their hourly rate, and with this third increase, their rate will reach the maximum paid in their respective classification.

Rates for Skilled Employees.

Employees of the Machine Shop, Tool and Gage Shop, Electrical Shop, Pipe Shop, Carpenter and Millwright Shop, and those in other skilled groups, exclusive of production people, will have a starting rate, not subject to automatic increases, for each of their respective classifications. Their rates will be subject to increase from time to time within the five month probationary period and such increases, at the discretion of their immediate supervisor, will be made on the basis of merit and efficiency. *This rule will also apply to clerical and office occupational hourly paid employees.* It is the responsibility of the supervisory force to consider carefully the potentialities of every employee for the purpose of judging what the individual can do best, and how he can advance. The supervisory force endeavors to give the same training opportunity and the same privilege of advancement to all employees consistent with ability and circumstances so that all may have the same chance to qualify for advancement.

Rates for Labor.

Yard labor, unloading and storing labor, car and truck loaders, janitors, porters and other service labor will be hired at a starting rate, not subject to automatic increases. Thereafter their rate at the discretion of their supervisor, in recognition of merit and efficiency, will be increased from time to time during the five month probationary period until the maximum rates of their classification is reached.

[fol. 612] Job Description and Rating.

A job description and rating procedure has been established for all jobs within the organization. This provides for a description of the job and an analysis of the various factors that constitute the job requirements. At least three persons including the Department head, who possesses an intimate knowledge of the job, and the Director of Industrial Relations, review the description and rate each job.

Through this procedure it is possible to establish related rates of pay for various jobs in accordance with the degree of skill and responsibility required.

These job ratings combined with periodic wage surveys conducted by the United States Government provide the management with the means of establishing and maintaining sound wage rates in accordance with our published policy.

Standard Hours of Work.

There will be eight hours in any working day, and forty hours will constitute a working week. To meet the schedule required of us by the National Defense Program, it will be necessary to employ three shifts on production operations. When production demands require a longer work day, or longer work week, the Company will pay the legal overtime rate as provided under the Walsh-Healey Act, and the Fair Labor Standards Act. When three shifts are operating there will be rotation of the first, second and third shifts every two weeks. A lunch period will be allowed on each shift and will be paid for by the Company, that is, no deduction will be made for this lunch period.

Payment of Overtime.

Time and one-half will be paid in excess of eight hours per day or forty hours per week. Time and one-half also is paid for authorized work on Sunday and national holi- [fol. 613] days, except in departments or occupations where the established schedule requires seven days continuous operations. This means that overtime is paid for Sunday work and holidays on repair, maintenance, mechanical and new routine process operations, but not for work such as watching, plant protection, or continuous procedure operations. The following national holidays— New Year's Day, Memorial Day, Fourth of July, Labor Day, Thanksgiving Day and Christmas, will be observed.

It will be the policy of the Company to avoid work on Sundays and Holidays as far as possible. However, since we are a part of the National Defense program, we shall have to adjust our schedule according to the needs of the situation.

Wage Payments.

Wages will be paid to the person to whom such money is due or to such properly identified person as may present the written order of the employee.

Fixed Pay-Days.

Payday will be on Friday of every week. Your pay will be delivered to you in your department. Wages unclaimed on payday can be had by applying at the pay-station in the Employment Office which will be open, daily except Saturdays, Sundays and holidays during the hours posted at the main gate.

Garnishment of Wages.

Garnishment of an employee's wages is costly to the Company, and requires the time of other employees which should be devoted entirely to the Defense Program. Therefore, the Company can not tolerate such proceedings, and if an employee's wages are garnisheed, such fact will be reason for the immediate suspension or dismissal of the employee.

[fol. 614]

Voluntary Leaving.

In cases where employees voluntarily leave the service of the Company, three (3) days notice is required before the final pay will be available, two work days after the closing of the last day worked. Your foreman has blanks for notification of intention to leave. In the event you do not give this notice, you may be obliged to wait for your wages until the regular payday.

Handling of Dismissals.

Employees who are dismissed for violations of rules or other sufficient reason will receive their pay as soon after their separation as it is possible to make it up. All final payments of wages are made at the Paymasters Office in Building 107.

Termination Interview.

Whenever the employment of a regular employee is concluded for any reason, a termination interview is given by

the Department of Industrial Relations. The purpose of the interview is to permit a discussion of the employee's work and experience and thereby facilitate the adjustment of any unsatisfactory condition which may have arisen.

Attendance.

Regularity in attendance is a characteristic of every reliable employee, irregularity throws an additional burden upon those employees who are on the job. Regularity and punctuality are habits that can be easily acquired. Each employee is expected to be on the job every work day. In case of unavoidable absence, notify your foreman if you know ahead of time. In any event phone the Employment Office just as soon as possible. If you are too ill to phone yourself, have someone else call for you.

[fol. 615] Leaving During Working Hours.

Employees wishing to leave the plant during working hours should obtain an "Exit Pass" from their immediate supervisor. The pass is to be given to the patrolman at the main gate. The clock card must be *rung out* when leaving.

Leave of Absence.

Employees may be granted a written leave-of-absence for a period of one week by the Employment Department for reasons satisfactory to that Department, and the employee can return to work at its expiration without physical examination. However, if for good cause, such leave is extended by the Employment Department, the employee upon return to work again must pass the physical requirements.

Change of Address.

It is important that you keep the Employment Office informed of any change in your address. Please do this immediately as it is very important that your record show your correct address at all times.

Relief on Continuous Operations.

For each group of machines which require constant attention, an extra operator will be provided in order to per-

mit a reasonable relief period for each operator in that group.

Employment of Relatives.

No person is employed to work under the direct supervision of a relative.

[fol. 616] Married Women.

The Company employs both single and married women. Each married woman employee may use her maiden name within the organization, if it corresponds to the name on her Social Security card.

Promotion Policy.

As already stated, it is the policy of the Company to promote from within the organization when persons within the organization are the best qualified for the positions that are available.

Rules of Personal Conduct.

The purpose of these rules is to promote safety and welfare for all employees and to maintain proper discipline and protect the company's interest. They are not to restrict the right of anyone, but to define and protect the rights of all. Infractions of rules and regulations cannot be tolerated and violators will be subject to disciplinary measures ranging from suspension to immediate dismissal, depending upon the seriousness of the offense in the judgment of the management:

Reasons for Suspension:

(1) Violation of Safety Rules.

(2) Deliberately ringing the clock card of another employee.

(3) Engaging in horse-play.

(4) Shouting or any other unnecessary demonstration.

(5) Soliciting donations or collecting contributions of any kind.

(6) Distributing or posting of written or printed matter of any description.

[fol. 617] (7) Operating machine tools or equipment by an employee who has not been specifically assigned to them.

(8) Leaving the job during working hours without the permission of the Supervisor, except in case of emergency.

(9) Failure to wear badge in plain sight.

(10) Washing on Company's time unless permitted to do so.

Reasons for Immediate Dismissal:

(1) Reporting for work under the influence of intoxicating liquor.

(2) Smoking except in the Canteens and Locker rooms.

(3) Stealing of Company or another Employee's property.

(4) Being insolent or insubordinate.

(5) Destroying Company property, tools and equipment.

(6) *Fighting on Company's Premises*—Provocators of any altercation will be dealt with the same as the assailants.

(7) Unwarranted interference with production in any manner.

(8) Falsification of personnel record.

(9) Frequent involvement in Garnishment proceedings.

(10) Habitual absenteeism or tardiness.

(11) Hurling refuse on the floors.

(12) Gambling.

(13) Running to the clocks at quitting time, crowding or pushing while in line.

(14) Running in the plant.

(15) Failure to work efficiently.

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[fol. 655] Q. In telling about that half hour that you said you were required to appear before shift, you said there was a bulletin issued on the subject? A. That is correct.

Q. An objection was made that you produce the bulletin. Look that over and tell us if that is the bulletin.

A. That is the bulletin.

Mr. Bond: I offer that in evidence as "Plaintiffs' Exhibit G".

"Mr. S. L. Herting". This is dated June 3, 1942. "All safety engineers: Effective Friday June 5, 1942, the working hours for inspectors will be as follows:

A Shift, 7:30 A. M. to 4:00 P. M.

B Shift, 3:30 A. M. to 12:00 M

C Shift, 11:30—No, sir, I haven't been inserting those A. M.'s and P. M's. It isn't on the exhibit, but take it this way:

"A Shift, 7:30—4:00 P. M.

B Shift, 3:30—12:00 P. M.

C Shift, 11:30—8:00 A. M.

"The time clock will be punched within fifteen minutes before the hour. In order that he may take advantage of the half-hour lap-over in shift time the following procedure for inspectors shall be used:

1. Punch time clock

2. Report to Chief Inspector's Office

[fol. 656] "3. Check files.

4. Obtain note-book and necessary material.

5. Report to unit and contact inspector from preceding shirt.

S. L. HARTLING."

[fol. 657] Q. Mr. Harris, what if anything do you know about where the ammunition produced at this plant went?

A. Well, the only thing I know of with regard to the destination of the ammunition, it was on two occasions

I was working in Building 105, which at that time was an experimental building of 60 calibre ammunition, and on one occasion we were required to produce a certain amount of test ammunition which was sent to Purdue University, Lafayette, Indiana. I saw the ammunition packed and saw it stenciled by the employees in 105 and saw it picked up.

Q. Picked up by whom?

A. By the company's truck. On another occasion we were required to pack test ammunition which was destined to Franklin University, Philadelphia, and likewise saw it packed and stenciled and picked up by the Cartridge company truck.

Q. Now I show you here a group of magazines, the genuineness of which has been admitted, that contain the names and post office addresses of employees on the back with their badge number. I will ask you what they are. What do you know about them?

A. This was a plant publication.

Q. Did it come to your observation while you were out there? A. Yes, I received this in the mail regularly.

[fol. 658] Q. Regularly? A. Yes, sir.

Q. Mr. Harris, at the time that you entered into employment of the defendant's safety department, had you had any previous training as a safety inspector or engineer? A. No, not as a safety engineer.

Q. Did you have any? How far did your education go?

A. I had an Eighth Grade education, and in addition to that I had charge of safety for a trucking company.

Mr. Bond: That is all.

Cross Examination by Mr. McRoberts:

Q. Mr. Harris, you say you had no experience in safety engineering before you went to work for the Cartridge Company?

A. I would say none except that that I just mentioned.

Q. You signed an application for employment out there, did you not? A. I did.

Q. That is your signature on that application, isn't it?

A. It is.

Q. I call your attention to the statement on the inside in pencil. It says, "My work for the past ten years has

been principally of an executive nature. I have a working knowledge of accounting, safety engineering, traffic management, time and motion study and should be qualified for most any work in an office and perhaps some service in the plant." Is that in your handwriting?

[fol. 659] A. That is right, and I think it is for the lines that I just stated.

Q. So you did have a working knowledge of safety engineering at the time you applied for work and so advised the company? A. I think so.

Q. When you went to work in the safety department, what training was given you?

A. There was no training as I recall other than the weekly meetings that were held on each shift for, I think they lasted about an hour, and there was no training as such. It consisted of lectures and study of a booklet that was published by the company, aside from a First Aid course that they gave us.

(A pamphlet is marked "Defendant's Exhibit 1".)

Q. I show you a book that has been identified as Defendant's Exhibit 1 and ask you if that is a copy of the booklet to which you refer?

[fol. 660] (Defendant's Exhibit 1.)

Safety Manual
For Plant Supervisors

Safety Standards

by

Safety Department
Western Cartridge Company
The United States Cartridge Company Division

St. Louis Ordnance Plant
Saint Louis, Missouri

August, 1943

Manual No. 0370

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[fol. 666] Introduction

The Safety Department has been established to aid the United States Cartridge Company in all phases of accident prevention, sanitation and health. It is helping to keep the Safety Standards of the Company well toward the top of the list among small arms ammunition plants throughout the country.

The Safety Department is headed by a professional Safety Engineer, and functions in an advisory capacity. Assigned to each unit or special function of plant operation is a Safety Engineer whose duty it is to inspect plant property, machinery, equipment, materials, operations and personnel, for the purpose of developing and applying corrective measures to prevent the occurrence of accidents. Rules, regulations, instructions, and discussions are periodically published by this Department. Safety Bulletins are posted in all units.

Foremen: The key to effective safety is the foreman.

1. Trained employees who have positions of authority and responsibility shall be held responsible not only for the specific duties of their positions but also for the enforcement of regulations and for vigilance in detecting any dangerous conditions or practices within their purview and for reporting same to their immediate superiors.

2. The foreman has no authority to waive or to alter safety regulations or to permit their violation by others.

[fol. 667] A. All foremen will familiarize themselves with the provisions of this Manual.

B. The foreman shall explain and invite the attention of all employees under his immediate supervision to standard safety regulations, stress the necessity of all employees living up to the spirit as well as the letter of safety regulations for their own sake as well as for the sake of others.

C. He shall supervise the training and instruction of employees either directly or through experienced operators until he is satisfied that the employee can work alone.

D. He shall report to his immediate superior cases of all employees, who in his opinion, are not fitted for the work to which they have been assigned.

E. He shall satisfy himself as to the identity of any persons entering or approaching the building and their authority to enter or remain in a building or area in his charge. He has the authority and shall exercise the right to eject any person whose presence or whose actions are prejudicial to Safety.

F. He shall be responsible for the enforcement of placard orders. When the total number of persons, including operators, foremen, truckmen, inspectors, [fol. 668] repair men, visitors, and Government representatives exceeds the number permitted in the room, it is the duty of the foreman to cease operations and invite the attention of the people not regularly employed in the building to the excess number. If the notice is not effective in reducing the number of persons in the room or building to the number permitted, he shall withdraw his crew, until they may return to work in accordance with Safety Regulations.

G. When the amount of explosives in a room or building exceeds the amount permitted the foreman shall have the amount in excess removed, or cease operations during the time the excess remains in the room.

H. He shall require permissible tools, not in use to be in place on a tool board or holder. In case of the loss of tools in Manufacturing process rooms or buildings, operations should be stopped until he is satisfied that the loss cannot become the source of additional hazard.

I. He shall see that regulations regarding personal protective equipment, safety uniforms, safety shoes are observed.

J. He shall not permit major repairs or changes in any building, machinery, or equipment in buildings containing hazardous materials, until he has contacted [fol. 669] the Safety Department who will enforce the safety standards in buildings under repair in his area.

K. At the close of work, he shall satisfy himself before leaving, that all conditions in his room, building or area with regard to a shut down comply with orders. When not relieved by a shift, he shall see that windows and doors are closed and locked, and that any master power or light switches outside of the buildings are opened. Before the foreman leaves the building it will have to be approved by the Safety Department.

L. He shall bring to the attention of his immediate superior all places where railings, foot boards, lights, guards, hoods, automatic stops, or safety appliances are required.

M. He shall forward to his immediate superior all requests, suggestions, and complaints made to him together with such comments as he may have with regard to safety standards. These will be in writing and will form a part of the safety records of the plant.

N. The foreman of each shift or crew shall be responsible for the cleanliness of the area. He shall maintain all safeguards, prevent the blocking of safety exits and aisles, fire alarms and fire extinguishing equipment, and enforce all safety regulations applying [fol. 670] to the employees under his supervision.

O. He shall report to his immediate superior all cases where in his opinion the employees do not have sufficient room for the performance of their duties or where sufficient ventilation, heat, light or other necessities are not being supplied.

[fol. 671] General Repairs & Maintenance.

1. Repairs to furniture, equipment and structures will be handled through regular channels, except where safety is involved.

2. Where work as a safety precaution is requested, the Safety Department shall distinctly have shown on a work order requesting work to be done *Safety Precaution.* When memorandum so marked is received, it shall have preference over all other memoranda except those marked *Emergency.*

3. Report conditions requiring repairs to your superior; in case of doubt or concern ask for help from Safety Department.

4. Faulty physical conditions and poor maintenance cause about 15% of our accidents. Make periodic inspections.

[fol. 672] Training in Safety.

1. The importance of safety should be impressed upon new employees.

2. All applicants are given a physical examination to determine fitness for work.

3. Foremen will train their new men to work safely, explain exits, fire fighting equipment and first aid procedure.

4. Occasional workers not familiar with explosives but required to make repairs or inspections near explosives will have the hazards fully explained to them by foremen.

5. The Training Department includes safety training as a regular part of the training program.

[fol. 673] Protective Clothing.

1. Appropriate protective equipment will be made available to all personnel whose duties require its use.

A. Safety Supply Store is maintained in the basement of building 204, where protective clothing and equipment can be procured.

All employees in production units should wear a uniform of the approved type, which consists of a sun tan coverall for the women and a sun tan coverall or sun tan pants and shirt for the men. Under no circumstances will female employees be allowed to wear dresses while working in manufacturing units. (For ruling governing the type of clothing to be worn on specific operations consult the Safety Equipment list.)

2. *Safety Shoes:*

A safety shoe is one which has toe boxes that are strongly reenforced to withstand the weight and impact

that is induced by falling objects. (For specific ruling governing the types of shoes to be worn consult the Safety Equipment list.)

A. Explosive operators' shoes will be worn in all explosive areas. This shoe commonly called a powder shoe, is equipped with a conductive sole which grounds out static electricity from the body.

B. Before an employee enters any magazine or building in which explosives are stored or processed, his shoes will be cleaned carefully of all mud, [fol. 674] grit or other foreign material.

3. *Special Clothing around Powder.* Safety uniforms and special clothing will be worn as prescribed by the management. The suits for men and women must have no metal buttons. They should have no pockets except skeleton pockets. When safety uniforms are required, a complete change of clothing is recommended. Street clothes will not be worn at work, and the clothes which are worn at work will not be taken from the plant unless they are in a safe condition.

Employees who are required to wear safety uniforms must not carry keys, coins, knives, or metal of any kind during the time they are in operating buildings.

4. Equipment should be frequently inspected by foreman or his authorized representative.

5. *Women's Clothing.* Safety clothing for women shop employees, as approved by Safety, must be worn. Basically, it consists of head covering, short sleeves, slacks, low heeled shoes, no jewelry. Women in powder area will dress as previously indicated (item #3). Women handling heavy objects will also wear standard safety shoes.

[fol. 675] Safety Equipment & Tools

1. In addition to *Protective Clothing,* other safety devices are needed for accident prevention efforts. Check the following against operations in your shop.

2. *Safety tools.* Non-sparking metal for use in areas of explosive vapors or dusts.

3. *Safety cans.* Closed containers for handling gasoline and solvents.

4. *Special carriers* for acetylene welding tanks.

5. *Ladder shoes* for securing grip on floors.

6. *Acid* carboy *siphons,* pumps and rocker stands.

7. Non-skid *floor compounds* and paint, for stairways and floors.

8. *Machine guards.*

9. *Floors.* Mats and special safety flooring. Floor cleaning equipment.

10. *Abrasive wheel* guards, shields, safety flanges.

11. *Emergency lighting* system or units.

12. *Waste* disposal *receptacles.*

13. Spark-proof *flash lights.*

14. Fire *extinguishers* and allied equipment.

15. *Ventilation* equipment such as hoods, ducts, booths, air movers, fans or blowers.

16. Warning *signs.*

17. *Dust collectors*—for dry abrasive, metallic or wood ducts.

[fol. 676] First Aid

1. On serious cases of injury or illness, send for doctor at once. Do not move patient. Keep him warm. While awaiting help, follow previous first-aid instructions as given for your particular operation.

2. On minor cases, send injured to dispensary or nearest first aid room, with pass card.

3. *First-aid treatment.* First aid treatment will be supplied in all cases of injury no matter how slight.

4. *Equipment.* Stretchers, blankets, showers, gas masks, first-aid kits, etc., are distributed as authorized; know where they are around you and how to use them.

5. Dispensers or other means for supplying salt tablets should be provided near drinking fountain serving locations in which the nature of operations might result in exhaustion.

6. A program of rehabilitation will be arranged to help place injured employes back on some productive work.

[fol. 677] Sanitation and Health

1. The lack of sanitation in any establishment affects the alertness of workers. Accidents frequently have been traced to unsatisfactory conditions and to unwholesome and unhygienic practices. Observation of certain standards tends to eliminate accidents, discomforts, and industrial poisoning.

2. The major influence on the worker's general well-being and health is his mental attitude toward his work and outside activities. Worry, hate, fear, envy, pride, jealousy, vengeance, etc., are poisons to the system.

3. Facilities are provided, such as drinking fountains, toilets, lockers, etc. Keep them clean and use them as you would your own at home. Your treatment of them reflects your character.

4. Food handlers are required to pass periodic physical examinations.

5. Spitting on stairways in halls and in buildings is prohibited, and is dangerous to the general health of employees.

6. Toilets are inspected frequently. Equipment, chemicals and methods of cleaning will be approved by the Safety Department.

7. Use items of protective clothing where exposure warrants.

8. Use covered barrels for refuse; keep grounds clean.

9. Special physical examinations will be given to any employees exposed to Benzol, Explosives, Solvents, Lead [fol. 678] and Mercury. If certain defects are discovered, employees will be assigned to other work.

[fol. 679] Dermatitis.

1. People vary in their reactions to skin irritation. One person may be affected and the next be immune.

2. Some sources of skin irritation are:

a. Personal uncleanliness. (Most important)
b. Acids, salts, alkalies
c. Solvents
d. Soaps
e. Explosives and their derivatives
f. Oils, waxes
g. Photo developers
h. Dyes

3. Consider protective clothing, ventilation, mechanical or chemical changes, or transfer of personnel.

4. Where indicated, use protective creams on hands before exposure. Wash off before lunch and apply second coat before going back to work. This is for protection—not cure.

5. Cutting oils and emulsions often contain germs which get into the oil *after* its arrival. When the oil is shipped, it is sterile. Safeguard this oil supply in systems serving your machines. Do not spill or throw refuse in this oil. Systems can be cleaned out and sterilized but can be quickly contaminated again. Permanent filters and heating coils are available on some systems which carry the supply through at 150° to 180° F. Use of germicides in [fol. 680] cutting oils is not acceptable to the United States Public Health Service who has been contacted on this point. The Safety Department accepts the general health suggestions of this organization. Above all, keep oil clean—"you keep it healthy and it will keep you healthy." Note 2a above.

6. Use only soaps found acceptable and listed by Safety Department. Harsh soaps can cause skin trouble.

[fol. 681] Fatigue.

1. Fatigue is to a great extent mental, or due to maladjustment to the job. Men who love their work can work for long hours, tirelessly, and under adverse conditions. Lives of famous people prove this. Consider mental attitude first.

2. Contributory influences, however, are recognized: in the form of poor ventilation, lighting, unhealthful working atmosphere, noise, hunger, posture, cleanliness, inefficient speedup of machinery, forced concentration to details, etc.

3. For manual workers who perspire in hot temperature, salt tablets may help. They are available near the water fountains. Four tablets a day should be the limit, with maximum of six. Office workers should stop fighting the heat, and relax—psychologically.

4. Rest pauses are provided twice a day for complete relaxation and rest. They should be used for this purpose, not for social gossiping. Food or beverages in small amounts during rest periods may be an aid in warding off fatigue.

5. General health and well-being contribute to avoidance of fatigue. If tiredness persists or is a habit, examine other more fundamental causes of ill-health.

6. Outside activity contributes to fatigue. These factors should be considered. Does worker get enough sleep? How is free time used? Are home conditions favorable?

[fol. 682] 7. Questions of speed, rhythm, noise vibration, clothing, and floors will be analyzed by engineers when specific exposure arises.

[fol. 683] Eating Habits.

1. Lunches may be eaten only in designated places. They must in no case be eaten in rooms containing powder or chemicals. Do not eat in toilets.

2. Wash hands thoroughly before eating. Washing is especially necessary after handling explosives or any chemicals. Use mild soap approved by the Safety Department.

3. Dispose of waste food and refuse in cans for this purpose.

4. Canteen service is provided on the premises for those who do not care to bring their own lunches.

[fol. 684] Office Work.

1. Do not leave desk drawers open. They may cause worker to trip and fall.

2. Place waste baskets and other equipment out of the way to avoid tripping. Keep aisles open and free.

3. Do not run. Haste is responsible for most office accidents.

4. Watch your step on stairways, landings, and doorways. Too much haste here may cost you days later on.

5. Do not stand on chairs or desks.

6. Keep your desk neat—inside and out. Many punctures start here. Neatness also reflects efficiency.

7. Report furniture needing repairs, or which is hazardous to use.

8. Remember that fingers can be cut badly by running them along the edge of paper—especially on the glued strips on boxes and wrapping paper.

9. Do not use pins for correspondence attachments.

10. Maintain extension cords for electric equipment in good order. Do not make repairs but ask for experienced help.

11. Keep floors clean, but not slippery. Special cleaning compounds are available for various types of floors.

12. Know where the fire exit is, and how to get to fire extinguisher.

[fol. 685] Transportation.

1. Only especially authorized passenger cars will be allowed inside the company gates.

2. Speed limit is 15 M. P. H. at the Plant Site; 20 M. P. H. at the Powder Storage Area. Speed limits for explosives

trucks on highways is 25 M. P. H. when hauling PETN, TNT, and Magnesium; 35 M. P. H. when hauling other chemicals. All state, county and municipal regulations must be obeyed.

3. Escorts must not ride on running boards of trucks. Room will be made on drivers seat, if possible. Otherwise escorts will walk.

4. No truck shall be backed except when guided by one person standing to the rear and to one side. Doors must be kept closed while truck is backing.

5. When parking trucks on an incline, one wheel should be blocked in addition to use of brakes.

6. No explosive truck will be left unguarded except when empty.

7. All explosive trucks should be equipped with safety mufflers in addition to items required by I. C. C. regulations.

8. All vehicles will be given a thorough check-up every 1000 miles. Drivers shall not take out a vehicle which is in an unsafe condition. Any defects must be reported to mechanic when leaving unit in garage.

9. Helpers will not ride on couplings or trains being hauled by jitneys or tractors. If there is no room on jitney seat, they should walk.

[fol. 686] 10. A small hand fire extinguisher will be carried by all motor driven vehicles.

11. Drivers should pass eye and heart tests yearly.

12. Bicycle riders will not hold onto the rear of trucks for a "lift."

13. Lights must be used on bicycles at night.

14. Bicycles will not be parked in the gutter against the curbing.

[fol. 687] Housekeeping.

1. All buildings and magazines in which there are explosives or ammunition will be kept clean. Waste paper, oil rags, or other inflammable waste materials will be placed in receptacles outside the building.

2. Aisles and exits. During operating hours, aisles and safety exits will not be blocked, and doors must not be fastened with any locks other than antipanic catches, or other quick-acting fastening devices.

3. Keep floors clean, free from oil, and in good repair. Lunch refuse or rubbish must not be left lying about.

4. Stack materials neatly, leave access to aisles, limit heights, tie in layers.

5. Painted lines on floor should be maintained as an aid to indicate areas to be kept free of extracts or materials. Always be prepared for emergency exits along aisles.

6. Explosives dust or other hazardous materials will not be allowed to accumulate on radiators, heating coils, or steam or hot-water pipes.

7. Waste materials, sweepings, or refuse contaminated with hazardous materials must not be left in or near operating buildings. It will be taken, as soon as practicable, in closed containers to the burning ground, to be destroyed in small quantities under careful supervision. All operating buildings must be kept clean and orderly, and their immediate surroundings must be maintained clear of rubbish, undergrowth or other readily combustible matter. [fol. 688] All implements must be kept in designated places.

8. In winter weather icy platforms, steps and walks shall be sanded. Icicles shall be removed from overhead when they are a hazard to employees.

9. In rooms where head clearance is low, as in cases of beams or trusses, contrasting colors should be painted on the obstacle, as red and white stripes. (Warning signs are less effective). It is even better, where possible, to stack materials such as files, boxes, cabinets, and stock directly underneath to protect the zone.

10. Do not leave tools lying about where they can fall or be tripped over.

11. Upon removing head from barrel or keg, bend over or remove the nails.

12. Avoid accumulation of debris from temporary jobs.

13. Realize that your particular working area reflects your neatness and efficiency. It is your "home" for the time you are at work—are you ashamed of it?

[fol. 689] Ventilation.

1. Normally the average person uses about 30 cu. ft. of air per minute. (Office: 15 cu. ft. with no smoking; 22 cu. ft. with smoking; strenuous physical activity—to 65 cu. ft.) If men indicate sleepiness, suspect foul air, and ventilate before an accident occurs. Factories should normally have 3 air changes per hour, offices 7; rest rooms 10.

2. Ventilation is mandatory for fumes and dusts having hazardous mixtures—see specific items concerned.

3. Exhaust hoods, fans, ducts and water sprays will be installed where needed. These are designated for specific uses, and no use should be made of them without proper authority. Alterations may be needed to make any new operation safe.

[fol. 690] Lighting and Wiring.

1. Adequate lighting in the right places is an important aid to safety. Watch out for shadows. Candle power of light at working plane can be determined and improved where necessary.

2. Lighting installations for illuminating rooms or buildings containing explosives, dust from explosives, or vapors from which explosives may condense normally will be designed to shine through panels such as approved. Electric lighting installations, located in rooms or buildings containing inflammable vapors or dust which may form explosive or inflammable mixtures with air, will comply with the requirements of the National Electrical Code.

The detailed requirements for lighting fixtures for hazardous locations prescribed in applicable Ordnance Safety Bulletins will be observed.

3. *Portable* extension lights must not be introduced into operating buildings while hazardous materials are present. Any lights introduced must conform with requirements.

4. Inspect extension cords for wear and possible short circuit.

5. Lights—Temporary or extension lights for use in magazines or buildings containing explosives or ammunition must be approved by the Safety Department.

6. Disconnect all portable electrical equipment and tools [fol. 694] when leaving work—especially for overnight.

7. Avoid temporary type of wiring. Keep it out of the way and protected.

[fol. 692] Exits.

1. *Doors*

a. All exits shall be marked plainly, and care should be taken that they remain unobstructed at all times. Outside doors must open outward. Safety doors, required in all buildings containing explosives, shall be double doors, glazed with clear wire glass. In no case will the opening be less than 2 feet 6 inches. During operating hours, in all cases, they must be fastened with antipanic catches only. All interior doors must be in the normal line of the flow of material and open in the direction of the flow of material.

b. Before any railway car containing explosives or ammunition is moved, the car doors will be closed.

c. When explosives or ammunition are left over night in cars or other conveyances, the doors must be locked securely, except in the case of railway cars which have been sealed for commercial transit.

d. Two or more doors, when available, must be unlocked when personnel is working in a magazine in order that more than one means of escape will be available.

e. Metal clad fire doors are hung to close automatically when a fusible link is melted by the [fol. 693] heat. Do not paint fusible links. Do not block the free motion of these doors.

2. *Windows*

a. In explosive or other hazardous areas the windows are preferably of wire glass. Measurable protection from broken glass may be secured by screens backed or supported by heavy wire netting. This, of course, results in the reduction of illumination from the window thus protected. Woven copper wire screen, 16 mesh, backed up by 2-mesh galvanized wire cloth, have been found practicable for this purpose.

3. *Stairways*

See that they are kept clean. Do not allow employees to run on them. Tools and material should be kept off. Design should be wide enough to take flow from all doors during emergency.

[fol. 694] Warehousing and Stock

1. No operations in which hazardous materials are involved, other than operations incident to storage, will be permitted in any storage building.

2. Containers of hazardous materials, and other heavy objects must be lifted or wheeled and not dragged, dropped, or thrown about in operating buildings.

3. Keep aisles open, lighted, and well marked.

4. Do not tier too high for safe handling.

5. Use ladders when climbing, not a series of boxes or bags.

6. Watch floor over-loading; it occurs more often in warehouses and stock rooms than in any other area. Wall signs are marked for maximum safe loading.

7. Use specially designed racks for storage of barrels, piping, steel bars, etc.

8. Use dunnage and tie in layers.

9. Watch for strains; know how to lift safely. Use equipment for heavy loads. Get help for medium loads.

10. Good housekeeping is a necessity for safe operations. Provide efficient floor layout, avoiding sharp blind corners. Keep floors and equipment in good repair. Report defective items.

11. Know where fire extinguishers are, and keep access to them clear. Other aisles should provide quick access to trouble in any area.

12. Guard windows, shaftways, etc. where exposed, on platforms, stairways, etc.

[fol. 695] Floor Loads

1. Permissible maximum floor load is marked on each floor of every building. Keep your stock and machinery under this amount. This refers to *distributed* live loads in excess of floor weight. Do not think you can concentrate a load, for instance, of 10 tons in an area 10 ft. square on a floor marked for 200 lb. per sq. ft., just because the surrounding area is unloaded. Use planking or other means to distribute the load. (Important in the case of safes, isolated machinery, and stock piles.) When in doubt, ask help of Safety Engineer. Some floors can be strengthened. Others will weaken with time and deterioration.

2. Vibration affects the floor loads. Figures marked are for static loads unless otherwise indicated. The factor of safety has to be increased in floors designed to carry vibration. In general, forget vibration unless it can be distinctly felt under foot. Some vibration can be lessened. Special floor design and foundation will be provided where necessary.

3. If same material is continuously used in the same area, mark horizontal lines on wall or column to show height giving this weight. If you do not know the weight of the material, consult an authoritative handbook or ask the Safety Engineer.

4. Inspect yearly for indications of weakness such as dry rot, rusting, corrosion (especially near acids).

[fol. 696] 5. Whatever is hanging on the ceiling below your floor (shafting, heavy fixtures, etc.) is part of your load—do not over-look it.

[fol. 697] Ladders.

1. Ladders present one of the greatest hazards—and their use is the cause of many serious accidents.

a. All ladders and similar related equipment will be purchased and delivered in the unpainted condition. After inspection for knots, checks and cracks, they will be stenciled for department, specific use, and other identifying information, and then painted with two or more coats of linseed oil.

b. All repairs to ladders and related equipment will be so made as to place the ladders in their original condition as nearly as possible. Improvised ladders and improvised repairs are prohibited.

c. All platform and step ladders will be so constructed as to permit the tightening up of side rails and treads by suitable means originally incorporated in the ladder design.

d. Extension ladders will be used as extension ladders and not as two or more single ladders.

e. Frequent inspection will be made of all ladders and ladder equipment, both as to condition and as to utilization.

f. Where portable ladders are used regularly and often for the same operation, they will be replaced by permanent ladders.

g. [Protable] ladders will be equipped with nonslip
[fol. 698] ladder shoes, bracings, cleats, or will be planted in the ground, or held by an employee.

2. Steepness should be about 1 in 4 (a 12 ft. ladder leaning 3 ft., for instance), with a maximum of 1 in 6 (leaning 6 ft.) and a minimum of 1 in 2 (leaning 2 ft.). For cases of slopes lower than the minimum, use steps or stairs.

3. For vertical fixed ladders, use cage guards, when over 20 ft. high.

4. Temporary ladders made up on the premises will be done by qualified carpenters using rigidly inspected materials. A sample design for a length of 14 ft. would be: rails 2x4, cleats ⅞x3, step distance 12" (never over 14"), inside bottom width 21", top 18". For other ladder lengths these measurements would vary. Cleats should be preferably housed ½" into side rails: otherwise use minimum of 3 nails in each end. Use care in storage. Inspect for defects. Use transparent protective coating such as oil. Identify by shop symbol. Hang to avoid sagging. Protect from weather.

5. Minimum clearance around portable ladders should be: Front 30", side 15", back 8". Fixed ladders: Front 24", side 12", back 6".

6. Face the ladder while climbing. Use both hands.

7. Do not misuse a ladder, such as using it for a foot bridge.

8. Do not rest ladder against moving shafting.

[fol. 699] 9. Do not leave tools or material on step ladder.

10. Use ladder long enough to extend 3½ ft. above landing.

11. Landings shall not be over 16 ft. apart.

12. If longer than 10 ft. the ladder must be held at the base by an attendant.

13. Guard against sudden opening of any nearby door, or passing of other employees.

[fol. 700] **Stairs.**

1. The worst stair accidents occur because:

a. There is material left on them or

b. They are dirty or slippery.

Other causes to watch:

c. Poor lighting (should be over 1 foot-candle.)

d. Haste and running.

e. Poor maintenance (worn treads, etc.).

f. Poor design (no handrails, etc.).

2. Use tread design which does not allow slipping. Several types available for various shop operations.

3. Pitch of stairs should not be too steep. Normal pitch is about 35° from horizontal, varying between 20° and 50°. Below this limit, use a ramp; above it, use a ladder.

4. The preferred ramp slope is about 7°. Avoid slipperiness by design and maintenance.

5. Three rules of thumb are used on proportioning tread to riser (nosing of tread not included):

a. Tread plus riser equal 17½ to 18

b. Tread plus 2 times riser equal 25

c. Tread times riser equal 70 to 75

6. Risers—maximum 7", minimum 5" treads—maximum 16", minimum [10']. Keep width 44" or more where possible, and never under 22".

7. Any set of steps having over 3 treads should be provided with a handrail on one side. Longer flights should have either one or two rails, depending upon exposure. [fol. 701] Use intermediate landings on long stairways—usually over 14 ft. high.

8. For width of 44" or less, 1 handrail.
For width of 44" to 88"—two handrails.
For width over 88"—three handrails. (one in center)

9. Protect any adjoining windows by suitable guards.

10. Replace wood treads when badly worn.

[fol. 702] Platforms and Runways.

1. Platforms or runways are required wherever employees are required to go into places where injury may result from falls or from contact with moving machinery or other objects.

2. For platforms over 30 ft. long or 250 sq. ft. in area, use two stairways or ladders.

3. Adjoining tanks, the platforms should be 42" below top edge of tank—as in handrails. Minimum height allowed 36"; above this use additional railing or toe boards.

4. Use toe boards 6″ high at edges of all elevated walkways or platforms where there is exposure to men below by materials falling off the flooring. In severe cases, use wire mesh full width between handrail and toe board.

5. Do not jump from loading platforms to ground; use steps. A man's foot is not designed for jumping.

6. Minimum width of temporary runways should vary according to height:

0–30″	— 1 2 x 10 plank	(9½″)
30″ – 5 ft.	— 2 " " " "	(17″)
5 ft. over	— 3 " " " "	(28″)

Provide guard rails for last two items. Provide toe boards for heights over 7 ft. if there is exposure to men below.

[fol. 703] Railings.

1. The standard height of handrails is 42″ above floor level, and when on stairways at 36″ above center of tread. New railings should be built with this in mind. Special cases will be treated as they arise.

2. Use only first-class material and build strong enough to hold a man's weight if he has to suddenly throw it against the railing.

3. Keep railings well maintained and secure. It is better to have no handrail at all than one which cannot be depended upon when needed. Should withstand 200 lb. in any direction with factor of safety of 5.

4. Removable or hinged railings are acceptable where necessary for operations. Keep in place when not in use.

5. Use metal railings where practical (minimum diameter 1¼″—use 2″ if available).

6. Spacing of supporting posts must not be over 8 ft.

7. Add toe board where needed—see walkways.

8. Intermediate railing between top rail and floor or steps shall be considered individually.

9. Some detail drawings of railings available for reference.

10. Minimum distance between handrails 66". Newels at end of any center handrail 6 ft. high.

[fol. 704] Floor Openings—Shaftways.

(Temporary or Permanent.)

1. All floor openings, excavations and shaftways must be adequately guarded by temporary handrails, or sheeting. Also provide toe boards if men are exposed below.

2. Where practical, cover with planking. Arrange by cleating or other device to avoid shifting.

3. Hatchway openings with hinged covers are acceptable if strong enough to hold load when closed. Provide guard when open. Chamfer top edges 30 degrees if over 1" above floor level.

4. Manhole openings must be guarded by barricade and by another employee.

5. Manhole covers must be able to take load of 5 tons if in roadway.

6. Excavations for foundations or trenches shall be guarded in same manner as floor openings.

7. Wall openings will be considered same as floor openings, when lower edge is within 3" of floor, especially if adjoining area drops 5 ft. or more. Openings higher up in wall will be protected when stock is piled nearby and in danger of falling through.

[fol. 705] Scaffolds.

1. This is the most fertile field for serious construction injuries. It covers all types of scaffolds—including single pole, suspended, painters, boatswain, carpenters bracket, bricklayers [swuare], outrigger, needle beam, ladder, horse and window jack.

2. Most important consideration is to select only first class material rigidly inspected.

3. Never allow a scaffold to be used without the approval of a qualified carpenter or engineer. Makeshift scaffolds—because "it will only take a minute"—have been the cause of many accidents.

4. Factor of safety on lumber—4.

Factor of safety on steel cable—8.

5. Provide 2 x 4 guard rails and 6 inch toe boards where possible.

6. Size of nails—minimum, 10 penny driven full length. (For 88 lb. lateral resistance; 12d for 98 lb.; 16d for 130 lb.)

7. Workmen crawling out on projecting beams or thrust-outs will wear safety belts. Maximum projection—6 ft.

8. Cross brace all pole scaffolds, and tie into building.

9. Watch overloading and accumulation of materials on scaffolds. Maintain good housekeeping.

10. When using ropes, protect loose and on ground, as in coiling in barrel. Keep away from chemicals and acids.

11. Watch for exposure below, particularly if personnel walk underneath. Use catch scaffolds.

[fol. 706] 12. Suspension scaffolds will be shifted only by the builder who is responsible for them.

13. When using horse scaffolds, give particular attention to supports. Never use temporary blocking under legs. When tiering is necessary, use only 2 tiers high, placing horses above each other.

14. In presence of considerable wood scaffolding, provide means of fighting any outbreak of fire (such as standpipes).

15. On needle beams—min. rope diam. will be 1 inch and not less than 1 foot from end of beam.

16. Scaffold material which is to be re-used, as in painters scaffolds, will not be painted. Treat as in ladders.

17. Upright splicing should be at least 4 ft. long, used on two adjacent sides.

18. Safe loads for Spruce or Norway Pine. Total uniformly distributed loads:

Span	2x10	2x12	3x8
6 ft.	256	309	526
10 ft.	153	186	316
14 ft.	110	133	225

19. For safe center concentrated loads, lower values must be taken.

20. Do not use boxes, barrels or loose lumber for supports.

21. Design should support for:

Stone masons	75	lbs.	per	sq.	ft.
Bricklayers	50	"	"	"	"
Carpenters, Painters	20	"	"	"	"
Lathers & Plasterers	30	"	"	"	"

[fol. 707] Tunnels.

1. Whenever tunnels are used for pipes or passageways they must be provided with a sufficient number of exits. They must be well lighted, drained, and ventilated. Live steam lines in tunnels must be installed with care; they must be well anchored and have necessary provision for expansion and contraction.

2. No one without authority will be allowed in these tunnels.

3. Inspect daily, and be on the alert daily for suspicious actions or conditions.

4. Keep tunnels clean and sanitary and well maintained.

[fol. 708] Flooring.

1. All floors must be marked for permissible maximum floor loads.

2. Keep clean all floors under your charge. Avoid spillage. Acids on wood floors rots the fibers. Oil is slippery and a fire hazard.

3. Special safety floor design is available to prevent slippage. Compounds of paint or powder can also be applied. Special floor mats for men standing at machines are available.

[fol. 709] Roofs.

1. When necessary to go onto roof, wear safety gripping shoes. Men working on steep roofs (over 30°) should wear safety belt with rope attached to chimney or other fixed point.

2. Roofing devices used, such as shingling footlocks, to be of 2 x 4 timber, secured by metal strip [st] least 4 inches wide. "Chicken ladders" can be used with hooks or belts to catch over ridge pole. Cleats to be 2 x 1 and project about 2½ inches on each side.

3. Minimum strength of roofs should be:

For slopes, 4" per ft. or less—30 lb. per sq. ft.
For slopes 4" per ft. to 12" per ft.—20 lb. per sq. ft., horizontal projection.
For slopes over 12" per ft. consider wind force of 20 lb. per sq. ft. normal to roof.

4. Normal design factors are based on:

1. Slope	4. Maintenance	7. Construction-type-fastenings.
2. Durability.	5. Fire	
3. Cost	6. Weight	8. Appearance

5. Do not install penthouses, water tanks, supply bins, etc. on roof without specific approval.

6. Keep in repair and report any loose or leaky sections. Lightning rods should be kept secured and not allowed to whip around on roof. Eliminate as soon as possible overhanging roofs, cornices, weak skylights, unnecessary gutters, etc.

[fol. 710] Carpentry.

1. Most important item for this activity is scaffolding. All supports must be solid, and woodwork approved by a competent foreman. Use only best of material.

2. Use both hands in climbing ladders. Use hand lines for tools or material.

3. Keep debris cleaned up, and materials stacked neatly.

4. Use lights around construction and excavations for protection of work at night.

5. Barricade all excavations.

6. Ground all portable electric equipment.

7. Wear safe clothing, safety shoes with thick soles, trousers without cuffs, etc..

8. If working near welders, protect eyes from "flashes."

9. Do not carry nails in mouth.

10. Do not leave tools in exposed overhead positions where they can fall on employees.

[fol. 711] Plumbing.

1. Piping will be identified in accord with a standard system, to avoid accidental contact or use of dangerous materials.

2. Care must be used in laying outside piping below frost line, unless lines are in service tunnels. Protection must also be given when passage is beneath structure walk carrying superimposed lead.

3. Men handling plumbing equipment and material should wear protective clothing such as safety shoes, and gloves. Torn or loose clothing should not be worn. Do not wear cuffs on trousers.

4. All tools must be maintained in good repair and inspected for defects before issuing to each shift.

5. Special care must be exercised on repairs to acid and caustic liquid lines. First drain, blow down with compressed air, and keep free from pressure. Disconnect plumbing.

6. Piping and fittings must be stored neatly in racks or bins.

7. Housekeeping is an important safety precaution, both in shop and around job. Many accidents are caused by strewn pipe sections. Keep wrenches and tools off overhead structures and stepladders. Provide adequate illumination.

[fol. 712] Painting.

1. In storing paint stocks and thinners keep them tightly closed, away from heat, sun rays or fire exposure. Provide natural ventilation in room used for stocks.

2. A fertile source of lead poisoning is the habit painters have of absorbing paint through the mouth in small quantities—(wiping mouth with sleeve, using paint-soiled handkerchief, eating lunch without washing hands, etc.).

3. Painters' scaffolding needs special attention. Keep paint off so that cracks can be detected. Use oil, varnish or shellac for preservative.

4. Watch out for exposure to other employees below or nearby.

5. Select safe scaffolding. Store in protected position.

6. Examine all ropes, rigging and equipment before use.

[fol. 713] Elevators.

1. Carry capacity must be posted at all entrances to the elevators and in the elevator.

2. Elevators must be of a safety type with safety catches, automatic limit stops, and emergency exits. The gate or door must be guarded securely by approved gates and hatchways. Gates or doors must be arranged so that the elevator will not start until the gate or door to the elevator has been closed. Devices giving equal security are acceptable.

3. Electrical power and lighting installations will be in accordanee with Standard Safety provisions.

4. Attention to the following details will be given: Car covering, lighting pit cleanliness, doors and gates, counterweights, cable wear, cotter pins, governor and cable-safety control, penthouses, brakes, machine guards, emergency signals, limit stops, interlocks, cable sockets, lubrication, grounding of machine frames, landings.

5. Operation. This is especially important in view of the difficulty in obtaining repair material.

a. Do not operate elevator for passenger service.

b. Do not operate elevator with hatchway doors open.

c. Do not overload elevator.

d. Always stop car at floor level.

e. Do not tamper with doors or locks to prevent automatic operation.

f. Do not tamper with mechanical or electrical parts of elevator.

[fol. 714] g. Elevator hatchway doors are to be opened only by operator.

h. Do not drag heavy loads on or off elevator.

i. Always use rollers under machine skids or heavy loads and always use trucking plates from floor to car.

j. If car top is removed to carry temporary loads, it must be replaced as soon as car is unloaded.

6. Any unusual hazards which may affect the safety of personnel around or in the elevator should be reported to the Safety Engineer.

[fol. 715] Safety Glasses.

All persons who work in production areas must wear safety glasses at all times that they are on duty. Glasses can be procured at the Safety Store where they will be issued and fitted to the individual.

The employee who wears prescription lenses, must at his own expense purchase safety glasses with lenses ground to fit his needs. The glasses must be of the same type and contruction as the glasses that are issued to other employees. The prescription glasses will be procured from the optometrist in the Safety Store.

Celluloid eye shades worn as part of a cap or separately are prohibited. They are dangerous because of their high inflammability.

Should the job entail any unusual hazard, personal protective equipment designed to safeguard the worker will be advised of such condition by his supervisor.

[fol. 716] Hand Tools.

1. Use safety tools in dangerous atmospheres. These are of various types, but all non-sparking.

2. Poor maintenance of hand tools is a chief reason for accidents.

3. Inspect for:

a. Mushroom heads
b. Loose or broken handles
c. Greasiness or dirtiness
d. Sprung frames
e. Files without handles
f. Screwdrivers with badly worn points
g. Misuse of wrenches, incl. posture
h. Eye protection when chipping
i. Unsafe carrying practices.

4. Good housekeeping is essential.

a. Do not leave tools scattered about on floor.
b. Store in safe position when through using.
c. Keep them off stepladders.
d. Keep them clean.

5. When issued, a man who accepts hand tools is responsible for their maintenance. When turning them in, report hazards.

6. Ground all portable electric power tools.

[fol. 717] Wire Ropes and Slings.

1. A wire rope should be considered as a machine, with different designs for different purposes. Six grades of steel are used for the wires laid in varying designs. An inner core is added and serves for internal lubrication. This is for permanent use. Outside lubrication is added periodically.

2. Unroll carefully to avoid kinks, preferably by rolling the reel or coil as a hoop, or better still by pulling off wire

from reel suspended to turn freely. Kinks may straighten out but hidden damage is done to rope. To recoil use similar method.

3. Handling. Damaging actions to rope are jerking (sudden starts and stops), slipping, vibration, lashing. Avoid them.

4. *Care.* Keep clean and lubricated.

5. Ropes left idle and uncared for usually deteriorate faster than if they were in service. Reel it up, lubricate it. Keep clean, and under cover.

6. Chains, hooks, slings and ropes must be inspected regularly.

7. Consider the rope normally unsafe when 10% of the wires are broken, in length of 8 diameters.

or—3 broken wires in one lay of 6 x 7
6 " " " " " " 6 x 19
9 " " " " " " 6 x 37
8 " " " " " " 8 x 19

[fol. 718] 8. *Strength.* A $\frac{5}{8}$" plow steel rope type 6 x 19 with fibre core, has 114 wires of approximately diameter .04. Taking ultimate tension of 28,100 lbs. with factor of safety of 5 this would be 5,620 lbs. working load. Other safe working loads are:

Nominal Diameter in Inches	Iron	Cast Steel	Plow Steel	Safe Working Loads Improved Plow Steel
$\frac{1}{4}$		820	905	1130
$\frac{3}{8}$	800	1750	2140	2460
$\frac{1}{2}$	1390	3000	3650	4225
$\frac{3}{4}$	2150	4600	5625	6475
1	5350	11500	14250	16375

9. *Crosby clips.* Use 2 for $\frac{1}{4}$" rope, 3 for $\frac{1}{2}$", always place U side on loose end, and nut side on main line.

10. *Slings.* Use thimbles where practical to avoid severe wear. Thimbles are available which allow one end of sling

to slip through the other end; strength of sling depends on position. Hung vertically under load, it develops full tensile strength. The greater the horizontal angle, the more load can be carried.

A 2000 lbs. object picked up by sling would exert:

at 90	degrees	from	horizontal	—1000	lbs.	each leg.
60	"	"	"	—1155	"	" "
45	"	"	"	—1414	"	" "
30	"	"	"	—2000	"	" "
15	"	"	"	—3864	"	" "

[fol. 719] Hence, fasten sling as near 60 degrees as practical, otherwise safe working strength of rope may be exceeded. Especially important on worn slings, roughly used.

11. Socketing. Use molten zinc at 750 degrees to 850° F. After spreading wires, cutting core, and cleaning (with gasoline, then dipped into acid). Top of strands at level of socket basket. [Babbit] not considered as good as zinc.

12. Man pouring zinc should wear Safety mask.

13. Sheave drum or pulley diameter varies, to meet diameter of rope.

For 6 x 19 type:

Rope Diameter	Rec.	Absolute Min. Drum Diameter
¼	12	7½
⅜	17	11¼
½	23	15
⅝	28	18¾
1	45	30

14. For 6 x 7 use 36 diameter of rope.
" 6 x 37 " 16 " " "
" 8 x 19 " 20 " " "

[fol. 720] Hemp and Sisal Rope.

1. Safe loads—New Manila Hemp Rope.

	Diameter—Inches				
	¼	½	¾	1	2
(Factor Safety 5)...	120	530	1080	1800	6200 lbs.
(Factor Safety 6)...	116	480	816	1366	5165 lbs.

2. On *old* hemp rope use factor of Safety of 10.

3. Inspect severely before each use; something may have happened to it while you were absent. A life may depend on this inspection.

4. Pulley diameter should never be below 9 times diameter of rope.

5. Avoid kinking as in "Wire Ropes", item number 2, p. 44. Store hemp rope where dry and free from damaging agents or deteriorating atmosphere.

6. Due to shortage of hemp, Sisal is being substituted. This is not as strong. With factor of safety of 5, compare with #1 above:

¼	½	¾	1	2
96	424	864	1440	4960

[fol. 721] Hoists and Cranes.

1. A capacity plate showing capacity of hoists in pounds or tons must be posted in a protected and [conspicious] place on each crane. The plate must show the lift capacity of the hoist or crane under varying conditions.

2. Parts of lifts and fastenings must be inspected weekly.

3. Normal factor of safety on parts of hoisting equipment.

Cast Iron	12
" Steel	8
Structural Steel	5
Forge Steel	5
Cables	5

4. All electric power equipment frames should be grounded.

5. Keep lighted at night, both for operator and nearby workmen.

6. Chain Wear—Permissible Link Wear:

Original Diameter	Worn Diameter
3/8	19/64
1/2	3/8
5/8	15/32
3/4	37/64
7/8	43/64
1	49/64

7. Diameter of sheave size should be 25-30 times diameter original link diameter, i. e.: ½" link above requires 13 to 15 inch drum.

8. Avoid chain kinks as in "Wire rope."

[fol. 722] 9. Safe loads for chains—(Factor Safety—3½).

Diam. Link Stock	Load Vertical	at 60°	at 45°
1/4	1060	917	750
3/8	2385	2065	1685
1/2	4240	3673	3000
5/8	6630	5743	4687
3/4	9540	8263	6750

Note changes in strength due to angle with horizontal.

See Wire & Hemp Ropes and Slings.

10. Store away from corrosive fumes. Oil sheave chains, but do not oil sling chains.

11. Hook sizes.

Chain Size	Sling Hooks	Grab Hooks
3/8	3-3/4	2-13/16
1/2	5-1/2	4
3/4	8-1/2	5-3/4
1	10-1/8	8

(This is verfical distance betwen top of eye and top of curved seat.)

12. Only experienced blacksmiths with full knowledge of annealing should be allowed to repair chains and hooks.

13. Signals should be given only by appointed employee who understands the hazards involved, and knows the accepted standard signals. Crane operator should not recognize signals from any other person.

14. Pick up loads gradually and avoid all jerky or sud- [fol. 723] den movements. See that others are out of way before swinging loads. Do not operate over heads of workmen.

15. Protect rear and side of cranes, so that other employees or public will not be exposed.

16. Protect all gears and moving machinery.

17. No person is allowed to "ride the load" o any crane or hoist.

18. Traveling cranes should have a warning signal—either manual or automatic. Where rails and wheels are exposed to men a fender guard should be provided to push away part of body exposed.

19. Access ladders and walks to traveling cranes should be provided and well maintained. Descent from cabs should not be by any other means.

[fol. 724]

Machinery

Basically, the machines used in the manufacture of small arms ammunition are of two types, presses and lathes. The safety rules given under these two headings are applicable to all machine tools used in the manufacturing processes.

Lathes

1. These include lathes, milling machines, shapers, planers, borers, broachers, gear cutters, threaders.

2. Keep all safety devices in place, and in repair. Gears and belt drives should be protected if not already done by manufacturer.

3. Keep floors clean and lighting good.

4. Cover cutting oil system keep it clean—see "Dermatitis."

5. Pull long chips from cutting tool with special hand tool or stick—do not use hands.

6. Provide exhaust ventilation for metal dust, such as milling machines sanders.

7. Protect cutters on milling machines, to keep fingers away.

a. Protect planer bed against shear between carriage and bed.

b. Guard all planer bed openings under 7 ft.

8. Minimum space at end of shaper ram 24" to protect men from being struck.

9. Don't oil or clean moving parts, or ride on machine while in motion.

[fol. 725] 10. Warning! Check machine for speed before starting work. Last man on it may have left it at high speed.

Power Presses

1. Accepted types of guards to keep operators away from point of operation, in order of preference:

a. Automatic feed, various designs

b. Rotary Feed

c. Fixed enclosure

d. Two hand tripping device

e. Sweep guards

f. Wrist harness

2. Guard tread e to avoid accidental tripping.

3. Housekeeping [importing] -- especially light aisles, neatness, floors and rooms. Special foundations necessary for presses. Don't place on old flooring.

4. Emergency disconnect switch necessary on power presses—near operator.

5. Limit established for clearance of guard stroke of ram, etc. is 3/8".

6. Use non-repeat attachment on presses offering exposure from stroke repetition.

7. For blocking up ram head, never use less than 4 x 4 hard wood with protected ends. A 2½" pipe o. k. if flanged. Report all cases needing adjustment or maintenance at once. An undependable guard is dangerous.

[fol. 726] Machine & Transmission Guards

Metal Working

1. All moving parts of machines which are at level of operator and offer possibilities of injury should be covered or protected.

2. Belts and pulleys over 1½" in width should be guarded to height of 6 ft. above floor. Use ½" mesh (max.) wire if belt clearance is under 4", otherwise 2" mesh.

3. Gears are especially important and must be completely guarded. Includes sprocket chain.

4. Watch for projections on shafting. A [quard] if redesigned is impractical. (Keys, set screws, couplings, nuts, etc.)

5. Provide emergency stop switch near operator.

6. Floor shafting must be covered by fixed guards, with minimum of 2" clearance, (includes under bench machines).

7. Overhead (ceiling) belts need protection only when,

a: They are overpassageways and move over 1800 ft. p. m.;

b. Span between pulleys is over 10 ft;

c. Belt is over 8" wide.

8. Maintain guards in good repair. A guard may offer increased hazards if not kept adjusted, and well maintained.

9. Stop machinery before oiling, adjusting or repairing.

10. Both hot and cold metal saws should have a guard at least to the depth of teeth. Portion of saw under table also to be guarded.

[fol. 727] 11. While working on machinery, lock open switch or hang sign on it.

Wood Working

1. Band saws—including metal working. Cover entire length except few inches directly above plane of operation. Use sliding guard when necessary to work heavy material.

2. Circular saws are designed for a definite safe speed. Don't exceed it or it may fly apart. Same behavior for abrasive wheels. Report cracks.

3. Both rip and cross-cut saws to be provided with hood, reaching at least to depth of teeth. Also under bench.

4. On rip saws provide non-kick-back device.

5. Jointers must not have square heads, but cylindrical heads only. Use guard on table.

6. Sanding machines to be guarded except for area in use. Drums, disc, belt types.

7. Provide efficient exhaust system for wooddust chips.

8. Nailing machines must have safety housing and safety stop devices.

9. Daily on beginning work employees must inspect the machinery under their charge. Employees will be responsible for the safe operation of their machines.

10. Special machinery will have guards to meet conditions (tetoner, boring mach., shaper, [motiser,] lathe, jointer, molding, etc.).

[fol. 728] 11. Keep floor around machines clean and free of debris. Watch for fire hazards.

12. Mechanical guards, railings, ladders, or safety appliances of any other kind will not be removed by employees except for repairs or cleaning. Machines will not be used until such safety equipment has been replaced.

13. After repairs have been made to machinery or equipment, it must be tested thoroughly and all safety appliances replaced before operations are resumed.

[fol. 729]

Abrasive Wheels

(Under 6" Diam.)

1. Keep guards, hoods and shields on them. Keep these clean and in repair. Maximum exposure should be 90° of arc, on bench and floor stands. 125° allowed when necessary to contact with wheel below horizontal.

2. Do not operate at a speed higher than that marked on wheel. Compare with R. P. M. motor rating.

"The force that tends to rupture a given wheel when overspeeding increases as the square of the velocity of that wheel; for example, the centrifugal force in a wheel running at 5,500 surface feet per [mitute] is 49 percent greater than in the same wheel running at 4,500 surface feet per minute although the speed is actually only 22 percent greater".

3. Maximum limits of surface speed allowed to avoid rupture mentioned in Item #2 are based on R. P. M. and design of wheel. For above surface speed of 5,500 ft. per minute, a 6" wheel would turn at the rate of 3,500 R. P. M. This would safely be met by such wheels as types 1, 4, 5, and 7; and by types 2, 6, 11, 12, 13, except for the soft vitrified and silicate bonds.

4. Keep tool rests adjusted close to periphery of wheel, preferably 1/8".

[fol. 730]

Abrasive Wheels

(Over 6" Diam.)

1. Keep guards, hoods and shields on them. Keep these clean and in repair. Maximum exposure should be 90° allowed when necessary to contact with wheel below horizontal.

2. Do not operate at a speed higher than that marked on wheel. Compare with R. P. M. motor rating.

"The force that tends to rupture a given wheel when overspeeding increases as the square of the velocity of that wheel. For example, the centrifugal force in a wheel running at 5,500 surface feet per minute, although the speed is actually only 22 percent greater."

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4. Keep tool rests adjusted close to periphery of wheel, preferably 1/8".

5. Use safety flanges. There is a designated size for each wheel diameter, starting at 6".

6. Maintain proper relationship between the size of spindle and size of wheel.

7. Use exhaust connection for buffing and for materials causing dust suspension.

[fol. 731] Sheet Metal.

1. Metal shears are the worst hazard in this trade. Guards are possible—fixed across front of blade, under which material is fed. When 2nd worker is present at machine, watch danger of tripping the shears with 1st man exposed.

2. Heavy gloves must be worn when handling sheet metal. Shoes should be high-cut, heavy soles.

3. Avoid loose clothing around machinery.

4. Shield men from welding operations.

5. Use compressed air with care. Do not use for cleaning clothes.

6. Inspect tools for defects. Electric drills must be grounded.

7. Provide adequate lighting and good housekeeping. Leave aisles open and clear. Avoid congestion of workers.

8. Use power equipment to handle heavy plates, instead of personnel.

9. Protect all parts of moving machinery.

[fol. 732] Pressure Vessels and Equipment.

1. This includes boilers, air receivers, gas cylinders, compressors, refrigerators and hot water tanks.

2. Basic design and construction to be according to A. S. M. E. code and A. S. A. Also all necessary operation, maintenance and repairs.

3. Boilers to be inspected internally biannually.

4. Hydrostatic tests do not constitute such an inspection. Such are to be carried out only when specifically directed. Pressure to be 150% maximum working pressure when such tests are run.

5. Pressure gage dials should read to twice the pressure at which safety valve is set.

6. No valve allowed between pressure vessel and safety valve.

7. Hot water boilers need safety valves. (Several explosive results indicated in Safety file.) Test periodically and keep clean.

8. Drain off water condensation from all air receivers yearly before cold weather. More frequent intervals (monthly) will help maintain full air volume.

9. Guard all moving parts, such as belts, to air compressor motor.

10. Due to high temperature caused in air tanks under high compression, select oil which does not readily decompose. (100 lbs. per sq. in. can build up temperature of 480 F.)

11. Watch for clean air intake. Especially important are fumes or gases. Watch for possible explosions from [fol. 733] oxidation of oils drawn into tank. Use air filter.

12. Air driven tools shall be guarded to avoid sudden accidental operation of trigger. Also use tool retainer on power tools.

13. No repairs are to be made on air driven tools until they are disconnected or line valve closed.

14. Gas cylinders must be secured in upright position, to avoid falling and damaging valve stem.

15. Keep oil away from valves. Oxidation with oxygen can cause fire. Never lubricate. If not vertical, acetone may be drawn out (acetylene is pumped into liquid acetone).

16. Never force connections which do not fit properly. When necessary to test for leaks, use soap suds. Keep cylinders away from open flames.

[fol. 734] Welding.

1. Operators must use helmets and goggles to protect eyes. Others nearby, if exposed, will probably get "eye flash" or conjunctivitis; therefore, protect work and arc with screens. Do not watch workmen; guard your eyes.

2. Welding glass shades:

No. 3 occasional observation & brazing
" 4 light acetylene welding
" 5 for light spot welding
" 6 & 7 for arc welding to 30 amps
" 8 for arc welding to 75 amps
" 10 for arc welding to 200 amps
" 12 for arc welding to 400 amps
" 14 for arc welding over 400 amps

3. Wear clear goggles under shield (after flame is cut off, cooling of metal causes scale to fly).

4. Wear protective clothing—gloves, apron, and high safety shoes.

5. Maintain good housekeeping in area. Keep tools in place, and parts away from aisles. Welding cables should be dry, free from grease, and protected against damage.

6. Handle equipment with care. Use only standard manifolds, hoses, and torches. Maintain good order.

7. Never put down a torch until gas supply has been shut off.

[fol. 735] 8. Disconnect all power lines from equipment when not in use.

9. Installation of equipment and circuits should be according to National Electrical Code.

10. Keep away from all combustible or explosive materials. Remember the Normandie.

11. Ventilate, if working indoors; fumes given off vary in toxicity according to fluxes, rods, metal, etc. Some of it is carbon monoxide or nitrous oxide.

12. Do not touch material being welded—it usually carries high amperage current.

13. One man on each shift of welding crew should know emergency artificial respiration.

14. Repairing of gasoline tanks and receptacles having held inflammable liquids is of greatest danger. See Safety Engineer before proceeding.

15. Warning: No welding is to be done inside any shop or building not specifically authorized and laid out for this work, unless a permit to do such work is obtained from the Safety Department.

[fol. 736] Motors & Electric Power.

1. Electric power & light (1) Electric motors will not be located in rooms or buildings containing explosives, dust from inflammable vapors or dust which may form explosive or inflammable mixtures with air unless such use is given specific approval by the Safety Department. Motors normally should be located outside of buildings containing these substances with no connection to the process building except through mechanical power transmission and control devices which pass through glands

or apertures adequately sealed against egress of the hazardous material in the building.

2. All control boards and switch panels and transformers should be guarded at all times. For temporary use a wood grillage or fence is acceptable. Do not let employees hang clothes in this area or go near it. Permanent enclosures should have lock with key in possession of responsible party.

3. All frames must be grounded—(size of wires).

Fuze cut out	Ground wire—copper
200-500 Amps.	4 A. W. G.
100-200 Amps.	6
30-100 "	10
10-30 "	14

Protect and inspect ground wire connections.

4. Portable electric tools should be grounded, as provided by 3rd prong at end of cable. (Size—No. 18 wire with 10 amp. fuze on wall). Provide convenient [fol. 737] Clamp attachment at wall socket for this connection. Use of conduit acceptable.

5. To avoid enclosure guarding of main wires keep at elevation above floor or ground.

Voltage			Elevation
300	—	750	7.0 ft.
750	—	2500	7.5
2500	—	7500	8.0
7500	—	30,000	9.0
30,000	—	70,000	10.0
70,000	—	100,000	12.0
Over 100,000			14.0

6. Never direct a solid stream of water against a power line; you will probably be electrocuted.

7. Do not fool with any equipment getting out of order. All repairs and adjustments should be done by competent electricians. Lock switches during repairs and give key to man working on lines.

8. Allowable carrying capacities of wire in amperes. (Use fuses and cut-outs to avoid overloading.)

Size A. W. G.	Rubber Insulation	Cambrick Insulation
18	3	...
14	15	18
10	25	30
6	50	60
3	80	95
1	100	120
00	150	180
0000	225	270

9. Know artificial respiration for severely shocked men.

[fol. 738] Lightning Rods.

1. Several experimenters have tried to find relationship between height of lightning rod and area of protection. One showed that a rod 1.1% of height of cloud shelters a radius 4 times rod height. Another showed there was a difference depending on charges; with plus charge on rod and minus on cloud, a rod 2.3% cloud height protected an area 12½ times height of rod; when charges were reversed with same rod, an area of but 2½ times rod height was found protected.

2. Ground terminals should be sunk deeply into the earth to wet soil. *All connections from here to roof should be tight and inspected semi-annually.* Air terminals to be of non-corrosive metal. Ground terminals of copper plates, rods or equal. Inspect, especially, point where conductor enters ground—deterioration is rapid here.

3. The system should be tested annually per instructions of the Electrical Department.

[fol. 739] Static Electricity.

1. The generation of static can neither be prevented nor is it practicable to attempt to do so. The hazard appears when the static accumulates to the extent that a spark discharge may occur.

2. Static is a more acute hazard in the winter than in the summer months.

3. Processes providing hazardous exposure:

a. Storage & Handling of Flammable Liquids

b. Transmission Machinery

c. Fibres and Dusts

d. Mixing, Grinding, Screening, Processing of Explosives

e. Discharge of Gases and Vapors

4. Presence of static can be determined by:

a. Cotton Thread

b. Electroscope

c. "Neon Tester"

d. Static Voltmeter

5. Humidification is probably the most positive means of preventing accumulations of static electricity, but more dependence is generally placed on grounding. . . . Carbon dioxide content of the air in humidified areas ranks equally in importance with relative humidity. . . . Their investigation indicates that humidification, in itself, is not the complete answer to the problem of the prevention of dangerous accumulations of static electricity. It should not, there- [fol. 740] fore, be depended upon as a primary means for the elimination of the static hazard.

6. Shoes & floors:—

a. In all cases where there is a static hazard in the maximum allowable resistence between ground and conductive bodies shall not exceed one million ohms.

b. In all cases where there is static hazard, equipment must be grounded, and floors and operators' shoes must be of such type that the sum of the resistances between ground and conductive bodies is less than one million ohms.

c. Shoes with soles of rubber [of] fabric which have a resistance of less than 250,000 ohms when the wearer stands upon electrode and holds the other electrode in his hands, are suitable for universal use.

d. Conductive floors as required in 3*b* above, must have a resistance of less than 250,000 ohms measured between ground and a 5 lb. electrode, in direct contact with 5 square inches of floor area.

7. Avoid concentration of explosive mixture in air.

8. Every possible source of static sparks, must be thoroughly grounded in a permanent manner

[fol. 741] Dusts and Gases.

1. The toxic hazards of dusts, for continual breathing, should be controlled.

	Maximum Dust Concentration.
Cadmium	0.1 Milligrams per cu. meter
Lead	0.15 " " " "
Manganese	50.0 " " " "
Mercury	0.1 to 0.2 " " " "
Zinc Oxide	15.0 " " " "
Silica (over 75% free)	5 million particles per cu. ft.

2. Explosive dusts include:

a. Carbon—coal, coke, etc.

b. Food—flour, sugar, starch, powdered milk, grain dust, etc.

c. Metal—aluminum, magnesium, zinc, iron

d. Resins, waxes, and soaps

e. Spices, insecticides

f. Wood, flour, and dust. Cork, etc.

g. Sulphur, tobacco, etc.

3. Provide ventilation to control. Inspect rigidly. Repair leaks at once. For exhaust design, consider vapor density.

4. Housekeeping is important. Don't allow accumulation of dusts, or sediment.

[fol. 742] Spray Painting.

1. Greatest hazard is *explosion* and *fire*. Paints with driers are an explosive hazard. In building where paints and oils are used in connection with manufacturing or assembling process, stocks should be a part of the installation. Sprinkler and deluge systems are not recommended, except as a control of secondary fires. Fire-foams, pyrene, carbon dioxide, carbon tetrachloride and treated sawdust, are effective fire extinguishers; water is not effective as an extinguisher.

2. Next hazard is inhalation of *toxic fumes*.

3. Zones for spraying operations must be set aside for this, and designed to avoid the two items above; with attention to ventilation, cleanliness and electric fixtures. Booths must be non-combustible.

4. All spray equipment must be of approved design and layout. Safety valve and pressure gauge included. Keep nozzle pressure as low as practical.

5. Keep booth clean and free from accumulation of paint. Note especially [grill] in front of fan, blades of fan, throat of hood and floor of hood. Spontaneous combustion is possible.

6. Air velocity at booth face should be 200 ft. per min., minimum.

7. Don't blow out booth with jet of compressed air, as this can generate static electricity.

8. Examine dust collection in nearby area; beams, cabinets, sills, etc. Dust explosion possible. Keep clean.

[fol. 743] 9. Isolate operations from rest of plant if possible. Otherwise, partition off this area.

10. No electric fixtures except "Explosion Proof" type should be within 20 ft. of the booth. Use conduits for wiring for distance of 30 ft.

11. Provide safe and adequate storage and mixing of paints, thinner, etc. Limit to 50 gallons per cabinet and 5 gallons per container. Ventilate room; keep it clean.

12. Be careful where exhaust discharges the gases and vapors. Fire and toxic hazards may be created.

13. On outside work or where air currents are not under control, use respirators.

14. Do not eat near booth. Wash hands.

The idea is to *smother* the fire. Avoid fire extinguishers unless specially compounded for this use.

[fol. 744] Lead.

1. Poisoning may occur from continuous breathing of dust or fumes. Provide efficient ventilation.

2. Some lead fumes are released by welding or soldering operations. If indoors, provide ventilation according to operations.

3. No hazard exists from contact with lead metal, except transferring to mouth. Wash hands thoroughly before eating lunch.

4. Avoid chewing in area of exposure. Lead dirt and paint taken in through the mouth is frequent cause of trouble. Keep clean. Painters should not wipe their faces with hand or sleeve.

5. Insist on good housekeeping.

[fol. 745] Acids—General.

1. Carboys in storage should rest on wooden strips. When piled in tiers care should be taken that the bottoms of the upper row do not touch the glass necks of those below. Acids should not be stored in wooden buildings.

2. Departments where acids are stored or used should be kept clean and free from rubbish, and all slippery places should be treated. Pails of clean water and neutralizing solutions should be placed so as to be quickly and easily available for removing acid from hands, face, or other parts of the workers.

3. Where acid fumes have a toxic, corrosive, or asphyxiating action, great care should be taken to prevent operators from being over-come or injured.

4. Goggles and respirators should be available and employees trained in their adjustment and use. Also wear gloves and apron.

5. Metal drums or tanks containing sulphuric acid or its mixtures must not be left open. The absorption of moisture from the air creates an acid sufficiently diluted to cause a rapid eating away of the container at the surface line.

6. Naked flames, lights, or work of any kind which will cause a spark must be avoided around acid stored in metal tanks. The action of acid on metal may generate explosive gas mixtures.

7. In addition to the foregoing, areas in which acids are [fol. 746] stored or used should have the following neutralizing material available in convenient form:

a. For neutralizing acids in quantities, slaked (hydrated) lime.

b. For cleaning acid from floors and equipment or as may be required, 10 to 20 per cent soda-ash solution. This neutralizing process gives off heat and should not be used where large quantities of acid are involved.

8. Employees must not enter buildings or tanks in which there is an excess of acid fumes or vapors unless they wear suitable protective equipment and have attached to them lifelines controlled by another employee outside the tank or building.

9. Extra good housekeeping in immediate area essential.

10. Where continuous exposure exists, install emergency shower and have gas mask available.

11. Use safe carboy trucks and stands for moving and storage.

12. Withdraw by siphon bulb or inclinator, with full knowledge of dangers.

13. Do not store in exposed position where breakage would affect safety of personnel—as in stairwells, where fumes would filter down to lower level.

14. Upon receipt of new shipment, loosen cork to relieve possible built-up pressure, stand clear and wear protective clothing.

Reseal and store in safe place. If stored in cool rooms, temperature reduction will take care of internal pressure [fol. 747] and above treatment is not necessary.

15. Foremen shall thoroughly supervise handling and withdrawing of acids until they can depend upon safety of designated subordinates.

[fol. 748] Solvents.

Inflammable solvents will be stored and handled in accordance with the requirements of "Regulations of National Board of Fire Underwriters for the Installation of Containers for Storing and Handling Inflammable Liquids".

1. Stoddard Naphtha

a. All equipment such as pumps, pans or tanks used in handling this solvent should be grounded electrically to prevent static electricity accumulations.

b. When cleaning with this solvent is done by hand, the work surfaces of tables or benches should be covered with non-ferrous metal connected electrically to the ground.

c. Supplies will be handled in Safety having self-closing lids.

d. Employees handling ferrous metal parts should be careful not to strike the parts together and cause a spark. All tool used should be of non-ferrous metal.

e. Stoddard naphtha will be mixed with sufficient carbon tetrachloride to raise the flash point to 135 . When mixtures of stoddard naphtha and carbon tetrachloride are prepared the density of the mixture should be determined with a hydrometer. This instrument must be used at frequent intervals to make sure that the proportions have not been changed by

[fol. 749] evaporation; while correctly proportioned mixtures of stoddard naphtha and carbon tetrachloride will not burn, they add intensity to fire in other materials; therefore, tanks containing such mixtures should be isolated from the combustible materials.

f. Employees using this solvent will wear rubber gloves and rubber aprons to prevent the solvent from coming in contact with the skin.

g. Where used in confined spaces, workers will wear respiratory protective equipment (Canister Masks) of the approved type.

h. Workers exposed to vapors will wear non-ventilated splash-proof goggles.

2. *Trichlorethylene.*

a. Supplies should not be stored in plain bottles or where it is exposed to the sunlight, but should be stored in amber bottles or metal containers (Safety Cans with self-closing lids.) as it decomposes in sunlight and forms hydrochloric acid and phosgene gas.

b. Trichlorethylene or its vapors must not be allowed to come into contact with open flames or hot surfaces, such as steam coils, etc., because these articles will decompose the trichlorethylene into hydrochloric acid and phosgene gas.

c. Physical examinations are made at regular intervals of all persons using trichlorethylene.

d. Persons using trichlorethylene will wear rubber [fol. 750] gloves and rubber aprons that will protect the skin from the solvent action of the chemical.

e. Persons using trichlorethylene will wear respiratory protective equipment (Canister Masks) of the approved type.

f. Workers exposed to vapors will wear non-ventilated splash-proof goggles.

3. *Ethyl Acetate.*

a. Workers exposed to ethyl acetate or its vapors will wear rubber gloves and rubber aprons to prevent the solvent from coming in contact with the skin.

b. Ethyl acetate will be used only in self-closing metal cans (Safety Cans).

c. Non-ferrous tools must be used in opening containers of ethyl acetate.

d. Where used in confined spaces, workers will wear respiratory protective equipment (Canister Masks) of the approved type.

e. Workers exposed to vapors will wear non-ventilated splash-proof goggles.

4. *Carbon tetrachloride*

a. Carbon tetrachloride must not be used in confined spaces such as rooms, vaults, or pits where ventilation is poor.

b. When used as a mixture with naphtha or other solvents to reduce the inflammability, the mixture [fol. 751] must be thoroughly mixed and tested with a hydrometer at frequent intervals to make sure that evaporation has not reduced the proportion of the mixture.

c. Carbon tetrachloride will be stored and handled in air tight metal containers having self-closing lids (Safety Cans).

d. The workers will wear rubber gloves and aprons to prevent the chemical from coming in contact with the skin.

e. Workers will wear respiratory protective equipment of the approved type.

f. Workers exposed to vapors will wear non-ventilated splash-proof goggles.

g. Carbon tetrachloride or its vapors should not be allowed to contact hot surfaces, as heat will cause it to decompose into phosgene gas.

5. *Ethyl Alcohol (Ethanol)*

a. Inhalation of fumes causes symptoms similar to intoxication. Processes using this agent must be accompanied by good ventilation.

b. The workers will be equipped with rubber gloves and aprons to prevent the fluid from coming in contact with the skin.

c. Ethanol should be stored in air tight containers. (When in use the supply cans will be of the self-closing type (Safety Cans).)

[fol. 752] d. Workers exposed to vapors will wear non-ventilated splash-proof goggles.

[fol. 753] Carbon—Monoxide & Dioxide.

1. Carbon Monoxide is poisonous and concentrations as low as 100 parts per million are unsafe:

From .01 % to .03 % may cause headache and dizziness,
From .03 % to .075% may cause unconsciousness,
From .075% to .10 % may cause death.

2. Carbon Monoxide is colorless, odorless, tasteless and non-irritating. Possible sources should be examined by competent engineers and all steps taken to eliminate hazards.

3. *Some Sources:*

	% Co
Cupola gas	17
Coal gas	16
Water gas	30
Coke producer gas	25
Fuel gas	30
Auto Exhaust	7

4. Do not leave motors running in closed rooms or shops!

5. Carbon Dioxide is much less toxic, but induces asphyxia by excluding oxygen. Due to heaviness of vapor it collects in low spots as in tunnels and manholes.

6. "Dry Ice" is the solid form of carbon dioxide. Where used, guard against released vapors. This may also cause damage in confined area where expanding vapor volume may blow out container. Handling "dry ice" may cause severe burns.

7. Safe limit of Carbon Dioxide is reached when oxygen content is lowered to 12% or Carbon Dioxide content increased to 3%.

8. For First Aid take employee to fresh air and if breathing has stopped, apply artificial respiration.

[fol. 754] Industrial Health.

Aid for Women.

A. Lifting or Carrying Weights.

A recent study of industrial injuries sustained by women in the United States, indicates that 43.5% of all accidents were strains and sprains. These injuries came about because the employees tried to lift or carry weights too heavy for them. Women are not, because of their physical make-up, as well qualified as are men for manual labor.

The U. S. Department of Labor's Special Bulletin #2— (Lifting Heavy Weights in Defense Industries) notes that, when a woman habitually carries or lifts weights too heavy for her, she is apt to endanger her spinal column, abdominal walls or pelvic region. Such weights are also liable to cause aggravation of menstrual cramp.

B. Odd Shifts.

For those who work on odd shifts, intelligent adaptation to systematic daily habits is important. Regardless of the hours, adequate rest and food are highly necessary. Organize your home life so that you will get these two essentials.

C. Posture.

It is recommended that in all lifting or carrying, the primary rule of good posture should be applied, i. e.,— "Stand close to object to be lifted or carried, bend knees and lift by straightening the knees, thereby putting the brunt of strain on the leg muscles, rather than on the back muscles."

[fol. 755] Weights of Materials.

Substance	Weight per cu. ft. in pounds
Ashes	43
Benzine	46
Brass, Cast rolled	534
Brick, hard	125
Cement, Portland	94
Coal, piled, anthracite	47–58
Coal, piled, bituminous	40–54
Concrete, plain	145
Concrete, reinforced	150
Copper, cast-rolled	556
Earth, dry, packed	93
Earth, moist, packed	100
Glass, common	164
Granite	179
Gravel, dry, loose	90–105
Ice	50–57
Iron, cast pig	450
Lead	710
Manganese	475
Masonry, brick, pressed brick	140
Masonry, concrete, cement, stone, sand	144
Nickel	537
Paper	58*
Sand, gravel, dry, loose	90–105
Snow, compated by rain	15–50
[fol. 756] Water, 40C maximum density	62.428
Wood, pine, white	26
Wood, pine, yellow, long-leaf	44
Zinc, cast-rolled	440

* Example: A pile of paper 4 ft. high would weigh 216 lbs. per square ft. of area and would be considered safe for floor marked for 200 lbs. per square ft. due to air spaces between bundles, which would bring this 216 down to about 200. However, a pile 6 feet high is dangerous on such a floor.

[fol. 757] Recommended Intensity of Light at Working Plane.

Foot Candles.

Location	Minimum Allowed	Recommended
1. Abrasive & Burnishing	2	15
2. Boiler Rooms	1	5
3. Carpentry-shop	1	19
4. Construction-indoor	1	10
5. Drafting Room	5	30
6. Elev. & Hoist Landings	2	10
7. Floor openings	1	5
8. Furnaces & Quenching	1	5
9. Garage—Gen'l	2	10
10. Garage Repairs	8	40
11. Lunch Rooms	5	8
12. Library—Gen'l	2	10
13. " Tables	8	15
14. Machine Shop—Gen'l	2	10
15. " detail work	10	50
16. Machine Oper. (unattended)	1	10
17. Machine Oper. (attended)	2	20
18. Metal Working Machinery	2	15
19. Office—Gen'l	2	10
20. Office Desk	8	20
21. Paint Shop	2	10
22. Pattern Making	15	30
23. Plating	2	8
[fol. 758] 24. Printing & Lithograph	5	15
25. Rest Rooms, Lockers	2	5
26. Stairs & Ladders	1	5
27. Streets	1	2
28. Tool Rooms	2	8
29. Warehouse, Shipping	2	5
30. Welding, Forge	3	10
31. Woodworking	3	10

If in doubt about working efficiency under specific light conditions, contact the Safety Department.

[fol. 759] Toxic Gases.

1. Hazard of industrial fumes, vapors and gases is by breathing them and not by swallowing. Hence air purity is important; check ventilating system.

Normal maximum safe limits are as follows:

Item	Parts Per Million
Ammonia	100
Amyl acetate	400
Aniline	5
Arsine	1
Benzene	100
Cadmium	0.1*
Butyl acetate	400
Carbon bisulfide	20
Carbon monoxide	100
Carbon tetrachloride	100
Chlorine	1
Chlorodiphenyls	1*
Chloronaphthalene	1 to 5*
Chromic acid	0.1*
Dichlorbenzene	75
Dichlorethyl ether	15
Ether	400
Ethylene dichloride	100
Formaldehyde	20
Gasoline	1000
Hydrochloric acid	10
Hydrogen cyanide	20
[fol. 760] Hydrogen fluoride	3
Hydrogen sulfide	20
Lead	0.15*
Mercury	0.1*
Methanol	200
Monochlorbenzene	75
Nitrobenzene	5
Nitrogen Oxides	10
Ozone	1
Phosgene	1

Item	Parts Per Million
Phosphine	2
Sulfur dioxide	10
Tetrachlorethane	10
Tetrachlorethylene	200
Toluene	200
Trichlorethylene	200
Turpentine	200
Xylene, coal tar naphtha	200
Zinc oxide fume	15*

(* Milligrams per cubic meter.)

Explosive ranges of gases:

Acetone	2.55%	to 13. %
Acetylene	2.3	80.
Ammonia	16.	27.
Amylene	1.6	—
[fol. 761] Benzene (Benzol)	1.4	6.7
Carbon disulphide	1.25	50.
Carbon monoxide	12.5	74.
Coal gas	8.	23.
Ethyl acetate	2.0	11.5
Ethyl alcohol	3.3	19.
Ethyl ether	1.85	48.
Gasoline	1.4	6.
Hydrocyanic acid	5.6	40.
Hydrogen	4.0	74.
Hydrogen sulphide	4.3	45.5
Lead tetraethyl	1.8	—
Methane	5.0	15.
Pentane	1.4	7.8
Methyl alcohol	6.7	36.
Propane	2.4	9.5
Toluene	1.3	6.7
Xylene	1.0	6.0

Note: Vapor from 1 gal. gasoline has explosive power of 96 lbs. dynamite.

[fol. 762] Identification of Piping System.

Color	Contents
Grey	Acid
Grey striped with 1" red every 3 ft.	Sulphuric Acid
Grey striped with 1" green every 3 ft.	Caustic Soda
Orange	5 lbs. Steam
Orange with 1 black stripe	20 lbs. Steam
Orange with 2 black stripes	200 lbs. Steam
Green	Soap Solution
Red	Illuminating Gas
Black	Cold Water
Black with 1" Grey Stripe every 3 ft.	Hot Water
Black with Red Bank 12" to 18"	Water for Fire Protection
Asphalt Black	Soil Pipe not covered
Same as wall and ceiling	Soil Pipe Covers
Same as wall and ceiling	Drain pipes covered and not covered
Blue	Low Voltage Electricity
Blue with Red Stripe every 3 ft. Stenciled 13,200 volts	High Voltage Electricity
Blue Striped with Green	Fire & Guard Signals
Yellow	Compressed Air
Brown	Cantex-Annex Water

[fol. 763] Angle Irons to be white on ceilings.

All pipe hangers same color as pipes.

All tanks to be identified by their original color.

All pipe supports grey enamel.

Coal Crusher and pulverizer, coal hoppers & boilers to be black enamel.

All covered pipes to receive two coats of paint.

First coat to be primer with gloss oil added; finish coat to be finished in its respective color.

[fol. 764]

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[fol. 767] A. I think this was part of the booklet to which I referred.

Q. This is part of the booklet?

A. Well, there was possibly another booklet. I think there was a book here introduced in evidence this morning.

Q. The other one is the booklet identified as Plaintiffs' Exhibit F, which you saw this morning?

A. Yes, sir, I think that is the other one, yes, sir.

Q. Now, referring to this Plaintiffs' Exhibit F, you were given a copy of this booklet at the time you started [fol. 768] started your safety engineering work?

A. That is right.

Q. And you were given a copy of Defendant's Exhibit 1, is that correct?

A. We were given a copy of one of the books, which one—I think it was this one—when we first started.

Q. By "this", you mean Plaintiffs' Exhibit F?

A. Yes, sir; I think this one came later.

Q. By "this one", you mean Defendant's Exhibit 1?

A. Yes, sir.

Q. Notwithstanding you were furnished with copies of both of these books, you were given lectures on them?

A. Correct.

Q. And about how many lectures did you attend on these booklets?

A. I would say that it took perhaps eight weeks to go through that book.

Q. Who gave those lectures?

A. Well, they were given by "Mack" sitting back there, and also by Mr. Trimble.

Q. By "Mack" you refer to Mr. McDermott?

A. Correct.

Q. Mr. Trimble is one of the plaintiffs in this case, isn't he? A. Correct.

[fol. 769] Q. And he is one of the men who gave you lectures on safety engineering?

A. Correct. First aid, principally, I think was Mr. McDermott's lectures.

Q. Now, you were not only given lectures on the question of safety, as such, but you were given a course in first aid treatment? A. That is right.

Q. So that you could give first aid if required while you were waiting for the nurses' and doctors' arrival?

A. Correct.

Q. And about how long did your first aid course take?

A. Oh, probably six weeks, consisting of thirty minutes each week.

Q. Now during the entire time that you were working as a safety engineer you had weekly meetings that you attended, did you not?

A. That is what I refer to now, or that I have just referred to.

Q. Did you have weekly meetings held with the Safety Committee in the various departments in the plant?

A. No.

Q. Let me straighten that up. This testimony that you have just been giving were the meetings where the lectures [fol. 770] were given to you? A. Correct.

Q. Now you held other meetings, or safety engineers held other meetings weekly, didn't they, with the safety committees in the different units of that plant, in which you discussed and advised them with respect to safety matters and safety problems?

A. I don't ever recall attending a meeting of the safety committee.

Q. You attended meetings from time to time at which you were furnished various safety bulletins that were published by the Government, did you not?

A. Those bulletins, if we got them, you didn't necessarily go to the meetings, they were placed in your mail box.

Q. But you from time to time were given exhaustive safety bulletins published by the War Department, and were required to study them and discuss them and be advised by them, were you not?

A. We were required to observe them.

Q. To observe and be guided by them? A. Correct.

Q. Without attempting to identify them page by page, let me show you a file of such bulletins and ask you if those are the bulletins to which you refer?

A. I would say that some of those were received. Certainly, I don't think we received them all.

[fol. 771] Q. Can you point out any one that you didn't receive?

A. Well, I saw one a few minutes ago on statistics that I am certain we didn't receive. It might have been given in to the director and his assistants, but we did receive some of this type the subject of which was the use of liquid for cleaning process.

Q. And all the types of any you received of these bulletins without attempting to identify them one by one—

A. I say, some of them were received.

Q. Mr. Harris, I don't want to take up the time of the Court and parties here to go through these page by page. I wish you would read through these rather quickly and tell me if you received the bulk of the ones shown there?

A. There appear to be two of each here. I would say definitely that there were a number of these that we didn't receive; they were issued before I went in the department.

Q. Whether other men in the department received them at that time, you don't know?

A. I couldn't say. And a number of them were received early in 1942, prior to the time I went into the department. And if you restrict me to testimony on those which were issued after I went in the department, we will get down to apparently—which is this card here (indicating), I would answer that and say there were a number of these in a manual we were given, that I received. For instance, I [fol. 772] don't think we received this. This has reference to bonds which we didn't manufacture. I think you could safely say that these that refer to the product we manufactured, I probably saw part of them.

Redirect Examination by Mr. Bond:

Q. Mr. Harris, these documents that you have been shown here are entitled War Department, Office of the Chief of Ordnance, Washington, signed by a name with the title Army Ordnance. Where did you get this form, such of them as you received?

A. Well, they no doubt selected the ones they wanted us to have and they came to us in a manual, in a booklet, they were loose leaf in a booklet.

Q. Were they accompanied with any instructions of any kind? A. No, sir.

Q. You just received them? A. That is right.

Recross Examination by Mr. McRoberts:

Q. What were you told to do with them when you received them?

A. We were not told to do anything with them.

Q. Were you told to return them?

A. We found them in our mail box, as I told you.

Q. What did you do with them? A. I reviewed them.

Q. Did you attempt to be guided by them?

A. That is right.

[fol. 773] Q. Now, referring back to this Plaintiffs' Exhibit F, those were the instructions which the company gave to you as a safety engineer with respect to your duties?

A. That is right.

Mr. Bond: Just a moment. That is not what it says. It says "to all safety engineers." I think he ought to state correctly what the writing says. It says "to all safety engineers."

Q. You said this was the instruction to you as an individual that you were to be guided by regardless of what happened to the rest of the safety engineers.

Mr. Bond: That is not the record. There were no special instructions given to this man. That was introduced as a bulletin gotten out by the company, addressed to all safety engineers.

The Court: There was no such question asked, either.

Mr. McRoberts: If there is any question about it we will stipulate that a copy of these instructions was given to each of the plaintiffs in this case, but knowing this witness couldn't testify to that I tried to limit my question.

Q. These were the instructions that were given to you?

A. Correct.

Q. And you were told that you should be guided by these instructions. Is that correct? A. Yes, sir.

Q. And that this little book would tell you how to per-

[fol. 774] form your duties as a safety engineer?

A. That is right, in addition to what I gained through observation.

Q. And going back to that, in addition to lectures and

booklets and pamphlets, you were put out in the plant with an experienced safety engineer to work with you at first, were you not. A. Two weeks.

Q. And show you how these instructions should be applied in actual, every-day work? A. That is right.

Q. After that, you were on your own?

A. That is right.

Q. Now, in addition to the instructions which Judge Bond read to you—

Mr. Bond: What page are you going to read from, so I can follow you? It doesn't seem to be paged.

Q. You were furnished on page 3 with a check list of mechanical items, 1 to 11, beginning with machinery, equipment, and guards and safety devices and ending up with house sanitation and hygiene. Was that a list of the mechanical items that you were to examine and inspect from the standard of safety?

A. Yes, sir, insofar as it applied to my specific job.

Q. And following that there is another tabulation caption, "Check list of unsafe practices?"

[fol. 775] A. Yes, sir.

Q. Beginning with the question, "Do employees operate tools, appliances or other equipment without authority," and that list of unsafe practices goes on further to the next page, does it not? A. Yes, sir.

Q. And is that a list of the unsafe practices that you were to watch for and attempt to correct? A. Yes, sir.

Q. Let's take Question No. 2, "Do employees work or operate at unsafe speed?" Is that one of the things you were supposed to check? A. That is right.

Q. How did you determine whether a man was working at unsafe speed or not? By observation?

A. By observation.

Q. A matter of judgment as to whether he was working too fast for safety or slow enough for safety, is that correct?

A. Well, it was a matter of judgment, the same perhaps as you might determine whether a man is driving an automobile too fast.

Q. A matter of judgment of what is negligent driving.

and it is a matter of questionable judgment, of course. Looking on down to Item 4. "Question: Do employees use defective tools or equipment, or use tools or equipment in [fol. 776] unsafe ways?" Did you determine that in the same way, merely by observation?

A. Well, of course, we were shown defective tools in the beginning.

Q. How about using tools in unsafe ways?

A. We were also explained the manner in which they should be used.

Q. You were given examples of what would be a dangerous method of using a tool and what would be a safe method of using a tool? A. Yes, sir.

Q. Were you shown the safe way and the dangerous way of using every tool in that plant, or were you just given examples?

A. We were shown with respect to hand tools which were commonly used in the plant. And getting back to the question you asked a little while ago with reference to the judgment exercised on whether a person was operating at unsafe speeds. Speeds had reference primarily to the operation of vehicles on which there were specified maximum speed limits set by the plant.

Q. It had to do with running or walking in the plant, too, did it not?

A. Running, of course, in the plant was prohibited.

[fol. 777] Q. That was prohibited? A. Yes, sir.

Q. And there were constant bulletins and cartoons put out telling the employees to take it easy and walk and don't run? A. Correct.

Q. And go slowly and be safe. It was your job to watch for things of that sort, wasn't it? A. Correct.

Q. And where you found anyone violating it, it was up to you to try to correct it or recommend steps to correct it?

A. Well, we followed the procedure which was set up with reference to correcting these things.

Q. You made recommendations as to how the various unsafe practices could be eliminated or stopped, didn't you? That was part of your duties, wasn't it?

A. We made the recommendations based on the instructions that we received.

Q. Your instructions were as to how an ammunition plant could be operated safely?

A. That is correct. In other words, the recommendations that might come as a result of the information that they gave us.

Q. In other words, you were not an expert before you started?

A. We were merely following a program that was laid out for us by the company.

[fol. 778] Q. Let's turn over to page 4 of this booklet. And you were required to turn in a daily log, were you not? A. We were.

Q. And in that daily log you were supposed to make a clear and concise report of the condition that exists, and will include the suggestion or recommendation that will reduce or eliminate the hazard. That was part of your duties, wasn't it? A. Correct.

Q. And then turning over to page 5, you were instructed to make inspection of every department of the unit to which you were assigned, and further instructed—and I will read this:

> "These inspections are made of the building structure, the machinery used for the manufacturing process, tools, equipment and materials and the working methods of the personnel in an effort to discover and eliminate any existing or potential hazard that may exist, by the development and application of corrective measures."

Those were part of your instructions, were they not?

A. That is right.

Q. And you were further instructed:

> "Special investigations are made by the safety engineer, in the event of fire or accident, for the purpose of determining the reason for the occurrence of such an event, in order that this information may form the basis for corrective action which will prevent the occurrence of a similar event."

[fol. 779] Is that correct? A. That is right.

Q. You were also instructed: "The rehabilitation of employees who are partially disabled is another function of

the safety engineer? When such employee returns to work the safety engineer should contact the supervisor of the unit to which the injured person is assigned and will assist in placing the disabled person in some type of productive operation which will not further the person's disability." Was that part of your functions?

A. No, sir, it was not.

Q. You didn't carry out those instructions?

A. No, sir, the department set up a special department for that.

Q. Then you were instructed as follows: "In striving for the prevention of accidents, safety engineers will watch particularly for the"—and I call to your attention No. 2—"unsafe conduct on the part of the employee." How did you determine what was unsafe conduct on the part of the employee?

A. Well, as an example, [wresting] or horse-play on the job.

Q. Horse-play, if it was extreme, was dangerous in an ammunition plant, wasn't it?

A. Horse-play was dangerous whether it was extreme or otherwise.

Q. How did you determine when horse-play was mild, inoffensive and not dangerous, and when it got to the point [fol. 780] when it was dangerous?

Mr. Bond: He didn't say that, he said all horse-play.

A. I determined horse-play is dangerous because in these educational meetings we had, that was definitely set out that horse-play was one thing to watch for as dangerous.

Q. What do you mean by horse-play, Mr. Harris?

A. As they explained to us, sparring, [wresting]—I don't recall all the various types of horseplay they went into.

Q. You had been given all these instructions: "When a safety engineer observes an unsafe condition or an unsafe act that presents an immediate danger, he will call it to the attention of the foreman and will enter such infraction or condition on the daily report form which will in turn be submitted to the supervisor." You followed those instructions? A. I think so.

Q. How did you determine whether or not a condition was unsafe, or an act was unsafe and whether it presented immediate danger or not? By observation?

A. That is a little difficult to answer.

Q. Well, what you did, as a matter of fact Mr. Harris, was to observe the particular act or the particular transaction and decide whether in the light of what you had been told it was dangerous in the manufacture of ammunition; whether it was or wasn't dangerous?

A. I don't think we had any discussion whether it was [fol. 781] dangerous or whether it wasn't.

Q. You were told here in writing that if it presented an immediate danger you were to follow one course?

A. Yes, sir.

Q. And I am asking you how did you determine whether any danger was immediate or not?

A. We found out that it didn't make a great deal of difference whether it was immediately of danger or whether it wasn't, we had no authority to stop any operations.

Q. You didn't? A. No, sir.

Q. I call your attention to page 7 where it says: "When a safety engineer discovers what he considers to be the existence of an extremely hazardous condition, he is authorized to take immediate direct action to eliminate the hazard. Any unsafe condition in the restricted areas will also fall under this category. The safety engineer will use discretion in the exercise of this authority so that there will be no unnecessary interruption of production." Those were your instructions, were they not?

A. They didn't mean anything.

Q. Those were your instructions?

A. They were, but they were only paper instructions and didn't mean a thing.

Q. Did you ever find a dangerous condition and attempt [fol. 782] to stop the operation? A. Yes, sir.

Q. Did you stop it? A. No, sir, not to my knowledge.

Q. When an accident happened you made a report, didn't you? A. Correct.

Q. You had to make a report for every accident?

A. Yes, sir.

Q. Is that one of your reports?

A. I couldn't say that it is. It purports to be, it doesn't bear my signature.

Q. Were not practically all of your reports typewritten, the signature typewritten?

A. No, sir, I can't say they were.

Q. Some of them were? A. They could have been.

Q. Well, just to refresh your recollection on that point, Mr. Harris, I will show you a whole file.

The Court: Do you know whether they were or were they not? A. I don't know.

The Court: Were they, as a matter of fact?

A. No, sir, they were not all typewritten, I know.

The Court: You are taking a lot of time.

Q. (Mr. McRoberts) Mr. Harris, what you did was to write out one of your reports and have one of the girls in [fol. 783] the office type that up. Wasn't that the way you did it, ordinarily? A. Sometimes.

Q. Just look at that particular report.

The Court: He asked you whether you did it ordinarily.

A. Ordinarily, it would depend on the amount of time we had in the office.

Q. Mr. Harris, will you just glance through that file of reports which purport to bear your typewritten signature and tell me if those are your reports?

A. Many of them, no doubt, are.

Q. Now, going back to the one report which I showed you, and having refreshed your recollection, if it does refresh your recollection as to your practice, could you tell me whether that paper you have in your hand is one of your reports on accident? A. I don't think it is.

Q. Will you read over the thing, read your report and see if it refreshes your recollection?

A. I am looking primarily at the corrections that involve knowledge. You have underlined certain things.

Q. The underlined part was not on your report, of course. I am referring to the report in the condition before there was any underlining.

A. In discussing these reports and in going through that mass of data you gave me a minute ago; I notice in prac- [fol. 784] tically all of it there was no definite correction taken. Here you have selected one in which there appears to be some definite action on my part.

Q. Is that why you don't recognize that as one of your reports?

A. That is one of the reasons. And in addition thereto I might say that it is a well recognized fact that those reports were "doctored" many times after we turned them in.

Q. Did you ever "doctor" them? A. I didn't.

Q. Were you present when any report was "doctored?"

A. No, but I was told by one of the men—

Mr. McRoberts: I ask the witness statement with respect to the reports being "doctored" be stricken out?

The Court: Sustained.

Q. Now, Mr. Harris, will you say that wasn't a report which you made? A. I will.

Q. You say you didn't make that report? A. Yes, sir.

The Court: You say you didn't make it?

A. I didn't make it.

Q. (Mr. McRoberts) Did you ever make any report on the accident referred to in that case? A. That I can't say. [fol. 785] Q. Have you any recollection of having made an investigation of that particular accident?

A. No, I don't have.

Q. You say the report, you testify under oath that that report is not your report, you didn't make it?

A. I say I don't think it was.

Q. You don't think it was? A. No, sir.

The Court: You don't say positive whether it was or not.

A. No, I can't.

Q. Mr. Harris, when you investigated accidents, did you instruct the injured employees, caution them as to what they should or should not do in order to avoid accidents?

A. We sure did.

Q. Then when you testified on direct examination, as I understand, that you have made your recommendations or reports only to the main supervisor, that was in error to that extent, wasn't it?

A. Well, I think I testified that was in connection with corrections. We would define a correction, some action that was actually taken to correct a condition. It may or may not have been made by someone else as a result of our recommendation to the foreman.

Q. When it came to giving instructions or precautionary words to the employee as to how to avoid accident, did you [fol. 786] give that to them?

A. I think we did, and only then in connection with first-aid cases.

Q. Well, just as examples of your work I call your attention to another one of these accident reports bearing a typewritten signature. Did you make that report?

A. Yes, I think I did.

Q. And in that report, under the caption "correction" you say the injured employee's name being Arthur Pollman, Mr. Pollman was requested not "to attempt to operate machinery until it had been formally turned over to him by a machine shop?" That is the action that you took in that particular case, isn't it?

A. Yes, sir, that was a first aid.

Q. I call your attention to another report and ask you if that is one of your reports. A. That is right.

Q. And in that particular case, under the caption "correction," you said: "Cautioned employee to leave lowering or raising of tail-gates to driver in the future, that that work is the duty of the driver." That is a correct statement of the action you took in that particular case, isn't it? A. Yes, sir.

Q. I call your attention to another report bearing a typewritten signature. Was that report made by you? [fol. 787] A. I presume it was.

Q. Under the caption "correction" you say, "Employee was instructed how to lift properly and cautioned to follow correct lifting procedure in the future." Does that correctly state the action that you took in that case?

A. Yes, sir.

The Court: Speak out, I can't hear you.

Q. I show you another report, was that made by you?

A. I presume it was.

Q. And under the caption "correction" you state, "Cautioned employee to see that the brass is placed in Iittrell machine and not left suspended from hoist. Foreman also requested to watch this condition and attempt to keep it corrected." Does that describe the action that you took in that case? A. Yes, sir.

Q. And here is another report. Is that another one of your reports? A. It appears to be.

Q. And the action in that case, under "correction:" "Employee was given proper lifting instructions." That describes what you did in that case, doesn't it?

A. Probably.

Q. I show you another report and ask you if that is your report? A. Yes, sir.

[fol. 788] Q. And under the caption "correction" there: "Cautioned employee to always shut off a machine before reaching into it, also to refrain from making adjustments until he is classified as an adjuster." That describes the action that you took in that case, does it not? A. Yes, sir.

Q. I call your attention to that report which bears your typewritten signature F. N. Harris. A. Yes, sir.

Q. And your answer. A. I presume it is.

Q. And the action which you took there stated under "correction" was, "Employee was given thorough job instructions which included pointing out the hazards of the job." Does that describe the action that you took in that case? A. I think so.

Q. Here is one that bears your manual signature, does it not? A. Yes, sir.

Q. And in that particular report under "correction" you said: "Cautioned injured employee and all four women operators around machine to turn off power in the future before reaching into the machine." That correctly describes the action which you took, does it not?

A. Yes, sir.

[fol. 789] Q. Now another part of your work as a safety engineer was to make recommendations for the installation of guards on machinery from time to time, wasn't it?

A. That is right.

Q. How did you determine when a guard was needed?

A. Usually as the result of an accident.

Q. And then you would decide that some type of a guard was required and would occasionally recommend that one be installed?

A. We might reach the conclusion that a guard was necessary and then the procedure was to file a report with the supervisor stating our views on the matter, and then they in turn would refer it to the so-called engineering department within the safety department.

Q. And it would be up to the engineering department to design a particular guard for that operation?

A. They would first go out and determine whether or not they thought our opinion was worth while on the subject.

Q. And you would make all sorts of reports for other operations that you thought would conduce to safety, would you? A. I don't understand your question.

Q. Well, let me give you some examples here. I will show you another report and ask you if that is one of your reports? A. I presume it is.

Q. And the action which you took there is stated in this [fol. 790] language, is it not? "Note the board which has been laid between machines 7 and 8 and suggest similar permanent boards be laid between all machines and steps erected to permit men to reach walk. These move—men otherwise are compelled to climb up and take all sorts of chances. Cautioned patient to be careful in the future until proper cat-walk is erected." That is the description of the action you took in that case, isn't it? A. I think so.

Q. I show you another report and ask you if that is one of yours. A. I presume it is.

Q. And the action that you took in that case was as follows, was it not? "Recommended a different type of goggle for use for operating saw, a form-fitting goggle which completely covers the eye-socket." Is that correct?

A. Yes, sir.

Q. This one is written out entirely in your handwriting, signature and all, isn't it? A. Yes, sir, it is.

Q. In that particular case the correction is in the following language: "The only suggested remedy would be the feasibility of wearing gloves when doing this particular job." Now in that case that was the only thing you could think of to remedy that condition, isn't it?

[fol. 791] A. That is right.

Q. So you decided that wearing of gloves was the only way to cure that type of accident, prevent that type of accident in the future?

A. That was my thought in the matter.

Q. That was your judgment, was it not?

A. That was my thought in the matter.

Q. Mr. Harris, do you remember an occasion when some welding was being attempted at some freight elevator door

openings and there was a question as to what should be done about it, and you made a report on it?

A. No, I don't remember exactly. There was a good deal of welding done in the plant.

Q. Let me show you what purports to be a copy of a daily log bearing your typewritten signature, and I ask you to read that over. A. Now your question.

Q. The question is, do you recall that incident?

A. I don't recall it, but it could have occurred.

Q. Do you question that that is a correct transcript of your daily log?

A. It purports to be my daily log and bears the typewritten signature of mine.

The Court: Have you any recollection about it?

A. No, I do not. This is an occurrence that frequently [fol. 792] the elevators needed repair. I don't remember the specific instance. I haven't been there for over a year and recalling specific incidents, it is difficult.

Q. Do you recall a difficulty they had when welding was being done that there was certain danger of fires and some fires had been occasioned by that, and this was one of the incidents that caused a special rule to be made that the safety department had to be notified and be present whenever any welding was to be done?

A. Well, the general rule in effect with respect to welding was that prior to the actual work being done we were required to inspect it and then call a fireman who would then turn the job over to the fireman who would stand there with his fire apparatus to put out a fire if one developed.

Q. And if a welder started to do his welding before you had made your inspection and made this arrangement, you would make him stop until those things had been done, wouldn't you? A. I don't know about making him stop.

Q. That is what you did in this instance, didn't you?

A. As I told you before, we had no authority to stop anybody.

Q. Just confine yourself, Mr. Harris, to what you did.

A. All right, I had no authority to stop anyone from doing anything.

Q. Despite the fact you had that written instruction [fol. 793] which you say had been furnished to you?

A. We definitely attempted to follow the written instructions, but we soon found out it was useless, they laughed at us, they were production conscious.

Q. You can't recall a single specific instance when an immediate hazard, an immediate danger was present and you attempted to exercise this authority given to you in your instructions, and didn't succeed?

A. At the moment, I can't—Yes, sir, I can, now that I have thought it over.

Q. Tell us about it.

A. I recall specifically an instance in Building 105, loading, on making my customary patrol of that building, I was on the night shift, I found an employee working in the building without safety glasses. I went to the foreman and asked him to have the employee removed from the job, and he said he would do it. I took it for granted that he did, and on my later patrol some two hours later I found the man working on the job without glasses. I reported it to my supervisor and I was given a 3-day suspension as a penalty for not having a man taken off the job. How could I take him off the job? I didn't even have the authority of a guard. I didn't have authority to arrest or incarcerate.

Q. Do I understand you correctly that you were given a three-days suspension by your supervisor for failure to [fol. 794] make that employee stop operations without safety glasses? A. Right.

Q. Do you remember when that was, Mr. Harris?

A. I think it was in the summer of 1943 or spring of 1943, or maybe the winter, I don't recall. But you probably have an IRP 43, I believe it was they gave on that, for which they suspended me and docked my pay, incidentally.

(Court and Counsel confer at Court's Bench.)

Q. Mr. Harris, you went to work first as a receptionist? A. Correct.

Q. And that had nothing to do with the safety department? A. No, sir.

Q. And you are not making any claim in your suit for any overtime while you were a receptionist? A. No, sir.

Q. Your only claim that you are making is for overtime after you went into the safety department? A. Correct.

Q. When you were transferred from the receptionist job to the safety engineer's job, who made the arrangement? Who interviewed you and told you what your duties would be? A. Mr. Hartling.

Q. What did he tell you as to what the salary was going to be? A. Mr. Hartling didn't tell me.

[fol. 795] Q. Who did tell you what your salary was going to be? A. Mr. Strickland.

Q. Mr. Strickland was the head of the safety department? A. That is right.

Q. Did Mr. Strickland discuss your duties with you, also? A. No, sir, he didn't.

Q. Mr. Hartling did that? A. No, sir.

Q. Did Mr. Strickland tell you what hours you were going to work, or did Mr. Hartling do that?

A. Mr. Hartling.

Q. And what hours did Mr. Hartling tell you you were going to work?

A. Mr. Hartling simply told me that I would be required to work around the clock. I mean by that, it was a three-shift basis.

Q. In other words, you were told that you would be assigned to one of the three shifts? A. That is right.

Q. The company was then on a three-shift basis? Working around the clock each day? A. That is right.

Q. And there were certain men in the safety department assigned to each of those shifts? A. Correct.

[fol. 796] Q. And each shift worked normally eight hours a day, six days a week, did they not? A. Correct.

Q. And you were told that your duties would be to work with the shift to which you were assigned?

A. That is correct.

Q. And that you would work the same hours that your shift, the production shift, worked. And I am not referring to this preliminary time before the shift at the moment. I am not trying to cut you off on that. Your duties would require you to be on duty whenever your shift was on duty?

A. No, sir, there was not any such discussion on that.

Q. Just what was the discussion?

A. Mr. Hartling told me in this particular case I was a new man and I was going to be assigned to a man named

Burke for two weeks, and Mr. Burke was on the day shift. And he told me to be there at 7:30 the following morning, and since I was on the day shift I would be required to come in one-half hour before the shift. And he told me substantially what was in the bulletin.

Mr. McRoberts: I ask that be stricken out, if Your Honor please. I would like to have the exact words and not "substantially what is in the bulletin."

Mr. Bond: The bulletin is in evidence, Your Honor.

The Court: Objection sustained.

[fol. 797] Q. Mr. Hartling told you you would have to report a half hour ahead of the shift and that you would have to work during the same hours that the shift worked in addition to that half hour? A. I didn't say that.

Q. What did he say as to when you could go home?

A. He told me in that instance that I would work from 7:30 until 4:00.

Q. And since your shift was on day shift you would report at 7:30 in the morning and work until 4 o'clock in the afternoon six days a week?

A. He didn't say anything about six days a week at the time. He added the further information that there were two rest periods during the shift, that we take two rest periods between going on work and between the lunch session, and our lunch session we would take at no regular time, just whatever fit in with our convenience. The lunch hours were from 11:30 to 1:30; that, however, we were subject to call at any time we were on duty. I mean if we happened to be in the lunchroom and something required our presence in the building, we were on duty.

Q. Mr. Hartling, if I understand you correctly, told you that you had to report at 7:30 in the morning and work until four o'clock in the afternoon? A. Correct.

[fol. 798] Q. How many days a week did he tell you you would have to work?

A. He didn't specify any number of days.

Q. Did he tell you how often the shift worked, or did you know that?

A. I knew that the shift work changed about every thirty days.

Q. How long had you been out at that plant before you started in the safety department? A. February to May.

Q. And you knew each shift worked eight hours a day, six days a week, didn't you? A. That is right.

Q. And you were told you would be assigned to one of the shifts? A. Correct.

Q. And you would report a half hour before that shift started?

A. I was told that the hours were from 7:30 until four.

Q. And when you started to work you worked six days a week, didn't you? A. Yes, sir.

Q. Except for occasions when you should have been off you worked six days a week throughout the period of your employment in the safety department?

[fol. 799] A. Correct.

Q. Who told you what your salary was going to be?

A. Strickland.

Q. And he told you your salary was going to be $200 a month? A. That is correct.

Q. What else did he say about your salary besides that?

A. Nothing.

Q. And you were paid at the rate of $200 a month from the time you began working as a safety engineer until you were subsequently raised?

A. I never received $200 a month.

Q. Well, what do you mean by that, Mr. Harris?

A. Well, at the end of the year, if you computed it on an annual basis it was less than $200 a month.

Q. Let's go back to the months themselves. The first month you worked how much money did you receive?

A. On the basis of $200 a month I received $46.15 a week.

Mr. Bond: Exhibit A you are looking at now?

Mr. McRoberts: Yes, sir.

Q. As a matter of fact, Mr. Harris, for the pay roll period under May 31, 1942, that is the one week you received gross wages of $46.15 did you not?

A. I presume I did.

Q. Less a deduction of 46 cents for Federal old age benefit tax, and miscellaneous deduction of $4.90, and for

[fol. 800] every week thereafter until November of 1942 you actually received gross wages of $46.15 less Federal old age benefits of .46 cents and a net amount of $45.69, is that correct?

Mr. Bond: Your Honor, we accept those figures that are in evidence. I don't see why we need waste time asking the witness about that. Just read from that as admitted figures. The figures that the exhibit shows he received each week, both sides concede. Just read from them.

The Witness: I concede it with the exception that on the week ending November 15th I failed to put in 40 hours and they docked me.

Q. (Mr. McRoberts) Week after week from May, 1942, down to November, 1942, you received the same figure each week? A. Yes, sir.

Q. And that figure is a gross figure of $46.15 and a net figure of $45.69 after deducting Federal old age benefit? That is correct?

A. I say the gross is correct, I don't know about the net, it would depend on what the deductions are.

Q. Well, the gross was the same each week?

A. Yes, sir, correct.

The Court: If you answer the question instead of arguing the case, it would be better.

Q. Now Mr. Harris, during all of that time you worked [fol. 801] six days a week? A. Yes, sir.

Q. And did you say anything to Mr. Strickland or to anybody at the United States Cartridge Company about overtime? A. Yes, sir, I did.

Q. When was that?

A. I don't recall exactly when it was.

Q. Was it the first week or second week, or two years later? A. I don't recall exactly when it was.

Q. Approximately when was it? Can you tell me approximately when it was?

A. No, except to say it was sometime after my employment in the safety department.

Q. A year afterwards?

A. I couldn't say exactly. I know it was, but I definitely raised the point—

Q. It was at least a year afterwards, was it?

A. I can't say that.

Q. It was many months after you started to work?

A. I would say it was quite sometime after I started to work.

Q. And during all that time you accepted the payments shown on this Exhibit A without complaining or questioning anyone connected with the company?

A. No, I couldn't say that.

[fol. 802] Q. What would you say? Tell us what you did?

A. I first discussed it with my supervisor.

Q. When did you first discuss it with him?

A. Well, my recollection is a little bad on that, but I told you I first discussed it with my supervisor.

The Court: Who was that?

A. Well, we had three.

The Court: Who was the one you discussed it with?

A. Mr. Maher. And Mr. Maher was supposed to take it up for me.

Q. (Mr. McRoberts) About when was that, Mr. Harris?

A. It was quite some time after I went in the safety department.

Q. Then up to that time and for quite sometime after you went into the safety department you accepted these payments without making any complaint to anyone connected with the company. Is that correct?

Mr. Bond: Object to the relevancy of all of this because under the Fair Labor Standards Act the rates provided in that act have to be paid by law, and they cannot be abrogated or changed by contract.

Mr. McRoberts: I am asking this question directed to the credibility of the witness as to what the actual understanding was as to whether the $200 a month was—

The Court: You may answer subject to the objection.

[fol. 803] (Last preceding question was read)

A. For quite sometime I accepted the payments.

Q. While you were accepting the payments, did you make any complaint to anyone connected with the company about that? A. I did.

Q. And your first complaint was to Mr. Maher?

A. That is correct.

Q. And up until that time you made no complaint to anyone?

A. Correct. I may add, if I may, that before I registered a complaint with Mr. Maher I called at the Wage and Hour Bureau here in the city and determined that my views on the subject—

Mr. Bond: Now wait a minute; just a moment. Don't give us any opinion, you can tell us what you did.

A. All right.

Q. When was it you went to the Wage and Hour Bureau? A. I can't give you any date except as to—

Q. Is that about the time you talked with Mr. Maher?

A. Just before then.

Q. And after you had been in the department for quite some time? A. Yes, sir.

Q. Mr. Harris, you started to work at $200 a month in May of 1942, and you worked at that salary until January [fol. 804] 25, 1943, did you not? Approximately that date?

A. Apparently I did.

Q. At which time you were increased to $225.

The Court: You say "apparently." Didn't you actually?

A. He is talking about specific dates.

Mr. McRoberts: I said approximately.

Mr. Bond: He has the figures before him and Mr. Harris hasn't. These exhibits show what he was paid.

A. I could answer that question and say whatever that exhibit shows is substantially correct.

Q. I want to bring out this fact, Mr. Harris: January, 1943, you were increased to $225 a month? Is that correct?

Mr. Bond: Is that your exhibit?

A. That is correct.

Q. And in October, 1943, you were increased to $240 a month. Is that correct? A. That is correct.

Q. During all of that time had you made a complaint about the payments you received? A. Yes, sir, I had.

Q. Was that before or after you received this first increase? A. I would say it was before.

Q. On October 25, 1943, you were then promoted to assistant foreman, were you not, and your salary was in-
[fol. 805] creased to $279 a month.

A. I was told by the superintendent that I was promoted to general forgman.

Q. Your understanding was that from October 25, 1943, you were a general foreman? A. Correct.

Q. And your salary then went up to $279 a month?

A. That is correct.

Q. And when you became general foreman, were you over any of the other safety engineers? A. No.

Q. You were assigned to the production department then, were you not? A. I was.

Q. You were transferred out of the safety department and put over in the production department as a foreman, but in charge of safety work for the production department? Is that about what it amounted to?

A. That is what I was told.

Q. You were told that was what your title and your duties were?

A. That I would be assigned three men who would work around the clock; that I would work the day shift and come in on the other shifts when I deemed it necessary and check these other men, but due to the man power situation, temporarily I wouldn't be able to work under that
[fol. 806] arrangement because I would have to work a shift as I had formerly been doing.

Q. You were in charge, then, of the two men, or, if they ever got the other one, the three men who worked around the clock in your particular building? Is that correct?

A. I was told that.

Q. The safety engineers on the other shift worked under your general supervision and direction?

A. They were supposed to, but I never at any time was given the third man, and as a result I was compelled to work a shift myself and could never supervise their work.

Q. Now, going back to this question of your actual duties, Mr. Harris: You made these inspections and when you found something was wrong you took the steps to

correct them or have them corrected, as you have testified to. Who did the manual work of making those corrections? Did you do it? A. No.

Q. That would be done by other employees?

A. The actual corrections were either made, or they failed to make them, by the foreman of the employee who needed the correction, or the condition that needed correction.

Q. And that foreman would either do it himself or tell some man to go out and do whatever had to be done?

A. Or he wouldn't do it at all, one or the other.

Q. But you, yourself, didn't install guards on machines?

A. No, sir.

[fol. 807] Q. Or physically go out and change the working conditions, or attempt to change them. You simply make your recommendations or gave instructions as to what was to be done?

A. Well, except on occasions when I took it upon myself, being unable to get the cooperation of the foreman to [cleam] excessive powder off the machines.

Q. On occasions you would see some excessive powder on a machine, you would just do it yourself?

A. When I couldn't get the cooperation of the foreman.

Q. You were not told that you were supposed to do that, were you? A. No, sir.

Q. Didn't consider that part of your duties, the foreman was supposed to take care of that? A. That is right.

Q. Upon your orders or directions? A. Yes, sir.

Mr. Bond: Object "on his orders," no evidence of that.

Q. Upon your recommendation or request?

A. My request.

Q. You say that on some occasions when those requests were not complied with you undertook to clean up the excess powder yourself? A. That is correct.

Q. By "powder" you are referring to explosive powder, [fol. 808] smokeless powder? A. Yes, sir, correct.

Q. Why did you do that yourself if that wasn't part of your duties?

A. We had been told that the accumulation of excessive powder on a machine was a dangerous situation.

Q. And you considered it was dangerous to leave it there?

A. I believed what I had read in the manuals and I did it myself.

Q. You spoke of a Mr. Hirschberger, you reported to him, I believe, at one time?

A. Mr. Hirschberger was an assistant director.

Q. Assistant director in the safety department?

A. Yes, sir.

Q. And you reported to him? A. Yes, sir.

Q. Mr. Hirschberger, I believe, is one of the plaintiffs in this case, is he not?

A. Yes, sir. Mr. Hirschberger, however, for quite a long time was an ordinary safety inspector.

Q. In your direct testimony you referred to some special clothing that you safety engineers were required to wear?

A. Yes, sir, they provided us with a uniform and we were compelled to wear it.

Q. And were you or were you not permitted to wear that [fol. 809] uniform home, or were you compelled to leave it at the plant and change?

A. We were compelled to leave it at the plant.

Q. Were you not told that you could leave it at the plant or wear it home at your option?

A. We were not, nor were any of the other employees in the explosive area, such as I was assigned to, permitted to wear their uniform home.

Q. Were you present when they were given instructions?

A. No, sir, it was a printed instruction.

Q. Do you have that? A. I do not.

Q. This was only while you were in the explosive area that you had the uniform that you were not permitted—

A. I wore it all the time until the transfer into production. Then they took it away from me.

Q. When you were in the production unit you didn't wear a special uniform?

A. Yes, sir, I did wear a special uniform.

Q. You said something about they took it away from you, and I didn't catch that.

A. To clear up that statement, when I first went in the safety department I was assigned to the so-called explosive area, which was the loading part of the plant. I remained in that work for quite a long time and was transferred into a production building where I worked quite a

[fol. 810] long time prior to transfer from the safety department to the production department. It was at that time, when we all transferred, or at least the bulk of us, from the jurisdiction of the safety department to the production department, our uniforms were taken away from us.

Q. And what happened to them, with respect to uniforms? A. Wore our own clothing.

Q. Wore your own clothing? Didn't wear a uniform any more? A. That is correct.

Q. That was about what time that you quit wearing a uniform? A. I think it was in October of 1943.

Mr. McRoberts: I think that is all, Your Honor.

Redirect Examination, by Mr. Bond:

Mr. Bond: Just a few questions, Mr. Harris.

Q. From that file of your reports that was first exhibited to you, Mr. McRoberts called your attention to a few instances where you had reprimanded an employee. Was that the regular practice?

A. It was in connection with first-aid cases.

Q. First aid cases?

A. Yes, sir, it wasn't in the form of a reprimand exactly as it was in the form of an attempt to explain to the employees the unsafe practice of wrestling.

Q. Those were instances that were connected with an [fol. 811] injury that had been sustained? A. Correct.

Q. And I believe your instructions that I had you read, or that I read in the record this morning, contained a sentence, or an exception where employees were engaged in an operation where serious injury may result? Is that correct? A. Correct.

Q. Where there was no injury or no other threat of immediate injury, was that your practice to reprimand the employee? A. No, it wasn't.

Q. Or to take any corrective action? A. No, sir.

Q. Would that come within that part of the instructions where you were directed not to attempt that in any way?

A. Yes, sir.

Q. Now then, in such cases you would, however, report

the occurrence to your supervisor for information, wouldn't you? A. That is correct.

Q. And would the supervisor report it to Mr. Strickland?

A. He did.

Q. And he would include yours and other safety inspector's reports in his? A. Yes, sir.

Q. And were they sometimes circulated among all safety [fol. 812] engineers? A. They were regularly.

Q. I show you one and ask you if this is a sample of such report of the supervisor and safety engineer to Mr. Strickland containing reports of ordinary engineers or inspectors, and a copy of which went to all inspectors?

A. It is.

Q. Taking the first two items on that report, I see that they refer to reports that you made to Mr. Kemp. He was then chief supervisor? A. Yes, sir.

Q. The first is "Infraction: Employee was wearing wrist watch. Foreman Hoffman. Remarks: Foreman reprimanded employee." Who was Hoffman?

A. He was a department foreman.

Q. Over the employee? A. Yes, sir.

Q. And under "remarks:" "Foreman reprimanded employee." That was the corrective action that was taken?

A. Yes, sir.

Q. By whom was it taken? A. By the foreman.

Q. Now the next item. "Not wearing safety shoes. Hoffman." "Foreman sent employee to safety store to buy shoes." Does the same explanation apply to that?

A. It does.

[fol. 813] Q. Are those two items that I have read into the record illustrative of the general practice that you followed in the matter of reporting infractions that you had observed? A. It was.

Mr. Bond: I ask that report be marked "Plaintiffs' Exhibit H"? (The report is marked as requested.)

[fol. 814]

Plaintiffs' Exhibit H.

To: Clyde E. Strickland — April 27, 1943

From: A. C. Kemp

Subject: Report of Violations of Safety Regulations 12-8 Shift

Unit 102—reported by Safety Engineer Harris

Dept.	Badge	Infraction	Foreman	Remarks
121	14712	Employee wearing wrist watch.	Huffman	Foreman reprimanded employee.
121	3880	Not wearing safety shoes.	Huffman	Foreman sent employee to Safety Store to buy shoes.

Unit 103—reported by Safety Engineer Yard

137		Powder vault in #2 Plate Loading Unit was found overloaded.	Fields	Foreman instructed powder man not to exceed the limit.
136		Poor housekeeping.	Tripp	Foreman corrected the condition.
135	4608	Not wearing safety glasses.	Sieland	Employee were reprimanded by foreman.
323	52604	Wearing jewelry	Naes	" " " "
323	49445	" "	"	" " " "
139	56763	" "	Bonham	" " " "
323	43255	Not wearing safety shoes.	Naes	" " " "

Unit 104—reported by Safety Engineer Gorg

149	13331	Employee working without safety glasses.	Puricelli	Foreman had employee secure glasses.
149		Soap barrel with exposed nails in rim.		Foreman had nails removed.
143		Drive chain guard on #7 Washer out of place.	Winkler	Foreman stated he would have guard replaced.
145		Rear guard on Bullet Assembly machine #3 hanging loose.	Reisch	Foreman stated have guard repaired.

[fol. 815]

Unit 105—reported by Safety Engineer Drozda

157		Packing chests being used as tote boxes were being overloaded with cartridges.		Foreman said he would make an effort to have practice stopped.

Unit 110—reported by Safety Engineer Hahn

Inspection of all Departments revealed housekeeping good, all mechanical guards in place, and personnel conforming to Safety Regulations.

Restricted Area #1 Plant—reported by Safety Engineer Peterson April 26, 1943

Dept.	Badge	Infraction	Foreman	Remarks
185	54551	Working at #9 30-Cal. Tracer Charge machine with sleeves down over arms and plastic cord dangling from neck.	Ward	Foreman had employee roll dress sleeves above uniform sleeves and slip cord inside uniform.
185	#2-50 Cal.	Excessive powder accumulation around and under powder stations.	Ronsick	Foreman had machine cleaned and reinstructed employee employees.
185	#5-50 Cal.	Excessive powder accumulation around and under powder stations.	Ronsick	Foreman had condition corrected

Restricted Area #1 Plant—reported by Safety Engineer Peterson April 27, 1943

185	#9-50 Cal.	Machine idle, powder in powder stations.	Ronsick	Foreman had powder removed immediately.
185	#12-30 Cal.	Powder heaped above water pan under powder stations.	Ward	Foreman had condition corrected immediately.

Restricted Area #2 Plant—reported by Safety Engineer Tyler

Inspection of Departments 33., 281, 285, and 286 disclosed that employees were conforming to Safety Regulations, mechanical guards were in place, and housekeeping was good.

287	X-Alloy Sieve Room #7 218-C; X-Alloy left in containers after sieve was used. About 2# powder.	Glaeser	This material was left from 2nd shift. Arrangements made to prevent recurrence.

[fol. 816]

287	Magnesium Sieve Room #10, Bldg. 218-A; containers left with magnesium in them under sieve. Sieve not in operation.	Allred	Foreman will issue instructions to avoid recurrence.

Unit 202—reported by Safety Engineer Livsey

Housekeeping in good order, mechanical guards in place, and personnel conforming with Safety Regulations.

Unit 203—reported by Safety Engineer Livsey

Housekeeping in good order, mechanical guards in place, and personnel conforming with Safety Regulations.

Unit 204—reported by Safety Engineer Zott

Dept.	Badge	Infraction	Foreman	Remarks
244		Acid leaking from Pickler drain pipe, and dropping near employees working in the Jacket Draw Dept.	Schuettenberg	Foreman issued instructions to the Plumbing Dept. to repair the leaking pipe immediately.
248		The rear exit in the Restricted Breakdown Area was blocked by gondolas.	Woods	Foreman ordered a floorman to move the gondolas away from the exit at once, and instructed the employees working in the breakdown area not to block the exit at any time.
249		Light bulb was burned out on the stairway leading from the Packing Dept. on the 2nd to the 1st floor.	Parker	Foreman instructed the Electricians to replace the burned out bulbs at once.

Unit 20[illegible]—reported by Safety Engineer Jennings

Inspection reveals housekeeping in good order, the few employees working conforming to Safety Regulations.

[fol. 817]

Copies Sent To:

D. C. Storms
B. E. Rogers
J. C. Stewart
O. W. Roberts
B. L. Haag
G. A. Gilbertson
M. Hurley
A. E. Allen
A. G. Krus
F. B. Attwood
C. W. Beck
V. P. Birtley
J. M. Baker
R. L. Burridge
R. W. Clifford
S. B. Sponder
O. M. Biederman
A. Bohn
J. C. Sewell
E. H. Ebert
H. C. Boling
I. De Grote
K. W. Kaveler
F. Garetson
A. Kemp
E. Maher
J. McKittrick
W. McDermott
M. M. Meyer
W. C. Marks
W. C. Nash
W. O'Mara
E. Peters
E. J. Ruby
M. F. Smith
M. P. Cody
R. V. Oldham
W. J. Hartenbach
J. V. Boyd
C. W. Conrad
A. P. Rudloff
C. C. Simmons
C. F. Seger
E. J. Schaller
W. Schutz
E. J. Strong
P. R. Tebeau
C. J. Werner
B. Ludwig
H. S. L. Wheat
G. J. Wuigk
R. St. Mary
B. Willmering
C. Kamper
A. Lockhart
W. B. Martin
J. De Largy

All Safety Engineers.

[fol. 818] Q. Your attention was also called to the fact that in some of your reports when you having reported the infraction or occurrence you accompanied it with a recommendation. I will ask you if you had any authority to put these recommendations into effect? A. No, I didn't.

Q. To whom did these recommendations go?

A. To either the foreman of the department, or to his superintendent, or general foreman, or to my own department supervisor.

Q. And beyond the department supervisor would that be included in his report to Strickland?

A. I don't understand.

Q. Your recommendations, would they be passed by your supervisor on to the director?

A. I presume, I don't know.

Q. But who had the authority to say whether or not those recommendations would be put into effect?

A. Mr. Strickland.

[fol. 819] Q. Mr. McRoberts drew attention to the period of the latter part of your employment where you were given the title of foreman. Tell us what, if any, change giving you that title resulted in your duties?

A. As I stated before, there was absolutely no change in my duties. I never at any time had the three men that were necessary to free me to supervise the work. The greatest number of men I had were two. There were three shifts in operation and therefore I had to work one of them, and when the building that I patrolled went on a schedule of 60 calibre ammunition it was reduced to a one-shift basis and the other two men were either transferred or let out and I was retained, the only safety man in the building, and I continued to do the same work then I did when I was originally employed in 1942.

Q. And the extra man was never provided who would have freed you from your routine duties so you could exercise supervisory duties? Is that it?

A. Yes, sir, correct.

Mr. Bond: That is all.

Recross Examination by Mr. McRoberts:

Mr. McRoberts: Let me ask you one further question here: Q. In connection with your duties, Mr. Harris, in addition to the recommendations and corrections of the type which I asked you about a little while ago, did you also make recommendations about transfers of employees [fol. 820] from one work to another? A. Yes, we did.

Q. Whenever you found that by reason of an employee's injuries, perhaps, or just his ordinary characteristic, he was not suited in your opinion for the performance of that one type of work safely, you would recommend he be transferred to different work or a different department?

A. We usually made that recommendation—people who were incapable of doing their work by reason of a physical defect or something or other. But we had no authority to see that our recommendations were carried out.

Q. You didn't make the transfers yourself?

A. It was merely a recommendation.

Mr. McRoberts: That is all.

Mr. Bond: That is all, Mr. Harris.

ROBERT M. POWELL

of lawful age, produced, sworn and examined, testified on behalf of plaintiffs as follows:

Direct Examination by Mr. Bond:

Q. Will you state your full name, please?

A. Robert M. Powell.

Q. And your age? A. Thirty-four.

Q. And where do you live?

A. 201 Hereford Avenue, Ferguson, Missouri.

[fol. 821] Q. I believe you were at one time employed by the defendant United States Cartridge Company?

A. Yes, sir.

Q. As a safety engineer? A. I was.

Q. Inspector first, I guess it was, was it not?

A. That is right.

Q. Exhibit A shows that you were employed to commence November 2, 1942, and terminated March 31, 1944. Is that correct? A. That is correct.

Q. Where did you go to get your job out there?

A. I went direct to the Administration Building on Goodfellow Avenue and talked to Mr. Strickland.

Q. And tell us what occurred between you and Mr. Strickland?

A. Mr. Strickland asked me if I had ever had any experience in safety work before, and I told him I had been. And then he said, "Well, we will give you a little training by putting you on with one of the other safety inspectors a few days before we can turn you over to a unit of your own." So I went around with another safety inspector for about three days before they gave me a unit of my own.

Q. Was anything said about terms of employment?

A. Yes, sir, Mr. Strickland said that I would start at a salary of $225 a month, and the basic work week was forty [fol. 822] hours. However, the Government had requested we work a six-day week, and that is all that was said.

Q. Did he tell you the basic week was 40 hours?

A. That is what I recall.

Q. Did you get one of those booklets that I have introduced in evidence? A. Yes, sir, I did.

Q. Now, to what production unit were you assigned?

A. The first [on], I believe, was about 102 or 104.

Q. Tell us what your duties were in that department.

A. As I started out I accompanied the other inspector around and observed his working, which was patrolling the entire building, and it has three supplemental buildings, the primary insert loading and magazine. And I followed him on his tour of the building and also in the first-aid station where he wrote up the accident reports. And as we went around he explained to me what to watch for in the way of poor housing and unsafe acts on the part of the employees, and unsafe conditions.

Q. And these general instructions that I read in the record this morning as having been given to all safety engineers, did you get those general instructions? A. Yes, sir.

Q. And they were the instructions on which you operated? A. That is right.

[fol. 823] Q. When you observed any infraction of safety rules, what did you do?

A. We informed the foreman directly over that employee, in case of an unsafe act or an unsafe condition.

Q. You say your would notify the foreman over the employee who was guilty of the infraction of the safety rule, who would make the correction? Is that right? A. Yes, sir.

Q. Then would you include it in any report that you made?

A. Yes, sir, we were required to make a report of the infractions as we observed them during the working shift, and they would go to our safety supervisor who would in turn insert them in a report that the safety department got out to the department managers.

Q. This Exhibit H is such a report, is it? A. Yes, sir.

Q. Now then, something has been said about the safety men having authority in cases of emergency or threat of death or serious injury, to take some corrective action.

What have you to say about that? Were you encouraged to act in that way or discouraged?

Mr. McRoberts: Object to the form of the question. It is an opinion and conclusion of the witness as to what he was encouraged to do.

Mr. Bond: I will leave it "encouraged."

[fol. 824] Mr. McRoberts: Object to the question as it is. He has his written instruction, he can tell whether he followed his instructions or whether he was penalized for not following his instructions, as the other witness did.

Q. The question is with reference to that part of your instructions whereby emergency such as where an employee is engaged in some operation where death or serious injury may result? What have you to say about that part of your instructions, and your practice under it?

Mr. McRoberts: Object to that as too vague and too general. I think if you ask the question the witness can answer, and I can object.

Mr. Bond: I think the question is all right.

The Court: Objection sustained.

Q. Did you have occasions come up while you were a safety inspector where you acted under that instruction?

A. I don't recall any, sir.

Q. All the infractions you noted or handled under the general instruction— A. Yes, sir.

Q. You reported them to the foreman for correction and for your supervisor for information?

A. Possibly with one exception, where you see an employee running, or something like that, and you caution him to stop running because he might have an accident. / [fol. 825] Q. But except for that no occasion came up where you acted under the exception?

A. No, sir. Although the bulletin there told us we should have that authority in case of chance of death or a serious accident, my recollection is we had a meeting in the Safety Department during the working shift where another safety inspector had taken upon himself to shut off a line of machines, and the meeting was called to make it a little more clear to us, that while the bulletin offered us so much authority we were not to do that because of

disrupting the production and we should see the foreman or general foreman before taking any action of that sort.

Q. When and where did that take place?

A. The meeting took place shortly after the incident. I point out a meeting took place in the safety department quarters which were in the fire-engine house, I believe, on the premises.

Q. I don't want to duplicate what I have been over today. You heard the description which was given here by the first witness as to the plant? A. Yes, sir.

Q. In a general way, is that your recollection of it?

A. That's right, yes, sir.

Q. And the organization of the safety department, tell [fol. 826] us how that was?

A. Mr. Strickland was supposed to be the director and head of the safety department and had two or three assistants, the number varying at different times due to trouble in the department I presume, and they had supervisors over each shift that were responsible for the different men in the units during that shift.

Q. And the safety inspectors or safety men were under those men? A. Yes, sir.

Q. At the bottom? A. Yes, sir.

Q. And was that a plantwide organization? A. Yes, sir.

Q. And the instructions under which the safety men operated, were they general?

A. To my knowledge they were, yes, sir.

Q. And the daily duties that you have described here, were they typical of those performed by all safety engineers?

Mr. McRoberts: Object to that, if Your Honor please.

The Court: Sustained.

Q. Did you say what department you were in?

A. I was in the safety department.

Q. I mean what unit?

A. I was originally I believe in 102 or 104, later being [fol. 827] transferred to one or two of the other units.

Q. Different from the unit that Mr. Harris was in?

A. Correct, yes, sir.

Q. But nevertheless, you had these same general instructions? A. Yes, sir, I did.

Q. And your duties in the unit you were in were the same kind that he has told about here?

A. Yes, sir, that is correct.

Mr. Bond: That is all.

The Court: Announce an adjournment until tomorrow morning at ten o'clock.

Thereupon, at 4:00 P. M., July 8, 1946, an adjournment was taken to 10 A. M. July 9, 1946. The proceedings were then resumed as follows:

Mr. McRoberts: I would like to recall Mr. Harris for a few questions.

Mr. Bond: Why don't you finish with Mr. Powell? I finished the direct examination of Mr. Powell last night.

Mr. McRoberts: It doesn't make any difference. I have some papers on Mr. Harris. If it is convenient I can get rid of them and get them back into the file?

Mr. Bond: Well, all right.

FRANK N. HARRIS

previously sworn on behalf of plaintiff, recalled for [fol. 828] further cross examination, testified as follows:

Recross Examination by Mr. McRoberts:

(Five papers are marked "Defendant's Exhibits 2, 3, 4, 5 and 6," respectively.)

Q. (Mr. McRoberts) Mr. Harris, from time to time during your employment as a safety engineer, you made application for pay during absence from your work, did you not? A. I imagine I did.

Q. I will show you Defendant's Exhibit No. 2 and ask you if that is your signature which appears on that paper?

Mr. Bond: Now, if Your Honor please, I object to any interrogation in reference to that paper which has been marked and identified as an exhibit and exhibited to him for the reason that what it purports to be is a company form of application for a leave of absence on account of

illness in which they characterize him as an exempt employee, which is the very point at issue in this case. That is not a matter that can be concluded either by the company's classification or by this agreement on his part. If under the Fair Labor Standards Act he is not within the Administrator's definition, no contract or consent on his part can make him come within that limitation, and it is wholly immaterial whether he did or did not sign such an application or they even made an agreement with him as to his classification. It is a matter of law which may not be determined by agreement. If employees could contract [fol. 829] with their employer as to what their status was there would never be any benefits open to them under this act, because they would always take such agreement. Therefore, I say it is irrelevant and immaterial.

Mr. McRoberts: I think it is admissible, Your Honor, as bearing upon the veracity of the witness and his contention as to what the terms and conditions of his employment actually were.

Mr. Bond: I can't see its bearing on the question of veracity or any statement he has made.

Mr. McRoberts: He made a statement, as I understand it, that he was employed and relied upon the booklet that Judge Bond introduced in evidence. The statement about the working hours being 40 hours per week for these parties who were not exempt under the Fair Labor Standards Act.

Mr. Bond: No, sir, the just benefits become as having gone to him and other certain parties as admission against interest.

The Court: Objection sustained.

Mr. McRoberts: May we make our offer on this? May I have him identify his signatures?

The Court: All right.

Q. (Mr. McRoberts) Is that your signature on each of defendant's exhibits 2 to 6 inclusive? A. They are.

Mr. McRoberts: We offer in evidence Defendant's Exhibits 2 to 6 inclusive.

Defendant's Exhibit A

Def Ex 2 7776

ORIGINAL

TO:
DEPARTMENT HEAD
PAYROLL DEPT
DIVISION HEAD
PAYROLL DEPT

THE UNITED STATES CARTRIDGE CO.
ST. LOUIS, MISSOURI

APPLICATION FOR PAY DURING ABSENCE SALARIED EMPLOYEES

DATE 12-4-42

BADGE NO. 1420

7-12-37

EMP DATE _____ EXEMPT EMPLOYEE ☒ NON EXEMPT EMPLOYEE ☐

ABSENT FROM 11-29-42 TO 11-30-42 INCL. AMOUNT OF TIME APPLIED FOR 2 HRS.

I _____ HEREBY CERTIFY THAT I WAS ABSENT FROM WORK ON THE DATES SHOWN ABOVE DUE TO THE FOLLOWING REASON:

ILLNESS OR OUTSIDE INJURY ☒; PERSONAL (EXCUSED) ☐; COMPENSABLE INJURY ☐;
OCCUPATIONAL DISEASE ☐

SIGNED J. L. Harris
EMPLOYEE

PAYMENT APPROVED Capt C Strickland
CHIEF, PROTECTION & SAFETY DEPT.

FOR PAYROLL DEPARTMENT USE ONLY

TIME ALLOWED PRIOR TO JUNE 1, 1942 _____ HRS.
TIME ALLOWED SINCE JUNE 1, 1942 _____ HRS.
TIME ALLOWED THIS ABSENCE _____ HRS.
TOTAL TIME ALLOWED _____
HANDLED ON FORM CP-7 SPECIAL

Chas J Berry
PAYROLL DEPARTMENT

FORM CP REV. (10-42)

323 Defendant's Exhibit 4.

ORIGINAL

THE UNITED STATES CARTRIDGE CO.
ST. LOUIS, MISSOURI

APPLICATION FOR PAY DURING ABSENCE SALARIED EMPLOYEES

EMP. DATE 2-13-42 EXEMPT EMPLOYEE ☑ NON EXEMPT EMPLOYEE ☐

ABSENT FROM 8 PM TO 12 INCL. AMOUNT OF TIME ATTENDED FOR 16 HRS.

I HEREBY CERTIFY THAT I WAS ABSENT FROM WORK ON THE DATES SHOWN ABOVE DUE TO THE FOLLOWING REASON:

ILLNESS OR OUTSIDE INJURY ☑ ; PERSONAL (EXCUSED) ☐ ; COMPENSABLE INJURY ☐ ;
OCCUPATIONAL DISEASE ☐

SIGNED _____ EMPLOYEE

PAYMENT RECOMMENDED _____ FOREMAN, SUPERVISOR OR DEPT. HEAD

FOR PAYROLL DEPARTMENT USE ONLY

TIME ALLOWED PRIOR TO JUNE 1, 194 2	16 HRS.
TIME ALLOWED SINCE JUNE 1, 194 3	24 HRS.
TIME ALLOWED THIS ABSENCE	8.0 HRS.
TOTAL TIME ALLOWED	HRS.

HANDLED ON FORM CP-84, No. 583

M. J. Schaller
PAYROLL DEPARTMENT

APPROVED _____
DIVISION HEAD

FORM C-8 REV. (10-42)

Note

Blank Pages at this Point

[fol. 834] Mr. Bond: Same objection as heretofore stated.

The Court: Sustained.

Mr. McRoberts: That is all.

Redirect Examination, by Mr. Bond:

Q. Mr. Harris, in reference to this statement you made on cross examination yesterday in reference to having been disciplined concerning a certain incident, was there any record made by the company of that incident?

A. Yes, there was.

Q. Do you have a copy of it? A. I do not.

Q. What is the nature of that record?

A. Well, I believe that the form number for that record was classified as an IRP No. 43.

Q. And in what file would that be?

A. Well, I presume that the company has a file of IRP 43.

Mr. McRoberts: Object to the presumptions, if your Honor please.

Q. Did you at the time receive a copy of it? A. I did.

Q. And you do not have it? A. No, I don't.

Q. Did you state when this incident occurred, yesterday?

A. I didn't. I don't think I did. I don't recall defi-
[fol. 835] nitely when it did occur, but I think it was—I think it occurred in the summer or spring of 1943.

Q. And what was the reason that you were disciplined?

Mr. McRoberts: I think the witness testified to that very specifically yesterday.

Mr. Bond: I don't think so, Your Honor. It was in cross examination, and I didn't ask him about it in redirect.

Mr. McRoberts: Witness stated very definitely what the reason was, yesterday. The only reason to ask him to go into it again would be an attempt to impeach his own witness.

Mr. Bond: No, sir, I didn't get it clear, Your Honor, and I don't think the record has it clear. I am not suggesting anything to him.

A. As I recall the incident, I was on the night shift and I entered the Building 105 and discovered an employee in that building with safety glasses which contained no lens. So I went to the foreman and asked that he have the man removed and send over to the safety store for glasses, which he said he would do. I went on about my work.

Q. By foreman, you mean the employee's foreman?

A. That is correct. I went on my duties patrolling other buildings and returned in, I think, about two hours, and I found the man still on the job, still with safety glasses with no lens. And I went back to the foreman and asked him why he had not removed the man and sent him over [fol. 836] to the store, and it had been raining very hard. He said he didn't take him off the job because of the rain and it was then near the close of the shift and he refused to send him over saying there was only a few minutes left to go. So I reported the incident to my supervisor. And I was later on called in by an assistant safety director and told that I was being given a three-day layoff for failing to see that the man was removed from the building.

Q. Did you have any authority personally to remove him?

Mr. McRoberts: Just a moment. Object to that.

The Court: Sustained.

Q. Is there any other fact in reference to this matter that you haven't stated?

A. Only one I think. When I was told that I was going to be laid off for three days, they gave me the customary form for that purpose, which is an IRP 43, which requires the signature of the individual who is being penalized. And that, of course, is a matter of record in the company files.

Q. Without stating what if was, I will ask you as a fact whether or not that IRP, whatever it is you described, states the reason for your layoff? A. I think it does.

Mr. Bond: I now ask Counsel to produce that record before this trial ends.

Mr. McRoberts: Your Honor please, the place where that record would be is in the personnel file of this wit- [fol. 837] ness. We have a personnel file of this witness, we have an IR2 which is a disciplinary action ticket on

another transaction. We do not have any disciplinary action on any such transaction as witness describes. If it is possible to locate that through other files in the company we will endeavor to do so, but I am sure you realize the difficulties involved there with a total of eighty odd thousand employees out there and the plant shut down and these files in storage.

Mr. Bond: I think with the definite description that the witness has given of the surrounding circumstances and the character of the record, that the controller ought to be able to locate it, Your Honor.

The Court: I think so.

Mr. Bond: I think that is all.

Recross Examination, by Mr. McRoberts:

Q. Will you state the name of the assistant supervisor who gave you this IRP 43?

A. I can't recall his name. I can describe him to you. He was a short, stocky man who I understand left the service of the company shortly thereafter and went in the East some place with another large concern.

Mr. McRoberts: That is all.

Mr. Bond: That is all.

[fol. 838] ROBERT M. POWELL,
previously sworn on behalf of plaintiff, recalled for further cross examination, testified as follows:

Cross Examination by Mr. McRoberts:

Q. Mr. Powell, you were hired in the plant as a safety engineer, were you not, or safety inspector? A. Yes, sir.

Q. And I believe you advised the company—

Mr. Bond: Could I interrupt just a moment? Mr. Harris comes up and tells me that he believes that man you asked him to identify was a Mr. Sewell. That is his best recollection now.

Q. (Mr. McRoberts) Mr. Powell, you advised the company in your application that you had done safety work before, did you not? A. I don't believe so.

Q. I will show you a copy of a paper which purports to be your application. Does that bear your signature? I direct your attention to the statement of your experience.

A. Well, this is worded in such a way that it might be ambiguous.

Q. You think safety work is ambiguous?

A. If you are referring to the part which says "common safety work", I didn't actually do the safety work.

Q. When you were employed, were you employed to go to work on a day shift?

[fol. 839] A. I believe so. It was my understanding it was going to be all day work when I was employed.

Q. You were told you should report to work at 7:30 A. M. A. That is correct.

Q. And that you would work until four o'clock P. M.?

A. Yes, sir.

Q. That you would have a half hour off for lunch?

A. Well, that wasn't brought out very clearly. I assume I had lunch time, that is correct.

Q. And you were told you would work six days a week?

A. As I stated yesterday.

Q. I am asking you now, were you told that you would work six days a week from 7:30 in the morning until four in the afternoon?

A. I was told the Government requested that we work six days a week.

Q. And therefore that you would work six days a week?

A. Yes, sir.

Q. And you were told that your salary would be $225 per month to start? A. That is right.

(A paper is marked "Defendant's Exhibit 7")

Q. Mr. Powell, were you also told that in addition to those hours which I named, that you might be subject to call in the event of emergencies beyond those hours?

[fol. 840] A. Yes, sir.

Q. When you were employed, did you sign a notice of employment for the company? A. I would like to see that.

Mr. Bond: I make the same objection to that, Your Honor. They have undertaken to put in a statement in

the form that he is an exempt employee. It isn't binding on the employee, it isn't in accordance with the Fair Labor Standards Act.

The Court: Objection sustained.

Q. Is that your signature on Defendant's Exhibit 7?
A. Yes, sir.

Mr. McRoberts: We offer in evidence Notice of Employment which sets forth, if Your Honor please, that he was exempt under the Fair Labor Standards Act.

Mr. Bond: Same objections.

The Court: Sustained.

Mr. McRoberts: Your Honor please, in order to save time with this witness and possibly other witnesses, we have other applications for pay during the absence of salaried employees, signed by this witness and also signed by various other plaintiffs, similar in form and wording and purport to the ones which we have identified and had Mr. Harris identify. Now without cluttering up the record by offering each of these documents separately, may it be understood that the same ruling would apply for each case?

[fol. 841] The Court: The same ruling would apply?

Mr. Bond: Yes, sir, same objection and same ruling.

The Court: Yes, sir, the same objection and ruling will apply.

Q. Mr. Powell, I will show you a document which has been identified as "Plaintiff's Exhibit F," and ask you if you were furnished with a copy of these general instructions? A. Yes, sir, I was furnished with copies.

Q. And you were to [illegible] these were the instructions to you as to how you should perform your duties as a safety inspector or safety engineer? A. Yes, sir.

Q. And generally speaking you abided by and followed these instructions as set forth in the exhibit?

A. I might say I abided by it until we couldn't exercise everything that was said in print.

Q. But under these instructions it was your duty from time to time to instruct employees with respect to safety matters, was it not?

A. Well, it was rather a hot and cold proposition. The director of the safety department seemed to change policy from time to time. At the time we started we were permitted to talk to employees and supposedly instruct them occasionally if the danger was present. Later on we were told not to contact the employee direct at all.

[fol. 842] Q. As a matter of fact, you instructed employees how to do their work safely all the way through your employment, did you not?

A. As I say, it was a hot and cold thing. There were times when we did and there were times when we didn't.

Q. When did your employment terminate?

A. March 31, 1944.

Q. Well, here in February of 1944 you were still instructing employees about safety matters, were you not?

A. I don't like the word "still". You may say at that time we were.

Q. Mr. Powell, I will show you a report which purports to bear your signature. Is that correct? A. That is correct.

Q. And I call your attention to the fact that in this report you state, "Foreman was instructed on proper procedure for future reference." Is that correct?

A. That is correct.

Q. On November 27, 1942, you report with reference to an accident to a female employee that you instructed her to keep gloves on and had foreman show her proper way to grasp cases." Is that correct? A. That is correct.

Q. And on January 31, 1944, you suggested to employee that she try using her left hand for these operations in [fol. 843] the future. Is that correct? A. That is correct.

Q. And on February 11, 1944, you state, "Safety engineer had employee demonstrate how he lifted these cartons, but this employee was not using the proper method. And I instructed him and notified the foreman to also watch him and reinstruct him if necessary." Does that correctly describe what you did? A. Yes, sir.

Mr. Bond: I think the witness has a right to an explanation if he wishes to make it.

Mr. McRoberts: I am not objecting to it.

A. I would like to say the reports you are using as examples are in connection with hospital cases, I believe,

and not merely the ordinary run of minor accidents which did not require reporting.

Q. As a matter of fact, your instructions were that whenever any accident occurred, no matter how small, the employee was to report to First Aid? A. That is correct.

Q. And one of your duties was to continually instruct the employees to that effect and see that they understood?

A. That was the duty of the foreman to instruct them to report to First Aid.

Q. You undertook to instruct them to that effect constantly, didn't you?

[fol. 844] A. No, sir, I couldn't say that.

Q. Well here, for example on February 8, 1943, you advise Mr. Loyet, who was the employee in the case, and his foreman that all accidents no matter how minor must be reported immediately to First Aid Station.

A. I don't think that bears out your statement we do it constantly. We did when it required it.

Q. If I may, I will read from some more of the daily reports of yours and the action which you took. Will you tell me in which case it is correct?

Mr. Bond: Are you reading from accident reports?

Mr. McRoberts: Daily accident reports. These are not basically accident reports, this is the hospital report that accompanied the accident report that you are looking at. What I am reading from is document entitled Safety Inspection Report, bearing a date and bearing your signature as safety engineer, and that is a report that you make after accidents have occurred which cause injuries.

A. Which cause hospitalization in the plant.

Q. All right, 1. Suggested to employee that he familiarize himself with machines and attachments, and work with care at all times. Had sharp hook replaced with blunt one immediately.

Another one. Had plumbers and porters correct condition immediately, but Couldn't locate any leakage. Cautioned employee to walk more carefully also.

[fol. 845] A. That is right.

Q. Had a metal guard approximately 5 x 10 inches added to the original guard to cover the gap and prevent recurrence. This guard installed 7/30/43. Four to twelve shift.

Cautioned other employees James Whitaker badge 23849, who let switch swing back and hit the patient. Also advised foreman to caution all other users of switch. Had switch raised to a height of about 6 feet one inch. Talked to employee in the presence of his immediate foreman, Vanmeter, and made definite recommendation that he go about his duties, a little more slowly in the future and be very careful in walking to work and around machines.

And then at the foot of the report, Safety engineer regards this man as a potential hazard working around machines and has asked his foreman to observe him carefully, and recommends that he be transferred to a less congested area if he doesn't follow suggestion to slow down or be terminated before a serious loss of time and accident develops. A. Correct.

Q. Another one. This employee is a chronic complainer about her health and frequents First Aid Station for aspirin, citric carbonate, and so forth. Has complained of headaches frequently in the past. Believe her to be a hazardous employee and recommend she never be allowed to be a machine operator. A. That is right.

[fol. 846] Q. And from time to time you would recommend different types of guards and safety devices be installed, didn't you?

A. Yes, sir, mostly as a result of these hospital accidents.

Q. And then sometimes you would conclude that no guard should be applied and would report accordingly?

A. Well now, I can't say that offhand.

Q. Let me read you this one. January 7, 1943. Discussed with foreman. No previous similar accident, no place for guard. Only carelessness would result in recurrence. Is that correct? A. Yes, sir.

Q. And you recommended that disciplinary action be taken from time to time, did you not?

A. There might have been occasions of that.

Q. Well, let me read you this one: Employee's foreman was apprized of the full details of the accident and will discipline employee who [caulsed] the accident, Violet Rains, badge 52802, Operator Department 238. Is that correct?

A. That doesn't say that I recommended it, it says he will do it.

Q. I read that correctly, didn't I? And that was your report? A. I believe you did. I didn't read it carefully.

Q. Well, follow these, please. Here is one, 2 10 44. Safety Engineer requested disciplinary action and employee was issued Form IRP 43 and reinstructed.

[fol. 847] A. Correct.

Q. 3 21 33, instructed employee to report any accident immediately in the future. Failure to do so would draw disciplinary action. A. Correct.

Q. 8/9/43, I believe that the expanded metal guards through which these particles fly out of the machines are really inadequate protection. I recommend plexi glass guards be installed to replace present. In this connection the safety engineer has contacted foreman, general foreman of this department, the assistant superintendent and superintendent of the building, the unit plant engineering department representative, the unit millwright foreman and Mr. Duncan of the Safety Engineering Department. Tentative plans are being considered for installation of plexi glass guards or other serviceable type of guard.

A. Correct.

Q. 1/23/43, I took Foreman Barth and General Foreman Broadshaw back to the scene and we determined that there should either be a hand tool made for removing the plates in the future, or that the sliding door should be equipped with a device to actuate the use of the pedal used to engage the press. A device is needed to permit the pedal to take effect of engaging the press only when this sliding door is closed, and to prohibit the engaging when sliding door is open. We will take this up with the engineering [fol. 848] department. A. That is right.

Q. Mr. Powell, would you say that this is a fair description of the job which you performed out there, and I am going to read this sentence by sentence and, if you will check with me each sentence.

A. May I suggest, wouldn't it be better to read it all the way through, as one sentence may be related to the other one further along?

Mr. Bond: I don't think that the witness should be asked to state a conclusion on a statement that he has prepared. Let him ask him for the facts.

Defendant's Exhibit B.

ORIGINAL

THE UNITED STATES CARTRIDGE CO.
ST. LOUIS, MISSOURI

APPLICATION FOR PAY DURING ABSENCE SALARIED EMPLOYEES

TO: DEPARTMENT HEAD; PAYROLL DEPT.; DIVISION HEAD; PAYROLL DEPT.

DATE 6-3-42

BADGE NO. 14201

DEPT. 424 CLOCK 220

EMP. DATE 2-13-42 EXEMPT EMPLOYEE ☑ NON EXEMPT EMPLOYEE ☐

ABSENT FROM May 31 TO June 1 INCL. AMOUNT OF TIME APPLIED FOR 5½ HRS.

I, E.H. Harris HEREBY CERTIFY THAT I WAS ABSENT FROM WORK ON THE DATES SHOWN ABOVE DUE TO THE FOLLOWING REASON:

ILLNESS OR OUTSIDE INJURY ☑; PERSONAL (EXCUSED) ☐; COMPENSABLE INJURY ☐

OCCUPATIONAL DISEASE ☐

SIGNED E.H. Harris
EMPLOYEE

PAYMENT RECOMMENDED J.D. McKittrick
FOREMAN, SUPERVISOR OR DEPT. HEAD

FOR PAYROLL DEPARTMENT USE ONLY

TIME ALLOWED PRIOR TO JUNE 1, 1942	[illegible] HRS.
TIME ALLOWED SINCE JUNE 1, 1942	1.6 HRS.
TIME ALLOWED THIS ABSENCE	5.5 HRS.
TOTAL TIME ALLOWED	[illegible] HRS.
HANDLED ON FORM [illegible] NO. [illegible]	6-1

L J Bridgman
PAYROLL DEPARTMENT

APPROVED O.K. Roberts
DIVISION HEAD

FORM G-8 REV. (10-42)

Defendant's Exhibit 5.

Def Ex 5

ORIGINAL

TO: DEPARTMENT HEAD: PAYROLL DEPT.; DIVISION HEAD: PAYROLL DEPT.

THE UNITED STATES CARTRIDGE CO.
ST LOUIS MISSOURI

APPLICATION FOR PAY DURING ABSENCE SALARIED EMPLOYEES

DATE 2-11-43

BADGE NO. 12211

DEPT. 424 ✓ CLOCK 220

EMP DATE 2/13/42 ✓ EXEMPT EMPLOYEE ☑ NON EXEMPT EMPLOYEE ☐

ABSENT FROM 6.7.42 TO _____ INCL. AMOUNT OF TIME APPLIED FOR 24 HRS.

I, O W Harris, HEREBY CERTIFY THAT I WAS ABSENT FROM WORK ON THE DATES SHOWN ABOVE DUE TO THE FOLLOWING REASON:

ILLNESS OR OUTSIDE INJURY ☑; PERSONAL (EXCUSED) ☐; COMPENSABLE INJURY ☐; OCCUPATIONAL DISEASE ☐

SIGNED O W Harris
EMPLOYEE

PAYMENT RECOMMENDED J W Bottom
DEPARTMENT SUPERVISOR OR ASST. SUPT.

FOR PAYROLL DEPARTMENT USE ONLY

TIME ALLOWED PRIOR TO JUNE 1, 194__ _____ HRS.
TIME ALLOWED SINCE JUNE 1, 194__ _____ HRS.
TIME ALLOWED THIS ABSENCE 144 HRS.
TOTAL TIME ALLOWED _____ HRS.
HANDLED ON FORM [illegible] OR SO-4 NO. [illegible]

M Gudash
PAYROLL DEPARTMENT

APPROVED J W Knight
DIVISION HEAD

FORM C-3 REV. (10-40)

Q. I will ask you if this is a fact, that this is a part of your job out there: Regularly inspects the entire property in his area for the purpose of eliminating safety hazards of all kinds; inspects machinery, lighting, floors, exit and storage materials. A. Right.

Q. Recommends changes such as additional machine guards, additional safety devices, new storing methods and new types of equipment. A. Yes, sir.

Q. Checks manual movements of employees, pointing out unsafe practices to the supervisor? A. Correct.

Mr. Bond: Does that mean your supervisor?

A. No, sir, employees.

[fol. 849] Q. Using his knowledge of safety practices, recommends changes calculated to decrease working hazards.

A. Right.

Q. Makes reports recommending general safety procedure not connected with a particular accident.

A. That is right.

Q. Holds meetings of unit and safety [committes] promoting adherence to safety regulations through employee cooperation.

A. I can't agree with that. That was a suggestion that wasn't carried out.

Q. Sees that injured employees receive immediate attention and care.

A. Well, yes, sir, we did that. The employees' foreman was the one who was obligated to see that the employee got into the First Aid Station. After the employee was referred to the First Aid Station we discussed the case with the nurse on duty, and if there was a doubtful case a nurse would sometimes ask us how it looked to us, if it looked like a hospital case, or something like that.

Q. Did you or not report every accident suggesting preventive measures?

A. That is correct. That didn't apply in every accident because that calls for numerous things, that is actually the result of carelessness or a breakdown of machinery, or careless act on the part of another employee. That calls for an accident even if an employee got a splinter in his [fol. 850] finger, that is an accident report.

Q. Next, advise all employees, with approval of departments concerned, in proper use of safety equipment.

A. Equipment methods there, that wasn't carried out.

Q. Going back to the percentage of time spent in the different types of work which I have just mentioned here, I will withdraw that. Did you perform any other duties other than the ones I have just asked you about?

A. That covers a lot of ground.

Mr. Bond: That calls for a conclusion. He stated yesterday in detail what his duties were, Your Honor. I don't think he should be asked to draw the conclusion as to whether these questions here cover that whole field or do not. The testimony is before the Court.

The Court: He may answer.

A. All right, other duties in a case of lost time, accident where an employee was taken—was taken from our plant to an outside hospital, at one time we were required to either go there by our own means of transportation or to accompany the patient to the hospital, and wait there even though it was beyond our regular working hours, and then writing that accident report so it would be available at the department.

Q. That was your job, to make a report of every accident? A. That was an extra.

Q. Was there any other type of work that you did that you can now recall other than what has been covered?

[fol. 851] A. Yes, sir, in some instances where an employee had an accident which restricted the capability to walk into the First Aid Station, we were sometimes called upon to help place the employee on a stretcher and carry him to the First Aid Station.

Q. Can you tell us any other duties you performed out there?

Mr. Bond: That is not a question of duties. He told yesterday what he did in detail. Those are just generalizations, they do not cover the actual detail of inspecting, patrolling and reporting. I think that it is unfair to this witness to question him that way.

The Court: He may answer.

(Last preceding question was read)

Q. Just in a general way.

A. There might have been others that I can't recall, but getting to the stretcher deal, it was our duty to see that the stretcher was returned to its compartment.

Q. Can you think of anything else? A. Not offhand.

Q. Going back to the question as to the amount of your time that you were called upon to spend in these various types of work, let me take up this first one: Did you regularly inspect the entire property in your area for the purpose of eliminating safety hazards of all kinds, inspect machinery, lighting, floors, exits and storage of materials? Would you say that 30 per cent of your time is a fair esti-
[fol. 852] mate for your time spent in that work?

Mr. Bond: Object. It is speculative and guess work.

The Court: Sustained.

Q. Will you tell us how much time you spend in that work?

Mr. Bond: I submit the same objection. They have reports from him as to what work he did, and if they wanted to devote any time to percentage, they are the best evidence for accuracy.

The Court: He may answer.

A. There is no way I can answer that accurately.

Q. Your best judgment.

A. Our days vary. Some days you have an excessive number of accident reports to write up which require a great deal of your time. Other days when they run lighter you have more time to devote to patrolling and surveying the building and safety conditions.

Q. You don't feel that you can attempt to express any percentage of figures, any average amount of time spent on those various things? A. No, sir.

The Court: Announce a 5-minute recess.

Thereupon at 11:35 A. M., July 9, 1946, a brief recess was taken. The proceedings then were resumed as follows:

Mr. McRoberts: That is all.

Redirect Examination by Mr. Bond:

Q. Mr. Powell, I believe last night in asking you in detail your view in reference to reporting of safety viola-
[fol. 853] tions, Mr. McRoberts showed you a lot of reports. I will ask you to what they referred?

A. The reports Mr. McRoberts has shown me only refer to hospital reports as a result of accidents where the employee was referred to the plant hospital, and they are quite different from the ordinary accident or infraction report.

Q. What were they? And in case of an accident where an employee was referred to the First Aid room—and as you go along differentiate where there was difference between the procedure in an accident and infraction case.

A. In the accident in his cross examination, when an accident occurred we would not be around the scene of the accident and would periodically check into the First Aid Station to see what accidents had been reported. We would take the slip from the nurse and go out, and it was our instructions to contact the employee to determine how the accident was caused, then write up the accident report. In case of a hospitalization case we not only had to determine how the accident was caused but were required to file a recommendation and also instruct the employee to the best of our ability to help prevent a recurrence. Now then, on the infraction report, we were not to talk to the employee at all, it developed into a process of noting the employee's badge number on our record and turning that into his report with a report of what the infraction consisted of and turning that in at the end of the day.

[fol. 854] Q. So your duty to make observations to the employee, it only involved upon you to do that in case of accidents? A. That is correct.

Q. And in case of infraction that was not part of your duty? A. No, sir.

Q. And your reports in the case of infractions of safety rules, relaying of those reports to your supervisor or director, I will ask you if they would be along the form of

the same general nature as Plaintiff's Exhibit H which has been introduced?

A. Yes, sir, they would be approximately the same.

Mr. McRoberts: May I clear the record on this? This is not a review that you or any safety engineer made, this Plaintiffs' Exhibit H.

The Witness: It is a composite report that all the engineers on a certain shift made.

Mr. McRoberts: But this particular document is a report which one of the supervisors would make to the head of the department?

The Witness: May I identify that, please?

Mr. Bond: That is partial identification, but identify it further because that was sent to all engineers.

A. This gentleman Kemp, who referred it to Mr. Strickland, got this information from the engineers on the shift.

[fol. 855] Q. (Mr. Bond) Who was Mr. Kemp?

A. Supervising and safety engineer.

Q. And the document was submitted to the engineer?

A. Yes, sir, and the management.

Mr. Bond: Any such document you won't find in the—

Mr. McRoberts: Well, the document sent out.

Mr. Bond: That is right.

Q. (Mr. Bond) Now, going back to these reports of accidents, those are recommendations that he made in certain cases of these hospital cases. Did you have any voice in putting those into effect? A. None whatsoever.

Mr. Bond: I believe that is all.

Mr. McRoberts: That is all, Mr. Powell.

FLETCHER JOHN EIFERT,

of lawful age, produced, sworn and examined, testified on behalf of plaintiffs as follows:

Direct Examination by Mr. Bond:

Q. Will you state your full name, please?

A. Fletcher John Eifert.

Q. Are you married or single? A. Married.

Q. Would you mind stating your age? A. Forty-six.

[fol. 856] Q. What is your occupation?

A. I work for the railroad.

Q. Now? A. Right now I am on a furlough.

Q. Were you an employee of the United States Cartridge Company? A. Yes, sir.

Q. During the period that they operated this safety department out there? A. Yes, sir.

Q. In what capacity were you employed?

A. Railroad yardmaster.

Q. And prior to being so employed what experience did you have as a yardmaster in the handling of shipments?

A. As an actual yardmaster I had no experience.

Q. What was your railroad experience?

A. Twenty-six years of various departments in the railroad.

Q. You worked twenty-six years? A. Yes, sir.

Q. In various railroad departments? A. Yes, sir.

Q. Sometimes with the Terminal, was it?

A. All the time with the Terminal.

Q. With the Terminal Railroad Association? A. Yes, sir.

Q. Now then, in the first place, give us some descrip-

[fol. 857] tion of the facilities out there for handling inbound and outbound freight?

A. Well, we had a receiving yard where all inbound and outbound freight was placed for movement into the plant.

Q. Were there any switch tracks?

A. The plant was covered with switch tracks to all the main buildings.

Q. Any switch engines? A. Two.

Q. Any receiving stations to receive inbound freight?

A. All the buildings had loading and unloading docks.

Q. The loading is for outbound freight? A. Yes, sir.

Q. Was there any loading and unloading equipment out there? A. What manner of equipment?

Q. Well, didn't you sometimes in loading heavy articles have assistants, oh whatever they are?

A. The men that loaded the cars had lifts and trucks, and so forth.

Q. What was your job up there?

A. My job was to see that the cars were spotted at the respective buildings upon orders from my superior to what buildings they wanted them.

Q. And did you have general supervision over the yard?

A. I might say, yes, sir.

[fol. 858] Q. Now, then, whose employees maintained those facilities? A. U. S. Cartridge Company.

Q. Were you a U. S. Cartridge Company employee?

A. Yes, sir.

Q. And in reference to handling outbound freight, whose employees handled the ammunition out of the plant to these shipping facilities? A. In the cars, you mean?

Q. No, sir, handling. Where was the ammunition brought from in order to be shipped?

A. Brought down out of the building and loaded in the cars at the loading dock.

Q. Whose employees did that?

A. To my knowledge the Cartridge Company.

Q. And describe the way in which they were loaded into these cars?

A. At various times, going around the plant, they were put in there by hand or with conveyor or lift trucks.

Q. Were they blocked or braced? A. Yes, sir.

Q. And this same crew did that, I suppose?

A. Carpenters did that.

Q. Whose carpenters?

A. To my knowledge the Cartridge Company carpenters.

Q. And after the ammunition was brought down and [fol. 859] loaded into the cars as you describe, were these cars sealed? A. Yes, sir.

Q. Under whose supervision were they sealed?

A. The army.

Q. United States Army? A. Yes, sir.

Q. Now then, as yardmaster did you receive any billing covering the outbound movement of that ammunition?

A. The billing was sent to my office and passed through my hands, and in turn turned over to the railroad.

Q. Did you exercise any—did you perform any service in reference to that billing? A. What would you call it?

Q. Did you examine it or check it? A. That is right.

Q. For what purpose did you examine it and check it?

A. For correctness of the car number and initials.

Q. Did you examine the [routeing]?

A. At times, yes, sir, if I noticed a discrepancy.

Q. And by discrepancies in [routeing], what do you mean?

A. Sometimes a billing would come to my hands destined to Texas. May [may] [musroute] like N. P. or T. P. A railroad man would know the N. P. doesn't connect with the T. & P.

Q. Would you make that correction?

A. No, sir, I had no authority to make it.

[fol. 860] Q. What did you do?

A. Army transportation man.

Q. You would call it to his attention? A. Yes, sir.

Q. In performing that duty did you learn where the shipments went? A. Naturally.

Q. Where in the main did they go?

A. Well, I don't know where in the main they went, but they went to the proving ground, and Vinamont, Alabama, and various ports and sites of army installation.

Q. Could you give us an approximate estimate in your best judgment as to what percentage of them went outside of the State of Missouri?

A. Seventy or eighty per cent.

Q. And you are talking now about the ammunition that was produced at that plant? Is that it?

A. Yes, sir, also the waste and refuse which was part of the product of the plant—salvage.

Q. That was shipped out in the same way, is that right?

A. That is right.

Q. Now then, in addition to this information that you got from checking those bills of lading, I will ask you if in the markings—in the first place, how would they pack this ammunition?

A. I wouldn't know anything about that.

[fol. 861] Q. They were in some kind of containers, were they not? A. They were in containers and marked.

Q. Was there any different marking where it was a local shipment or outside shipment? A. On the container?

Q. Yes, sir. A. I couldn't say.

Q. Well, on the bill of lading?

A. The bill of lading was naturally destined to the town it was going to.

Q. And would the form and character of the document itself show the destination as well as the [routeing] on it, in many cases?

A. The document would show whether destined into the State of Missouri or out of the switching limits of Missouri.

Q. Is what you have stated in reference to handling of an outbound shipment of this ammunition, did that go along during the whole year or years the plant was operated? A. Yes, sir.

Q. You have stated the ordinary routine from the time you began until the plant stopped operating last August? Isn't that right? A. Yes, sir.

Q. You were there largely to assist operation as yardmaster? A. Yes, sir.

[fol. 862] Mr. Bond: You may cross examine.

Cross Examination, by Mr. McRoberts:

Q. Mr. Eifert, these bills of lading that you refer to as Government bills of lading?

A. The predominant part of them were, yes, sir.

Q. On outbound shipments, they were all Government bills of lading, were they not? A. Oh—

Mr. Bond: Perhaps he can state what were and what were not, and name, regulation and all of the salvage.

Q. (Mr. McRoberts) On the finished product.

A. The finished product, the ammunition went out on Government bills of lading.

Q. To the best of your recollection?

A. Yes, sir; and the salvage went out on a commercial.

Q. What do you mean by Government bill of lading?

A. It was a form of bill of lading issued by the Government. It stated on the top it was a Government bill of lading.

Q. Who was the shipper in that?

A. I don't recall the exact wording, it wasn't the Cartridge.

Q. It was Government, whether it said "Government" or [Ordinance] Department, it was some agency of the United States Government? Is that correct.

[fol. 863] Mr. Bond: Object to that, Your Honor, if you are going into that detail.

A. I think it said St. Louis Ordnance Plant. I may be wrong.

Mr. McRoberts: You asked him about the contents of the bill of lading and the destination shown, and I didn't object.

Mr. Bond: I will withdraw the objection. Go ahead.

Q. Who would be the consignee in this bill of lading?
A. Various army depots.
Q. Other branches of the Government? A. Yes, sir.
Q. And who made up the Government bills of lading?
A. The best of my knowledge, the Government office.
Q. Did you have anything to do with making them up?
A. No, sir.
Q. Did anybody connected with the United States Cartridge Company have anything to do with making them up, so far as you know?
A. As far as finishing the complete Government bill of lading, I don't know whether they did or not.
Q. Do you know of any connection that anybody with the United States Cartridge Company would have with making up those bills of lading? A. No, sir, I do not.
Q. And where we would get those bills of lading? From whom?
[fol. 864] A. I would get them from a Government sealer.
Q. A Government sealer, you mean some representative of the United States of America? A. That is right.
Q. And what would you do with those bills of lading after you were through with them?
A. After I was through I gave them to the Terminal representative.
Q. That is a representative of the Terminal Railroad Association? A. Yes, sir.
Q. Did anybody for the Government tell you to check those bills of lading for [routeing]?

A. Not specifically, no, sir.

Q. Or for any misdescription of any kind?

A. Major Stevens, head of the transportation department, asked me if I noticed anything [wrong] in the bill of lading to call it to his attention.

Q. Major Stevens was representative of the Government of the United States of America? A. Yes, sir.

Q. He was not an employee of the United States Cartridge Company? A. No, sir.

Q. And in accordance with this request, when you noticed anything wrong you called it to the attention of [fol. 865] whom? A. Major Stevens.

Q. And after he was gone?

A. I think there was a Lieutenant King.

Q. Any error you noted you called it to the attention of a representative of the Government? A. That is right.

Q. Did you call any of those errors to the attention of anyone connected with the United States Cartridge Company?

A. If they were errors that were happening often, I did.

Q. What sort?

A. By car numbers and initials, I called to the attention of Mr. Zimmerman, because it was my understanding—

Q. Wait a minute, testify to just what you know.

A. Well, I know then that the Cartridge Company employees turned those car numbers over to the Government representative before they were put on the bill of lading and in what manner they turned them over, whether written or oral, I don't know.

Mr. Bond: Turned what over?

Mr. McRoberts: Car numbers and initials.

Q. In other words, after the car had been loaded the car number and initials would be turned over by some employee of the United States Cartridge Company to some representative of the United States Government?

A. Yes, sir.

Q. Now these representatives of the United States Gov- [fol. 866] ernment that you speak of, they were right there at the plant all the time? A. Yes, sir.

Q. They had their office alongside the Government office in the main office building?

A. You might say so; they didn't.

Q. They had one end of the building and the company had the other end? A. That is right.

Q. And the Government also had its employees and army men and representatives stationed throughout the plant at different places, didn't it? A. I believe so.

Mr. Bond: Simply because I think it is immaterial and unnecessarily lengthening the record, I want to object to that line of testimony, and for the reason the authorities are uniform if the goods were produced for commerce and moved in commerce, whoever shipped them is immaterial whether the producer or somebody else.

Mr. McRoberts: It goes to the heart of the defense, whether they were goods produced for commerce.

The Court: Admitted subject to the objection.

Q. Now Mr. Eifert, you took those bills of lading that the Government furnished you and turned them over to the representative of the Terminal Railroad Association? A. That is right.

[fol. 867] Q. What did you do with the cars that were loaded out there and that were described in these various bills of lading?

A. Switched them out of the building they were loaded in and put them in the receiving and delivery yards.

Q. Where is the receiving and delivery yard?

A. Connected to the main part of the plant.

Q. It is on part of the plant grounds? A. Yes, sir.

Q. And by this receiving and delivery yard, that is just a railroad yard you are speaking of? A. Yes, sir.

Q. Where they had a number of switch tracks?

A. Yes, sir, fenced off from the main plant.

Q. And you or those two switch engines and your employees operating them, would deliver the cars to that yard? A. That is right.

Q. And you would then turn over the bill of lading to the Terminal Railroad Association? A. That is right.

Q. And then what happened to those cars?

A. They would pull them out and deliver to connecting line for destination.

Q. Terminal Railroad Association would pull them out?

A. Yes, sir.

Q. After the Terminal Railroad Association pulled them [fol. 868] out you don't know what happened to the cars of your own personal knowledge? A. No, sir.

Q. And from the time those railroad cars were delivered to this yard—did you call it a receiving yard?

A. Receiving yard.

Q. To this receiving yard, did you do anything more with them?

A. After they were delivered to the receiving yard?

Q. Yes, sir. A. No, sir.

Q. Your duties with respect to those cars ended?

A. Yes, sir.

Q. Did you have anything to do with selecting the destination of those cars? A. No, sir.

Q. Or the route by which they were to be shipped?

A. No, sir.

Q. Who did that? A. I imagine—

Mr. McRoberts: Just a moment. Object to his guessing.

Q. It wasn't you? A. No, sir.

The Court: If you don't know, don't answer.

Mr. McRoberts: That is all.

[fol. 869] Redirect Examination, by Mr. Bond:

Q. You mentioned about Mr. Zimmerman as the man to whom you reported certain car numbers and initials of outbound shipments under certain circumstances?

A. Yes, sir.

Q. Who and what was he, and what position did he hold?

A. Traffic manager of the United States Cartridge Company.

Q. United States Cartridge Company? A. Yes, sir.

Mr. Bond: That is all.

RALPH WILSON HUGHES,

of lawful age, produced, sworn and examined, testified on behalf of plaintiffs as follows:

Direct Examination, by Mr. Bond:

Q. Will you state your full name?

A. Ralph Wilson Hughes.

Q. Where do you live? A. St. Louis, 5547 Mimika.

Q. Are you married? A. Yes, sir.

Q. What is your age? A. Thirty-five.

Q. What is your occupation? A. At the present time?

Q. Yes, sir.

[fol. 870] A. Claim adjuster for the Transit Casualty Company.

Q. Were you an employee of the United States Cartridge Company during their operation of the St. Louis Ordnance plant? A. For a period of time I was.

Q. When did you go to work for them?

A. August 25, 1941.

Q. How long did you work with them?

A. Up to July 28, 1945.

Q. Well, in what capacity did you first go to work for them?

A. I was employed as a material control clerk in the Production Controls Department.

Q. Where was that located at that time?

A. That was located in the Paul Brown Building.

Q. That was in 1941? A. Yes, sir.

Q. Before they completed the plant out there, wasn't it?

A. Yes, sir.

Q. And what were your duties there?

A. My duties there were very brief. At the time I was hired the company apparently, to my knowledge, they were building an organization and they needed men, and the job I was hired for there was not any work ready for me at the time. So when I was interviewed by my supervisor Mr. Streck, he mentioned my past experience and lo-
[fol. 871] cated and discovered in my conversation that I had some shipping knowledge, so he put me on the task of trying to prepare shipping papers.

Q. What shipping papers did you prepare?

A. I don't know that what I prepared was ultimately printed or not.

Mr. McRoberts: Object to that, it is preliminary work and immaterial whether that may or may not have been used.

The Court: I can't see how it is relevant.

Mr. Bond: I won't insist on it at this time.

Q. You did make some preliminary shipping papers, bills of lading, and so forth? A. Yes, sir.

Q. Now then, what other job did you go to next?

A. I was placed in the shipping department after this interview with my immediate supervisor, or superior. Placed in the shipping department and remained in that department for my entire career at the plant. I will take that back, I was later transferred into the warehouse.

Q. You speak of shipping department. Were there one or two and by whom were they operated and were they ever consolidated? Tell us the facts about that.

A. Well, I was in the shipping department of the United States Cartridge Company, and the shipping department was also a shipping department maintained by the Army Ordnance Department.

[fol. 872] Q. Was there any relation between those two, the duties?

Mr. McRoberts: Let him describe the facts.

Mr. Bond: That is what I am asking him.

Mr. McRoberts: Was there a relation between the two? That may call for a conclusion of this witness.

A. Well, the work in preparing the papers was similar.

Q. Was there ever a time when they were consolidated?

A. I understand they were, yes, sir.

Q. In what year?

A. I don't recall the exact date or year.

Q. And thereafter were the employees of the departments joint employees or not?

Mr. McRoberts: If you know, Mr. Hughes.

A. What is that?

Q. Do you know of any employee who was a joint employee?

A. Not a joint, he was a Civil Service employee and later came to the United States Cartridge Company as a United States Cartridge employee.

Q. When he was a Civil Service employee who was he working for?

A. He was working for the United States Government.

Q. What do you mean by "he afterwards came over to the United States Cartridge"?

A. I was referring to the time when the shipping department of the Army Ordnance was absorbed or was taken [fol. 873] over by the United States Cartridge Company.

Q. Well, after that what was the status of the employees? For whom were they working?

A. To my knowledge they were working for the United States Cartridge Company.

The Court: You say "to my knowledge," do you mean you know that?

A. Well, the boys in the office told me they were United States Cartridge employees.

Mr. McRoberts: Ask that the answer be stricken.

The Court: Sustained.

Mr. Bond: I think a man in the department ought to know who his associates were working for.

Q. Now then, what other job did you have out there?

A. I was the shipping supervisor, and I worked in the stores as a supervisor, in the Central Stores Division. It was also a division in the Production Control Department.

Q. Did you for a period serve as yardmaster?

A. Yes, sir.

Q. Tell us about that. A. During Mr. Eifert's vacation.

Q. By Mr. Eifert, you mean the man who has just testified here?

A. That is right. At the time for him to take his vacation I served in his position as yardmaster while he was [fol. 874] away on his vacation.

Q. And you heard him describe his duties here. Did you perform those duties during his absence? A. Yes, sir.

Q. Did they include the checking of these outbound bills of lading? A. Yes, sir.

Q. And for errors in [routeing] and other errors?

A. Yes, sir.

Q. And in the performance of that duty did you become familiar with the destination of these outbound shipments?

A. Yes, sir.

Q. Where did they go?

A. To my knowledge I know that some of the cars the bills of ladings showed they were consigned to Rarifan Arsenal, Raritan yardmaster; the Army Service Forces' Depots, at Columbus, Ohio. And there was an army depot at Venetia, California—I don't recall the correct name. And there were others that I can't remember.

Q. At the time of that absorption that you were talking about, of the functions of the two shipping departments, were you given any duty with deference to the routine of that absorption? A. Yes, sir.

Q. What?

[fol. 875] A. I was assigned to the Ordnance Transportation Department to go down there and learn the details because when this—when my superior led me to believe that this department would be taken over, or this production work would be taken over by the United States Cartridge, all the employees that were down there might not go over to the Cartridge Company, they might decide to remain in Civil Service or just leave the whole organization altogether. So the company, wanting to be prepared, assigned me to the task of going down there and learning the whole detail. And I was privileged to examine the records and interview the men and ladies in this department to find out the duties, and to write them up and describe them so in the event the employees didn't come over to the United States Cartridge Company I would have to assist in building an organization to absorb all that work.

Q. In doing that investigation work, you say you had access to all of the records of the Army Ordnance. That is Army Ordnance shipping records and privilege to interview with the personnel? A. Yes, sir.

Q. In the performance of those duties did you come in contact with the billings they used to cover outbound shipment? A. Yes, sir, I was familiar with the papers.

Q. Did you learn from those papers the destination of [fol. 876] these shipments? A. Yes, sir.

Q. Tell us where they went.

A. Just as I named before, the shipment went to Army Service depots around the country, and naming the ones at Columbus, Ohio, Raritan, New Jersey, and Venetia, California. And some went to Savannah, Illinois, and Army Proving Grounds, I don't recall, there were many others.

Q. Did you have any connection with the question of packing and bracing of these shipments, or any duties in reference to checking up on that?

A. Yes, sir, as shipping supervisor for the United States Cartridge Company, responsibility was placed with me for the bracing of these cars.

Q. Containing ammunition?

A. That is right, and see that they were correctly braced. And all I could do was offer suggestions that the bracing be made stronger or weaker, whatever the case may be. And my suggestions were usually followed.

Q. When these cars arrived at destination, would any communication come back, pictures or other things that would come to your attention in reference to the condition of these cars being received at destination?

A. Yes, sir, the cars would be shipped out of the plant and we would hear from our superior that a car reached [fol. 877] a certain army depot and the car was damaged, and pictures would come back to the plant showing the damaged car, with the car number and depot that it had been received.

Q. Were those depots ever outside the State of Missouri?

A. Yes, sir, I would say 90 per cent of the times.

The Court: It is the usual time for recess.

Mr. Bond: I am through.

Mr. McRoberts: I have a few minutes cross examination

The Court: Announce a recess until 2 o'clock.

Thereupon at 12:30 P. M., July 9, 1946, a recess was taken to 2 P. M. The proceedings were then resumed as follows:

The Court: Proceed.

Mr. Bond: Mr. Hughes, I had two or three further questions to ask you.

Q. Mr. Eifert in his testimony mentioned some so-called commercial bills of lading covering outbound shipments of scrap. Did you as part of your duty with the shipping department, have anything to do with those bills of lading? A. Yes, sir.

Q. Tell us what it was.

A. As shipping supervisor bills of lading were prepared by—

Mr. McRoberts: Your Honor please, object to any testimony with respect to shipments of scrap, that comes ordinarily of goods produced in commerce within the meaning of the act.

[fol. 878] Mr. Bond: I expect to show it was and connect it up.

The Court: It will be admitted subject to the objection.

Q. Go ahead.

A. As shipping supervisor it was the duty of employees under my supervision to type these commercial [bill of ladings] upon scrap brass, and they were in turn delivered, on carload shipments, they were delivered to the yardmaster, and on truckload shipments they were delivered to the truckdriver and transported out of the City of St. Louis.

Q. What do you mean when you say "commercial bills of lading"?

A. Commercial billing is the bill of lading that is put out in an industrial form, that people have them printed. They come under the jurisdiction of the Interstate Commerce Law.

Mr. McRoberts: I ask that be stricken.

Mr. Bond: The interstate commerce part, he can strike out. The rest I think is proper.

Q. Whose commercial bills of lading were those?

A. Those were bills of lading that appeared in the name of the United States Cartridge Company.

Q. And what material moved under those bills of lading?

A. The scrap brass that was created at the plant there.

Q. In the manufacturing operation? A. Yes, sir.

Q. In the manufacture of bullets, brass was the material that was used?

[fol. 879] A. Yes, sir, that is cartridges, in the manufacture of cartridges brass was used.

Q. And this was scrap that was developed in that process? Is that it? A. Yes, sir.

Q. And the company shipped it outbound under these bills of lading? A. Yes, sir.

Q. To where?

Mr. McRoberts: Let the bills of lading speak for themselves.

Q. What did you have to do?

A. I was responsible for the employees that made them up. My name appeared on the bill of lading as shipping representative for the United States Cartridge Company.

Q. Are you familiar with the contents of these bills of lading?

A. Yes, sir, the ones that my name appears on, they were reviewed the following day and shipment was made by me.

Q. Do you now know of your own knowledge that some of these bills of lading you just described covered shipments out of the State? A. Yes, sir.

Mr. McRoberts: Object—

Mr. Bond: I think that is proper, Your Honor; that is information gained in the ordinary course of business, that [fol. 880] document coming under his jurisdiction. It isn't offered for the purpose of showing the terminology or application of the contract, it is to show the fact of the destination of these shipments and source of his knowledge.

Mr. McRoberts: Object. The document is the best evidence, Your Honor. They are available, as I understand it and some of them are here in Court.

Mr. Bond: No, sir, not this. This man says he has knowledge where the shipments went, and this is where he got that knowledge.

The Court: Admitted subject to the objection.

Q. Now you may answer.

A. On truckload shipments there were numerous shipments made to Western Cartridge Company at East Alton, Illinois.

Q. Do you know how many truckloads a day that would average?

A. I would say on the average of about 18 truckloads a day.

Q. By the way, where would the trucks get these shipments?

A. They would be picked up at the receiving docks at the various manufacturing units. You see, that process depends on my duty to see that it was loaded.

Q. And did you, in fact?

A. Yes, sir, I had it in my hands; in checking my employees and covering the plant I saw the brass was picked up and loaded on trucks at numerous times.

Q. Would the trucks bear markings or labels?

[fol. 881] A. Yes, sir, some bore the name of Anderson Motor Service Company, and some trucks just the tractor bore the name of Anderson Motor Company and the trailer didn't.

Q. Would you see them move out of the plant?

A. Yes, sir.

Q. Have you had any railroad experience?

A. Yes, sir, I have. I have worked for the Missouri Pacific and the Terminal Railroads.

Q. For the record, what is a bill of lading?

A. A bill of lading is a document used to transport material within a state or interstate, and some bills of lading can be used in doing either one, if it is a bill of lading that is approved by the Interstate Commerce Commission, I mean.

Q. May I ask you this: A bill of lading as used in railroad parlance, is that a document which shows the name of the shipper and the name of the consignee?

A. Yes, sir.

Q. And describes the commodity and route of movement? A. Yes, sir.

Q. And contains negotiating instructions?

A. That is right.

Mr. Bond: I believe that is all.

Cross Examination by Mr. McRoberts.

Q. Mr. Hughes, you testified to a taking over of certain employees of the Ordnance Department by the United [fo]. 882] States Cartridge Company? A. Yes, sir.

Q. If I understand the facts they are these—and you correct me if I am wrong: Up until the time you speak of, employees of the Ordnance Department of the United States Army did the clerical work of making out these bills of lading, and did the clerical work of making up certain other papers in connection with shipments of cartridges from that plant?

Mr. Bond: I think that calls for a conclusion and argumentative. I think he ought to state the facts.

A. Yes, sir.

The Court: He may answer subject to objection.

Q. After a certain day those employees ceased to be employees of the Ordnance Department and became employees of the United States Cartridge Company?

A. Yes, sir.

Q. After they became employees of the United States Cartridge Company, then the United States Cartridge Company through these employees wrote up these bills of lading?

A. Yes, sir, these Government bills of lading.

Q. Government bills of lading, that is what I was talking about. A. Yes, sir.

Q. And they also wrote up, in connection with each shipment, another paper or set of papers, which described the contents of the car. Is that correct?

[fol. 883] A. Yes, sir.

Q. I don't know whether you call that a daily sheet, they have different names, and that is what they refer to?

A. It is.

Q. But it was a sheet that told what particular box of ammunition, and the number of each lot it was it went into, and the particular car. Is that correct?

A. Yes, sir.

Q. And these same employees made up those papers?

A. Yes, sir.

Q. Now before these employees made up the Government bills of lading they would get from the commanding officer of the St. Louis Ordnance plant a Government shipping order, wouldn't they?

A. Yes, sir; in my experience working down there that was a blank order.

Q. From time to time the United States Army would issue a shipping order stating which lots of ammunition were to be shipped and where they were to be shipped to? Is that correct?

A. No, sir, I don't believe that is entirely correct. They were given blank orders for so much ammunition to be shipped to one depot.

Q. And those orders would state which lots of ammunition, whether armor-piercing, or tracer, or ball?

[fol. 884] A. Yes, sir.

Q. And also describe the lots themselves. Certain lots of ammunition had already been accepted, and they would say "ship these lots of ammunition to this Government arsenal or depot." Is that correct? A. Yes, sir.

Q. And those Government shipping orders would be sent either by the commanding officer or by somebody else for him? A. Yes, sir.

Q. By "commanding officer" I am referring to the officer of the United States Army who is in charge of the St. Louis Ordnance plant. There was such a person there at all times?

A. The way I understand, the orders came from the Transportation Officer in Washington.

Q. But they came through the commanding officer at the St. Louis Ordnance plant?

A. They were addressed to him, yes, sir.

Q. And with regard to the individual whose signature was on there, it was some officer or agency of the United States Army? A. Yes, sir.

Q. And then these employees of your department would make out the Government bill of lading from those orders?

A. At the time of that those employees were not in my department.

[fol. 885] Q. And whether it was in your department, those employees that came over and were working there, they made up the Government bills of lading from the Government shipping orders? A. Yes, sir.

Q. After they made up one of these Government bills of lading and filled in the blanks according to those instructions, what did they do with them?

A. You mean after the bill of lading was prepared?

Q. After it was prepared and they got it signed by some Government representative, didn't they? Or do you know?

A. Yes, sir, they were signed by a transportation officer.

Q. And a transportation officer of the United States Army, is that correct? A. That is right.

Q. And after they had been signed by the transportation officer of the United States army, what happened to them, if you know?

A. The bills of lading were transported to the railroad representative, to Mr. Eifert the one copy, and the rest were sent to the Terminal Railroad representative at the yard office.

Q. Those Government bills of lading were made in a number of copies, were they not? A. Yes, sir.

Q. And one copy would go to the Terminal Railroad?

A. Yes, sir.

[fol. 886] Q. And another copy would go to the consignee, wouldn't it? A. Yes, sir.

Q. That is, the Army depot or the Army arsenal, or wherever the Army was shipping those particular cartridges? A. That is right.

Q. And another copy would go to some other Government office? A. That is right.

Q. Did any of those copies go to the United States Cartridge Company? A. Not to my knowledge, no, sir.

Q. And whatever happened to them, they went to different Government agencies or offices? A. Yes, sir.

Q. Now those daily sheets that were made up, those were made up in duplicate copies or quadruplicate copies?

A. Yes, sir.

Q. And those sheets also were submitted to different Government agencies? A. Yes, sir.

Q. Were any of them sent to the United States Cartridge Company? A. No, sir.

Q. Or retained by them? A. No, sir.

[fol. 887] Q. You don't know anything of your own personal knowledge as to the reasons why these employees were transferred from the Ordnance Department to the United States Cartridge Company department?

A. The only thing I can say, their duties appeared similar.

Q. I am not asking you what their duties were, I am asking you about the reasons. A. I don't know.

Q. Approximately when was the transfer of these employees made?

A. I would say about the beginning of 1945, January, or the end of 1944.

Q. At the end of 1944 or the early part of 1945?

A. Yes, sir.

Mr. McRoberts: That is all. Thank you.

ARTHUR J. BENDA,

of lawful age, produced, sworn and examined, testified on behalf of plaintiffs as follows:

Direct Examination, by Mr. Bond:

Q. State your full name, Mr. Benda. A. Arthur J. Benda.

Q. Where do you live?

[fol. 888] A. 3441a Crittenden Street, St. Louis.

Q. Are you married? A. Single.

Q. What age? A. Fifty years old.

Q. What is your occupation?

A. United States Field Auditor.

Q. You are a field auditor for the United States Army Ordnance? Is that it? A. Yes, sir.

Q. Where are you now stationed?

A. 4200 Goodfellow, or 4300 Goodfellow.

Q. That is what is now called the St. Louis Administration Center, isn't it? A. Yes, sir.

Q. And was formerly near the St. Louis Ordnance plant?

A. Yes, sir.

Q. And that is the plant and those are the premises we are talking about in this case? A. Yes, sir.

Q. As field auditor for the United States Army Ordnance, you are in charge of certain records out there, are you not?

A. Yes, sir, in a general way. I am in charge of the administrative audit.

Q. And you have under your control the records of the [fol. 889] outbound shipment of ammunition from your plant during its operation as a war plant? A. Yes, sir.

Q. And I believe I had subpoena duces tecum served upon you to produce in this Court the records of the outbound shipments of ammunition from your plant, did I not? A. You did.

Q. And following the service of that [sunpoena] upon you, I called on you at the plant and you advised me that you had obtained permission to produce those records? Isn't that so? A. That is correct.

Q. Did you tell me anything about what an undertaking it would be to bring all the records covering all the ammunition, or can you tell the Court what it would be.

A. Well, it would be—it wouldn't be a physical impossibility, however I would judge that to bring in all of the records it would take about three or four truck loads.

Q. And so did we have an understanding then that you would take out a bunch of bills of lading with attached documents from the files for each year at random?

A. Yes, sir.

Q. And bring them down here as illustrative?

A. Yes, sir.

Q. Did you do that? A. I did.

[fol. 890] Q. Have you them here? A. I do.

Q. I believe you have them for the years—

A. 1941, 1942, 1943 and 1944.

Q. I believe 1941 was mostly in the period of construction, was it not? A. That is correct.

Q. And the real movement of ammunition began in 1942?

A. Yes, sir.

Q. Suppose, then, we start with 1942. A. All right.

Q. In the first place, suppose you describe to us what those records are that you have brought here in that folder, first telling us how you obtained that folder.

Mr. McRoberts: The record will [snow] by identification number what it is he is talking about.

Mr. Bond: Yes, sir. Let's identify these as a bundle of bills of lading, a sack of bills of lading with attached papers in a folder marked "WQ", and have the reporter identify them as "Plaintiffs' Exhibit I". Suppose you mark the folder for the time being. (The folder is marked as requested)

Plaintiffs' Exhibit I.

Standard Form No. 1058a
FORM APPROVED BY
COMPTROLLER GENERAL U. S.
AUGUST 26, 1942

UNITED STATES OF AMERICA

PI Ex I 7/9/46 tp

No. WQ- [redacted]

Bill to WAR DEPARTMENT [redacted]
(Department or Establishment and Bureau or Service)

[redacted]
(Appropriation chargeable)

[redacted]
(Mailing office)

[redacted], 19[redacted]
(Name and title of issuing officer) (Date issued)

GOVERNMENT BILL OF LADING

MEMORANDUM COPY

Received from [redacted]
(Consignor)

by the [redacted] (Name of transportation company) the public property hereinafter described, in apparent good order and condition (contents and value unknown), to be forwarded subject to conditions stated on the reverse hereof,

from [redacted] (Shipping point) to [redacted] (Destination)

by the said company and connecting lines, there to be delivered in like good order and condition to [redacted] (Consignee)

via [redacted]
(Route journey only when some substantial interest of the Government is subserved thereby)

MARKS	NUMBERS ON PACKAGES	NUMBER AND KIND OF PACKAGES	DESCRIPTION OF ARTICLES (Observe strictly carrier's freight classification. Avoid trade or technical names)	WEIGHTS *
[redacted] U.S. PROPERTY MILITARY Route Order No. WD 37707 War Dept., C of T.S. Sept. 16, 1942		[redacted]	[redacted] "This is to certify that actual weight of damage used in this car is 100 pounds, not included in the above weight." [redacted]	[redacted] "Actual"

[redacted] U.S. PROPERTY MILITARY Route Order No. WD 37707 War Dept., C of T.S. Sept. 16, 1942 | [redacted] | [redacted] | [redacted] "This is to certify that actual weight of damage used in this car is 100 pounds, not included in the above weight." [redacted] | [redacted] "Actual"

Pick-up service at origin was / was not by the Government. [redacted]

†{Size car ordered [redacted] ft. Size car furnished [redacted] ft. Date furnished [redacted] Initials [redacted] Car No. [redacted]}

TARIFF AUTHORITY
(To be filled in by general office rendering account)

S.O. [redacted]
AUTHORITY FOR SHIPMENT

[redacted]
(Name of transportation company)
Received subject to terms and conditions of the Railroad Company's form of Bill of Lading
(Date) F. E. [redacted] Agent

CERTIFICATE OF ISSUING OFFICER
(To be filled out when this bill of lading is issued for use by contractor in making shipment)

Contract No. ....., or Purchase Order No. ....., dated ....., 19....

(F. O. B. point named in contract) (Issuing officer)

(CARRIER'S RIGHTS TO SHIPPING CHARGES NOT AFFECTED BY FACTS SET OUT IN THIS CERTIFICATE)

MEMORANDUM COPY

Delivery service at destination was / was not by the Government.

* Show also cubic measurement for shipments via ocean carrier in cases where required.

† Furnish this information in case of carload shipments only.

☆ U. S. GOVERNMENT PRINTING OFFICE : 1942 16—26006-1

PROPERTY SHIPPED COPY

[fol. 892] Q. Referring to the folder marked Plaintiff's Exhibit I.

A. In the folders are copies of Government bills of lading showing movements of ammunition and other materials from Missouri to other points.

[fol. 893] Q. By "other points" you mean points outside of the State of Missouri?

A. As indicated on these copies of bills of lading, yes, sir.

Q. But they all refer to outbound shipments out of the State, do they not?

A. I wouldn't say that every copy of bill of lading in there would cover that answer. As I mentioned to you, Judge, at the time these were picked indiscriminately, some of these folders will contain inbound shipments and outbound shipments together. These bills of lading are filed by numbers numerically, and you wished me to pick them indiscriminately, and I did.

Q. And insofar as you got outbound shipments, they are all points out of Missouri?

A. I don't know. I didn't examine every bill of lading in the folder.

Q. Take the top one here, tell us what that is?

A. This is a copy of a Government bill of lading showing shipment of 300 boxes of smokeless powder shipping—it looks like 300 smokeless powder boxes shipping loose empty, used.

Q. It gives the weight?

A. Yes, sir, and shows the destination.

Q. In other words this document, who does it show as the shipper?

[fol. 894] Mr. McRoberts: These documents speak for themselves. I have no objection.

Mr. Bond: I am trying to get one in and ask him for a stipulation in reference to what the others would show and see if I can't avoid having all this material put in the record.

The Witness: This copy of bill of lading indicates that the issuing office was St. Louis Ordnance plant, St. Louis, Missouri.

[fol. 903] Q. Outside the State of Missouri you have records? A. Yes, sir.

Mr. Bond: Now then, will you let the record show that Mr. Benda is permitted to withdraw these three exhibits and that he has agreed to have photostats made of them and to mail sufficient copies to me for my use and the reporter's use and Mr. McRoberts' use?

Mr. McRoberts: You offer your exhibits in evidence?

Mr. Bond: Yes, sir, I have offered them in evidence.

[fol. 904] Mr. McRoberts: Is that all you have with this witness?

Mr. Bond: Yes, sir.

Cross Examination by Mr. McRoberts:

Q. Have you your 1944 file? A. Yes, sir.

Q. Mr. Benda, this Exhibit K is not quite complete, in that the top is torn off and in the place that is torn off there should appear the words "U. S. Government bill of lading memorandum." Is that correct?

A. Yes, sir, that is correct.

Mr. Bond: The carbon copy isn't torn, is it? This bottom paper, the carbon copy of the top paper?

A. It bears the same number and it is shown as a memorandum.

Mr. Bond: Perhaps, maybe in having your photostat made you could photostat the bottom one instead of the top one that is not mutilated.

May we also let the record show that any outbound shipment outside of Missouri that moved ammunition in 1945, moved under bills of lading similar to Plaintiff's Exhibit K?

Mr. McRoberts: Whatever the testimony of the witness is.

Mr. Bond: There was no change in form in 1945, was there?

A. It would still be Government bills of lading, Judge, I wouldn't know whether they changed the forms in the

Q. (Mr. Bond) Go ahead. And who does it indicate was the consignee.

A. It indicates the consignee was Carmo, Inspector of Ordnance Western Cartridge Company, East Alton, Illinois.

Q. And it describes the commodity shipped?

A. Yes, sir, as 300 empty used smokeless powder boxes.

Q. That wouldn't be a shipment of ammunition, would it? A. No, sir.

Q. The next one, then. State into the record what that is, who it shows as consignor, who was consignee, and destination and material shipped.

A. This is a copy of a Government bill of lading No. WQ 4,612,424. It shows the issuing office to be St. Louis [Ordbance] plant, St. Louis, Missouri. It shows the consignee as the Commanding Officer, Seneca Ordnance Depot, Kendall, New York, United States property, Military. It purports to ship 1056 boxes of small-arms ammunition. [fol. 895] That means small arms cartridges, loaded.

Mr. Bond: Now I will put this bill of lading in the record, and I wonder if we could stipulate that during the year 1942 there was a substantial movement of ammunition produced at this plant to out-state points on bills of lading similar in form as the one you now hold in your hand, Mr. McRoberts?

Mr. McRoberts: I think so. Just a moment. Mr. Banda, is this exhibit which I have in my hand a typical example of the type of bills of lading that was used in the shipment of a substantial part of the ammunition in the year 1942?

A. I would say so, yes, sir.

Mr. McRoberts: There is your testimony.

Mr. Bond: All right, I will have it marked and offer it in evidence. You said a substantial movement, didn't you?

Mr. McRoberts: I think it was in the question.

Q. (Mr. Bond) The fact is, you know that the big outbound movement was ammunition, don't you? A. Yes, sir.

Q. And that was true of every year except 1941?

A. Except 1941, and perhaps half of 1945, naturally.

middle of the year, or later, or not. I wouldn't know with-
[fol. 905] out checking every bill of lading in the entire year, if there was a change from this year to this year. I don't know about that, but all back bills of lading would follow some form or other indicated.

Mr. Bond: And it covered in 1945 a substantial outbound movement of ammunition to points out of Missouri?

A. I think so.

Mr. Bond: I want to formally offer in evidence Plaintiffs' Exhibits I, J and K. Those are the ones you are to photostat the bills of lading, just the top paper, and mail to me.

A. Except, Judge, this one where the U. S. Government bill of lading is cut off, the photostat will be made of this copy, but it will not bear this inked—

Mr. Bond: I guess you had better photostat the top one because it is torn, because Mr. McRoberts has explained the mutilation in the record.

[fol. 906] Mr. Bond: That is all.

Q. (Mr. McRoberts) Referring to Plaintiffs' Exhibit I, I see under the caption mark, in addition to the name Commanding Officer, Senaca Ordnance Depot, Kendall, New York, the words "U. S. Property, Military." Does that refer to a marking on the box or carton, or to what does that refer? A. I don't know.

Q. Before that I see the words, "Route Order No. TS 37707." To what does that refer? A. I don't know.

Q. And below, the words, "War Department C of TS, September 18, 1942." Do you know to what that refers?

A. No, sir.

Q. And down below under the caption, "Authority for Shipment," I see the letters and figures SO 6469-T-2, September 18, 1942. Do you know to what that refers?

A. I could guess, but I don't know.

Mr. Bond: I don't want him to guess.

Q. All of those records which you have produced here, including the three papers which have been offered in evidence as Plaintiffs' Exhibits I, J and K, are Government records? Is that correct? A. That is correct.

Mr. Bond: That will be marked plaintiff's exhibit.

The Witness: If you want a copy we will have a copy made for you for introduction into the record, but we can't give up that. It being Government records I just can't [fol. 896] do it, but a copy can be made.

Mr. Bond: Would it be satisfactory if we mark this "Plaintiff's Exhibit I," and you take it away with you and have exact copies made? Mail one to Mr. Phelan, one to Mr. McRoberts, and one to me.

The Witness: Yes, sir, you indicate to me and we will have photostatic copies made of that.

Mr. Bond: Yes, sir, that will be satisfactory, Your Honor.

The Court: That is right.

Mr. Bond: Just send the three copies to me and I will distribute them.

Q. (Mr. Bond) Now take the file of 1943. I show you here the top bill of lading on that file and ask you to describe that as you did the other. Give us the consignor and consignee shipment, describe the shipment.

A. This is a copy of the Government bill of lading numbered WQ 8,891,100. It shows the issuing office the St. Louis Ordnance plant, St. Louis, Missouri. It purports to ship to the commanding officer, Bluegrass Ordnance Depot, Ft. Estill, Kentucky, U. S. property, military, 848 boxes small arms ammunition. Small arms cartridges.

Mr. Bond: Now then, will you mark that "Plaintiffs' Exhibit J?" (Paper is marked as requested.)

Q. I will ask you, Mr. Benda, if this is representative [fol. 897] of a substantial movement of ammunition from the St. Louis Ordnance plant to points outside the State of Missouri during the year 1943? In other words, did a substantial quantity of ammunition move in that year to points outside the State of Missouri under bills of lading in this form?

Q. And property of the United States Government?

A. Yes, sir.

[fol. 907] Q. And under the control and supervision of the United States Government? A. Yes, sir.

Q. They are in the possession of the Government?

Mr. Bond: No, sir, they are in his possession.

Q. You are a representative of the Government, and as such they are in possession of the Government?

A. Government records and Government property.

Q. And they are not in possession or control of the United States Cartridge Company?

A. Not under their control.

Mr. Bond: The United States Cartridge Company has access to them, have they not?

A. Yes, sir, they have access to them.

Q. (Mr. McRoberts) How would they have access to those records?

A. They could go to the place where they are filed, because these bills of lading are filed numerically. They will cover some inbound shipments as well as outbound shipments, and in order to correct or check the record it may be that they would have to refer to the number of the box on the bill of lading in order to check with the records. That would be the way they would refer to them.

Q. Do they walk in there any time, or ask permission?

A. No, sir, they ask permission definitely.

[fol. 908] Q. And you grant them permission normally?

A. Yes, sir.

Q. Or refuse them if you see fit to do so? A. Yes, sir.

Mr. McRoberts: That is all.

Mr. Bond: That is all, Mr. Benda. Much obliged to you.

Mr. Bond: I have a very elaborate document here, Your Honor, entitled "Bullets by the Billion", issued over the signature of the St. Louis Ordnance Plant and the United States Cartridge Company and McQuay-Norris Manufacturing Company, the genuineness of which has been admitted, and from which I would like to read in evidence—I would like to have it marked for identification as an exhibit and read in evidence certain portions of it.

Mr. McRoberts: May I ask a question that may simplify it?

Mr. Bond: Yes, sir.

Mr. McRoberts: From your familiarity with the records, Mr. Benda, wasn't all or substantially all of the ammunition which was shipped out of the plant during the year 1943 shipped in bills of lading, Government bills of lading in the form of this Plaintiffs' Exhibit J?

Mr. McRoberts: I object to singling out piecemeal. I think the entire document ought to be offered, if at all.

Mr. Bond: It is a publication gotten out by the Publicity Department of St. Louis. I am offering the part bearing on the question of knowledge on the part of this defendant that the bullets were manufactured.

The Court: All right, read it, and you can offer any other that you want.

Mr. Bond: The portion I want to read occurs on page 1 and is as follows:

> "The first completed cartridges were accepted by [fol. 909] the Ordnance Department on December 8, 1941, the day after Pearl Harbor, and since that date over two billion rounds of ammunition have been manufactured and accepted by the Ordnance Department and shipped to the fighting forces all over the world."

Mr. Bond: Then I wish to read the following from one of the introductory pages that is marked with red:

> "The cartridges manufactured here are packed in several ways depending upon the needs of the army forces and use for which the cartridges are intended. Originally, all of our output of cartridges was packed in cartons and sent to ordnance depots where they were repacked, but now an increasing percentage of our cartridges are packed here for field service."

And following, also marked in red, on one of the subsequent pages:

> "We can visualize our ammunition in the hands of white-clad soldiers in the frozen North. We know it is used by half naked fighting men in [streaming] jungles and amid the torrential rains of the Tropics. We can understand why our ammunition must be made to function perfectly under all climatic conditions because whether in mud and slush, in desert [heart] or arctic cold the fighting man behind the gun depends on us for ammunition that will not let him down. Our cartridges go places. It would be inter-

Note

Blank Pages at this Point

esting and exciting to follow our ammunition to its ultimate destination and actually see it in action [fol. 910] against the enemy. We have heard from friends and relatives in military service how they have used the ammunition produced at the St. Louis Ordnance Plant, but few of us have known exactly how the cartridges were handled in order to reach our fighting men. After the finished ammunition is accepted by the Ordnance Department here at the plant, it is then shipped to another section of the Ordnance Department which in connection with the service of supply is responsible for the distribution of all materials of war, such as ammunition, guns, shells, planes and tanks to the military services in all parts of the world. Some of the ammunition goes to vast storage areas from which it can be quickly transported to the theatres of war. (skipping a paragraph)

Through the service of supply our calibre 30 and calibre 50 cartridges go everywhere in the world that our army forces use rifles and machine-guns—on the ground, in the air and on the sea. Our ammunition can be found on tanks, on plane, on jeeps, halftracks, armored cars, on ships, torpedo boats, and in the hands of antiaircraft fighters. Many of our employees who have sons, husbands and brothers in the Navy and Coast Guard will be happy to know that much of our ammunition finds its way into Naval Ordnance depots where it will be available to the various types of naval vessels and naval aircraft."

Mr. Bond: Now, mark this "Plaintiffs' Exhibit D", entitled "Bullets by the Billions," St. Louis Ordnance [fol. 911] Plant, containing the names of top officials of the Ordnance Department, of the United States Ordnance Plant, United States Cartridge Company, and McQuay-Norris Manufacturing Company, an elaborate publication with photographs and articles. (The publication is marked as requested.)

[fol. 932] As further showing knowledge on defendant's part, and for other purposes, I offer in evidence certain issues of a magazine or publication entitled "United States Cartridge News," published at the St. Louis Ordnance

Plant, and the genuineness of all of which has been admitted, being the publications for October 1, 1942, November 1, 1942, November 15, 1942, December 1, 1942, February 15, 1943, July 15, 1942, and September 1, 1942. And of these publications I am offering in evidence the portions which I read. Reading from the issue of November 1, 1942:

"It is now only too clear that every single small operation in the manufacture of a cartridge is vastly important, for now we know that a defective cartridge can stop one of our guns. We realize also because of this the man behind the gun may die. One defective cartridge may stop an anti-aircraft gun which could have brought down an enemy bomber. One defective cartridge may cause a tank to be captured. One defective cartridge may be the result of one operation carelessly performed. You get kind of a shaky feeling when you stop to think that every soldier, every sailor, every man in the air corps, every [fol. 933] machine, is depending upon you and me. For it takes bullets to stop the enemy, and the armed forces are looking to us for an ever increasing flow of ammunition. Most of us felt a surge of pride within us when we realize we, too, play an important part, not in this show but in that big show—the war. We are, the people who make it possible to operate the tanks, the jeeps, the half track squad cars, the anti-aircraft defenses, the machine guns and rifles in actual battle. We, the workers of the St. Louis Ordnance Plant, are the guys behind the guys behind the guns. It is a good feeling—a proud feeling."

Mr. Bond: There are a number of other extracts to the same effect which are offered to show knowledge of the purpose for which this ammunition was manufactured, which I will not—I will let the record [———] were read in evidence, but I will only read certain of them. This issue of July 15, 1942, this is one I want to read as if bears on the proposition of the safety department being interwoven with the war part.

"Most of us realize that working in a war industry, such as the St. Louis Ordnance, is more important

than working in a nonessential industry. Everyone of us should feel that this work matters not only to himself and his foreman, but his work is a vital part of the total war effort. The statement applies with [fol. 934] equal truth to the executive and porter, to the machine operator and file-clerk, the stenographer and inspector. You do not necessarily have to handle machines or cartridges in order to help make ammunition; but whoever you are, wherever you are in this great plant, you have been chosen to play a vital role in the production program."

Mr. Bond: In the issue of September 1, 1942, the paragraph marked with a red check, on page 2, let the record show was read.

Mr. Bond: On the issue of October 1, 1942, let the record show that on page 2, two extracts with a red check, red pencil check after them, were read in evidence.

Mr. Bond: The issue of November 15, 1942, on the front page, let the record show that three paragraphs indicated by red pencil checks, were read.

Mr. Bond: The issue of November 1, 1942, let the record show that part marked in red pencil on page 1, was read.

Mr. Bond: The issue of December 1, 1942, paragraph on first page, marked in red pencil, was read.

Mr. Bond: February 15, 1943, I offer in evidence so much of the first page as contains the biography of a man handling ammunition out of a box, entitled "St. Louis Ordnance Plant," and with the title at the top, "Unpacking our cartridges on aircraft carrier during invasion of Africa," and the writing on the bottom.

[fol. 935] Mr. Bond: Next, "photograph shows a sailor aboard an aircraft carrier unpacking belts of calibre 50 machine gun cartridges made in our plant. The cartridges are to be used by our fighters protecting troop ships en route to invasion of North Africa last November. The lettering on St. Louis Ordnance Plant, which is clearly seen on the packing chest behind the sailor gives proof that our cartridges played an important part in the success of the North African operations."

[fol. 899] A. Yes, sir.

Mr. McRoberts: Now as to the destination of these individual shipments, you do not attempt to testify as to where any particular shipment went?

A. That is correct.

Mr. McRoberts: But a substantial part of it, according to your information was shipped outside of the State to other Government agencies? A. That is correct.

Mr. McRoberts: To what particular party, you don't know? A. I don't know.

Mr. McRoberts: All shipments that were made were made on this form?

[fol. 900] A. Yes, sir.

Mr. Bond: I don't like that "other Government agencies", they were shipped to points outside of the State of Missouri.

Mr. McRoberts: That is what the witness testified to.

Mr. Bond: No, sir, he doesn't know that all went to Government agencies. Some went to Government depots and some to other addresses.

Mr. McRoberts: The record will speak for itself as to what he testified.

The Court: Let the witness say.

Mr. Bond: Of course, Your Honor, we are trying to cover, we are trying to make this illustrative of a substantial movement, that is all. And the substantial movement that I want it illustrative of is of ammunition to points outside the State of Missouri. And I am willing to concede that it was shipped in this way, in bills of lading in this form. Is that agreed to?

Mr. McRoberts: That bill of lading speaks for itself. The witness has testified that shipments of ammunition were made on the same bill of lading. And I am willing to stipulate that so far as we know they were shipped to the same or similar consignees.

Mr. Bond: All right. Let me have the one for 1944.

Q. (Mr. Bond) Taking the top one, tell us what that is. It is taken from the files of 1944,

[fol. 901] A. This is a copy of a Government bill of lading numbered WQ 6,832,350. It shows the name of the shipper as St. Louis Ordnance Plant, 4300 Goodfellow Boulevard, St. Louis, Missouri. It is marked, "Marked for U. S. Navy stock. Consignee, Supply Officer Naval Ammunition Depot, Crane, Martin County, Indiana, yard track". The destination is the same, Crane, Martin County, Indiana. "Reported to contain 1092 boxes of small-arms ammunition." Small army cartridges, loaded.

Q. And all outbound ammunition that moved out of the plant during the year 1944, moved under a bill of lading in similar form? A. Correct.

Q. And there was a substantial outbound movement of ammunition during that year? A. Yes, sir.

Mr. Bond: I ask that be marked "Plaintiffs' Exhibit K".

(The bill of lading is marked as requested.)

Mark these as my exhibits. And those publications, "United States Cartridge News," will be Plaintiffs' Exhibits E-1, E-2, E-3, E-4, E-5, E-6, E-7.

[fol. 992] GORDON B. DARBY,
of lawful age, produced, sworn and examined, testified on behalf of plaintiffs as follows:

Direct Examination by Mr. Bond:

Q. State your full name, please. A. Gordon B. Darby.

Q. Where do you live, Mr. Darby?

A. 3928 Chippewa, St. Louis.

Q. What is your occupation?

A. Service station operator.

Q. And are you married or single? A. Married.

Q. Did you formerly work at the St. Louis Ordnance Plant? A. I did, yes, sir.

Q. In what capacity? A. As a safety engineer.

Q. I believe during all the time you were safety engineer you never got any change in title. Isn't that right?

A. That is right.

Q. How did you get your job? Where did you get it, rather?

A. My original application was sometime before I went to work out at the plant as a safety engineer. I was to go to work for the plant as coordinator. However, a few days previous to when I was to report for work I understand there were some changes made in the department of coordinators, therefore it was quite some months later before [fol. 993] I went to work as a safety engineer.

Q. According to Plaintiffs' Exhibit A, Mr. Darby, you went to work as a safety engineer on March 21, 1943. Isn't that correct? A. I believe that is about the time, yes, sir.

Q. And your work terminated on August 31, 1945. That is when the plant closed? A. Yes, sir.

Q. And during all that time you were safety engineer?

A. That is right.

Q. Now in what unit or to what unit were you assigned?

A. Well, the first two weeks at the plant I believe I just made tours and was assigned to another man to be-

come more or less familiar with the whole setup of the plant.

Q. Had you had any previous experience in safety work?

A. No, sir.

Q. And in your application for the job were any special requirements demanded of you? A. No, sir, there were not.

Q. You were not required to have any special training?

A. No, sir.

Q. And to what unit of the plant were you sent?

A. I think it was about two weeks after I went to work there I was assigned to Building 104, which was 50 caliber ammunition manufacturing building.

Q. Who were the other two engineers with you?

[fol. 994] A. I don't remember the names of those men that worked on the other shifts.

Q. What shift did you work on?

A. It seems to me I went to work on that shift at that particular time. I am not sure whether it was midnight or the four to twelve shift.

Q. What were you required to do?

A. To patrol the building in general and inspect equipment throughout the building, also watch employees for infractions as to whether they were wearing the proper equipment, safety glasses, proper shoes in restricted buildings, the primer building, loading building of that manufacturing unit.

Q. And were you also required in the case of accidents to follow up on accidents?

A. Yes, sir, periodically we would go to the first aid room to see whether or not there had been any accidents, and pick up these slips that were made out by the nurses and, wherever possible, interview the injured employees.

Q. Now, going back to that part of your duties, that consisted of daily patrolling and inspecting report on infractions of safety regulations, that was your main duty?

A. Yes, sir.

Q. When you found any violations of safety rules or practices, what did you do?

A. If it was an employee, we went to the foreman, con-

[fol. 995] tacted the foreman to have the infraction corrected. If it was equipment we would also go to the foreman of that department, or the general foreman, whoever was handy, and make a request that it be rectified. Now

Plaintiffs' Exhibit K.

STANDARD FORM NO. [redacted]

FORM APPROVED BY COMPTROLLER GENERAL U.S. 1943

NO. WY-6832350

Pl Ex K
7/9/46 AT

CAR INITIALS AND NO.
NYC 913

NAME OF INITIAL TRANSPORTATION COMPANY (Switched by TP&W)

TRAFFIC CONTROL NOS.

COMPANY New York Chicago & St. Louis RR Co.

STOP THIS CAR AT FOR

†SIZE CAR IN FT. & INS. ORDERED	FURNISHED 40'6	†MARKED CAPACITY OF CAR ORDERED	FURNISHED 100	†DATE CAR FURNISHED	DATE [illegible]

FROM (SHIPPING POINT) St. Louis, Missouri

FROM (FULL NAME OF SHIPPER)
St. Louis Ordnance Plant
4300 Goodfellow Blvd., St. Louis, Mo.

MARKS
MARK FOR "U.S. NAVY STOCK"

as marked

RECEIVED BY THE TRANSPORTATION COMPANY NAMED ABOVE, SUBJECT TO CONDITIONS NAMED ON THE REVERSE HEREOF, THE PUBLIC PROPERTY HEREINAFTER DESCRIBED, IN APPARENT GOOD ORDER AND CONDITION (CONTENTS AND VALUE UNKNOWN), TO BE FORWARDED TO DESTINATION BY THE SAID COMPANY AND CONNECTING LINES, THERE TO BE DELIVERED IN LIKE GOOD ORDER AND CONDITION TO SAID CONSIGNEE.

T.C. No. 12

CONSIGNEE
SUPPLY OFFICER
NAVAL AMMUNITION DEPOT
CRANE(MARTIN COUNTY) INDIANA
YARD 2

DESTINATION
CRANE(MARTIN COUNTY) INDIANA

VIA (ROUTE JOURNEY ONLY WHEN SOME SUBSTANTIAL INTEREST OF THE GOVERNMENT IS SUBSERVED THEREBY)

SYCAMORE

CHARGES TO BE BILLED TO
Finance Officer, U.S. Army, Washington, D.C.

APPROPRIATION CHARGEABLE
Transportation of things - 1944

ISSUING OFFICE
St. Louis Ordnance Plant, St. Louis, Mo.

NAME AND TITLE OF ISSUING OFFICER
Lloyd H. Huff, Capt. Ord. Dept. T.O.
Transportation Officer

PICK-UP SERVICE AT ORIGIN WAS NOT (Insert "WAS" or "WAS NOT") BY THE GOVERNMENT OR ITS AGENT

INITIALS OF SHIPPER'S AUTHORIZED AGENT OR EMPLOYEE

*SHOW ALSO CUBIC MEASUREMENTS FOR SHIPMENTS VIA OCEAN CARRIER IN CASES WHERE REQUIRED.

PACKAGES NO.	PACKAGES KIND	DESCRIPTION OF ARTICLES (USE CARRIERS' CLASSIFICATION OR TARIFF DESCRIPTION IF POSSIBLE, OTHERWISE A CLEAR NONTECHNICAL DESCRIPTION)	NUMBERS ON PACKAGES	WEIGHTS*
		MILITARY		

CRANE(MARTIN COUNTY) INDIANA

VIA (ROUTE JOURNEY ONLY WHEN SOME SUBSTANTIAL INTEREST OF THE GOVERNMENT IS SUBSERVED THEREBY)

SYCAMORE

PICK-UP SERVICE AT ORIGIN WAS NOT (Insert "WAS" or "WAS NOT") BY THE GOVERNMENT OR ITS AGENT

INITIALS OF SHIPPER'S AUTHORIZED AGENT OR EMPLOYEE

APPROPRIATION CHARGEABLE
Transportation of things - 1944

ISSUING OFFICE
St. Louis Ordnance Plant, St. Louis, Mo.

NAME AND TITLE OF ISSUING OFFICER
Lloyd H. Huff, Capt. Ord. Dept. T.O.
Transportation Officer

*SHOW ALSO CUBIC MEASUREMENTS FOR SHIPMENTS VIA OCEAN CARRIER IN CASES WHERE REQUIRED.

PACKAGES NO.	PACKAGES KIND	DESCRIPTION OF ARTICLES (USE CARRIERS' CLASSIFICATION OR TARIFF DESCRIPTION IF POSSIBLE, OTHERWISE A CLEAR NONTECHNICAL DESCRIPTION)	NUMBERS ON PACKAGES	WEIGHTS*
		MILITARY		
2092	Box	Small Arms Ammunition (small arms cartridges) Loaded		120,12[illegible]
		Dunnage used		[illegible]
				120,[illegible]
		Free dunnage		[illegible]
				120,12[illegible]
				"actual"
		TRRA Car Seals: 796901-02		
		SPOPA-S-93293-4 11 Oct 44		
		Auth: No Charge		

CERTIFICATE OF ISSUING OFFICER

CONTRACT NO. OR PURCHASE ORDER NO. OR OTHER AUTHORITY FOR SHIPMENT _____ DATED _____

F. O. B. POINT NAMED IN CONTRACT _____

SIGNATURE OF ISSUING OFFICER Lloyd H. Huff, Capt. Ord. Dept. T.O.
By: N. Torrillo, T.C.

NAME OF TRANSPORTATION COMPANY (Switched by TP&W) NEW YORK, CHICAGO & ST. LOUIS RR Co.

DATE OF RECEIPT OF SHIPMENT

SIGNATURE OF AGENT F. E. SAWYER, Agent 10/30/44

MEMORANDUM COPY

7

PROPERTY SHIPPED

that sometimes could be done immediately, other times it required a work order which would have to be followed through by the man that succeeded me on the next shift and a report—however, we kept a written record of these different things that transpired and turned that into our supervisor at the end of the shift.

Q. In case you observed an employee in violation of the safety practices, or found some defective apparatus, you say you reported it to the employee's foreman or the foreman? A. Yes, sir.

Q. Or supervisor, production supervisor in that unit? A. Yes, sir.

Q. Did you do anything about correction?

A. No, sir, I had no authority to force a correction, but merely to request a correction.

Q. And having done that and then having reported it to this supervisor or foreman in your daily log, is that the full statement of your relation to the matter?

A. Yes, sir, that would be. It was taken in and put on the supervisor's desk and was viewed by him and later consolidated for the full shift and distributed among the employees in the safety department, and I believe some of [fol. 996] the manufacturing officials, among which are building superintendents and so on. Now in case of accidents, that was handled separately and that was handled definitely. Minor accidents, we would go to the First Aid and probably talk to the employee and get his version. Hospital cases and most cases you would report on what the injury was, would come back to me probably through my supervisor, which would be incorporated in the report I made out according to the survey that I had made.

Q. And going back to the ordinary matter of violations of safety regulations in employees or equipment, and to those reports that you made to your supervisor, would he make reports then on to the director in reference to that?

A. That was the consolidated report.

Q. And would they go to all safety engineers?

A. Yes, sir, they were not given to you directly, they were put in an open shelf or box.

Q. And by that way you could obtain one? Is that such a one? I am referring to Plaintiffs' Exhibit H.

A. Yes, sir.

Q. That reflects the manner in which you would ordinarily report several violations? A. Yes, sir.

Q. And the manner in which you would report what at-
[fol. 997] tention the foreman gave to that? A. Absolutely.

Q. And the manner in which your supervisor would pass that up to the director? A. Yes, sir.

Q. Now these machines that you patrolled and the buildings that you patrolled and employees that you observed—were the buildings, machines and employees concerned in the manufacture of these bullets? A. Yes, sir.

Q. Do you know all these men who are plaintiffs in this case?

A. I know part of them. There are some I never saw until today or yesterday.

Q. But you know a great many of them? A. Yes, sir.

Q. And you remember them as being at the plant and as being safety engineers?

A. Yes, sir, they worked in the same department I did.

Q. You got one of those books, I believe, "Your Job With the St. Louis Ordnance Plant?" A. Yes, sir.

Q. And you received this magazine that I have read from, in the mail? A. Yes, sir.

[fol. 998] Mr. Bond: I believe that is all.

Cross Examination by Mr. McRoberts.

Q. Were you given lectures on that book?

A. No, sir, I never attended a lecture. I have attended the supervisors' meeting, yes, sir.

Q. Who gave you your copy of this Defendant's Exhibit F?

A. I believe the supervisor, when I was employed; he gave it to me.

Q. And what did he tell you about this?

A. He told me to take that book, read it and study it, and that was the general rules for the safety department.

Q. Were you also furnished with a copy of this booklet which has been identified as "Defendant's Exhibit 1"?

A. Yes, sir, I believe that I was furnished one of those. We were given several of those books.

Q. You were given other bulletins from time to time?

A. Yes, sir, bulletins.

Q. And War Department and Ordnance Department bulletins that related to safety matters of different sorts?

A. The only bulletins I received along that line were

bulletins where they had several accidents in other parts of the country. The superintendent of my building in turn passed it to me to read.

Q. Was it part of your duties to make a report of accidents which happened to employees, and to make recom- [fol. 999] mendations for correction? A. Yes, sir.

Q. I have some which purport to bear your name. Were those reports which you made from time to time, some of your reports?

A. Yes, sir, some of those. The ones identified are the ones that have my handwriting and signature.

Q. How about some of these that have simply a typewritten signature?

A. I am not so sure about them, whether that is exactly as I wrote it.

Q. You don't deny it? A. I don't deny it.

Q. Now let me read some of these recommendations or corrections which you suggested. Will you tell me if that correctly describes what you did on these various occasions? First, 4/14/43, told Mr. Walker, foreman in this department, to instruct the men to work in unison with more attentiveness in the work in the future in the handling of heavy materials. A. That is right.

Q. And under 5/21/43: Talked with Mr. Crommie, general foreman of this department, and Mr. Jaccard, assistant superintendent of the building. Suggested a larger or different type guard be put on machines. To this they both agreed. Will issue work order. Is that correct?

A. Yes, sir.

Q. Do you recognize the initials M. J. H. at the bottom? [fol. 1000] A. That is probably a stenographer, I imagine.

Q. Well, we will pass that. Now 7/8/43, Employee was instructed that no matter what jams or breaks in a machine, to first cut power then see that machine is out of motion before attempting to release or fix any part; that her health is more valuable than equipment. A. It is O. K.

Q. 10/21/44, Employee was instructed that the foreman was his superior and he is expected to follow instructions. In this instance the responsibility for his ear condition falls fully upon himself. Also instructed by me to go to the safety stores and purchase a new pair of ear defenders and to wear them at all times when working on range. Is that correct? A. Yes, sir.

Q. And again, 7/8/43, Foreman instructed to instruct employee as to the manner in which these chests are to be handled and to be alert and attentive to his work.

A. Correct.

Q. Here is 6/17/43, Foreman instructed to [reinstate] employee as to proper methods of handling this material. Is that correct? A. Yes, sir.

Q. 9/20/43, Employee was instructed by foreman to be less hasty and move—some word which I can't make out—more observant in the future in doing his work.

[fol. 1001] A. Yes, sir.

Q. 10/2/43, Employee was reinstructed to always keep chain plate clean and use the utmost caution in handling plates and doing work.

A. That is not my writing. Wait just a moment. I will take it back, it is.

Q. And that one is correct, too, is it? A. Yes, sir.

Q. 10/30/43, Instructed injured to be more careful—

A. No, sir, that is not my writing.

Q. Is that your signature? A. No, sir.

Q. And this one? A. Yes, sir, that is my initial there.

Q. This one under date 8/3/43, I am of the opinion that this is an unsafe condition in the tank at the base of these machines. The employee must use a rag or sponge to wipe out the ~~soap~~, and bottom of tank has numerous small particles of brass which fall from cases during the process of manufacture. I believe a screen should be installed to catch these small particles. This would prevent the small cuts and puncture wounds suffered by employee. Is that correct? A. Yes, sir.

Q. 7/28/43, Foreman was instructed to impress upon employee the responsibility that he must carry in attempting [fol. 1002] and in doing work in a first-class workmanship manner. This employee corrected the condition at time of accident. A. Yes.

Q. On 7/28/43, supervisor was instructed that position is usually filled by male employee but due to labor conditions where females are replacing the males, the employee should be given instruction as to method and procedure in doing work without hazard to themselves or others. Is that right? A. Yes, sir.

Q. Now Mr. Darby, did you have occasion to make an audit of the building 117 with Mr. Ed Stoke?

A. Mr. Ed Stoke, I believe, was a roving supervisor. He would come in and make an audit.

Q. Did you help him make an audit?

A. Not necessarily. They would come in and make an audit of the building, and if anything was wrong you were called in on the carpet usually about it, afterwards.

Q. This memorandum says, "Audit was made by Mr. Ed Stoke, accompanied by Mr. Darby, safety supervisor of 117." Is that correct?

A. Yes, sir, on 117 Mr. Stoke would come in and several others of the supervisors would come in and say, "Well, I want to make an audit of your building."

Q. Did you make—

A. I accompanied him throughout all parts of the build-[fol. 1003] ing. He makes audits.

Q. And the recommendations were not made by you?

A. No, sir, the recommendations were made by him. I am supposed to see that they are corrected.

Q. Mr. Darby, was it part of your duty to regularly inspect the entire property in your area for the purpose of eliminating safety hazards of all kinds.

A. Yes, sir, we would make a tour of the building, attempting to make it usually after the start of a shift. You would proceed around the building and observe machinery, equipment and employees as you attempted to make a tour of the whole building.

Q. You inspected machinery, lighting, floors, exits and storage methods? A. Yes, sir.

Q. Was it also part of your duty to recommend changes such as additional machine guards, additional safety service, new storing methods and new equipment?

A. If in our opinion we felt it was necessary we made a request to the proper department head.

Q. Was it your duty to check manual movements of employees, pointing out unsafe practices to supervisors?

A. Yes, sir, just from our own observation, if we could watch an employee and felt that the way he was handling his work was hazardous, then of course it was up to us to [fol. 1004] have a [corrections] made.

Q. That was a substantial part of your work, watch these employees and observe the manner in which they were doing their work and to determine whether you

thought it was hazardous or not and make your recommendations to his superior for correction?

A. Yes, sir, that is right.

Q. Was it part of your duty to use your knowledge of safe practices and recommend changes to decrease working hazards?

A. That would be my knowledge, that would be my own personal opinion, yes, sir.

Q. And was it part of your duty to make reports recommending general safety procedure, not connected with a particular accident? A. No, sir.

Q. It was not?

A. No, sir, I had nothing to do with setting up of procedure.

Q. I don't mean setting up the procedures, but if in your work out there you thought that some operation was being conducted in a hazardous manner, even though no accident had occurred, you would make recommendation to change the procedure?

A. I would probably talk it over with the foreman of the department, and if I thought it was serious enough, make the same suggestion in writing to my supervisor, who in [fol. 1005] turn would take it up with the different departments.

Q. And you would decide whether you thought it was serious enough to take it up with your supervisor, or whether it was of sufficiently minor importance you could let it drop?

A. Not necessarily let it drop. If it was worth observing at all it was worth discussing with the supervisors.

Q. Was it part of your duty to hold meetings of the union and safety committees promoting adherence to safety regulations? A. No, sir, I never attended one.

Q. Was it part of your duty to see that injured employees received immediate attention and care?

A. If you happened to be there, yes, sir. I have accompanied several of them to the First Aid.

Q. Was it part of your duty to submit a written report of every accident, suggesting preventive measures?

A. Yes, sir.

Q. These reports from which I have just read, are all of them correct?

A. Yes, sir. Some of them were more serious. However,

the correction doesn't amount to anything on splinters and finger wounds. Those people we didn't see until after it was all over with.

Mr. McRoberts: I think that is all, Mr. Darby.

Redirect Examination by Mr. Bond:

Q. These reports in which he called your attention to the [fol. 1006] fact that you had issued instructions or made suggestions to employees were all in reference to accidents, were they not? A. Yes, sir.

Q. You never reprimanded an employee that violated safety rules or practice?

A. That is one of the things we were told, we had no authority to reprimand an employee. And I believe if I remember correctly you were subject to dismissal for doing that.

Q. And in these cases in which you reported on these accidents, many of which were serious, you made recommendations, did you have anything to do with putting those recommendations into effect?

A. No, sir, we had no authority outside of the suggestion.

Mr. Bond: That is all.

Recross Examination by Mr. McRoberts:

Q. Judge Bond referred to this booklet, "Your Job." When did you receive that booklet with respect to the time you were employed?

A. It seems to me that I received that book at the employment office. I am not quite certain as to that, whether I got it there or after I went to the plant.

(A paper is marked "Defendant's Exhibit 8")

Mr. McRoberts: If Your Honor please, this paper which I have identified as Defendant's Exhibit 8 is of the same type and character as similar exhibits which Your Honor [fol. 1007] has rejected upon objection, and I propose to question this employee with respect—this witness, with respect to this exhibit with particular reference to the booklet "Your Job." That booklet was offered at the time of employment, I take it, as being some sort of admission

of the defendant as to whether the employee was or was not on an hourly basis and entitled to overtime or subject to the Fair Labor Standards Act. I propose to show that simultaneously herewith the company took the position that this employee was an exempt employee, and that was brought to the notice of this particular plaintiff. I think it would go to the effect of any weight that might be given to the booklet itself. I don't think the booklet means anything because all it says, where you are subject to the act you will be upheld by the act. It is our contention that they are not subject to the act. We say that giving that book is perfectly consistent with taking the position that they are exempt. And we took the position at the time and have taken that position ever since. I don't know it is binding on the employee.

Mr. Bond: That has no reference to the booklet, the booklet is not referred to. It is a notice to employee that is made and signed, an agreement to certain things, and I say it is wholly irrelevant and [material] what he might have signed in reference to his status, under the Fair Labor Standards Act, that is covered by law and not by agreement.

The Court: Sustain the objection.

[fol. 1008] Mr. McRoberts: I take it the objection will be sustained with respect to any inquiry regarding this exhibit?

The Court: Yes, sir.

Mr. McRoberts: That is all.

AUBERT R. KETTENBRINK,

of lawful age, produced, sworn and examined, testified on behalf of plaintiffs as follows:

Direct Examination by Mr. Bond:

Q. State your full name. A. Aubert R. Kettenbrink.
Q. How old are you? A. Twenty-six.
Q. Where do you live? A. 1627 Tower Grove, St. Louis.
Q. Did you serve in the armed forces during the war?

A. Yes.

Q. What branch of service? A. Air Corps.

Q. Where did you see service?

A. Sicily, Italy and Africa.

Q. What was your job in the Air Force?

A. I was a flyer pilot.

Q. In the battles over Italy and Sicily? A. Yes, sir.

[fol. 1009] Q. What kind of a weapon did you use?

A. We used P-40 and P-47 aircraft.

Q. What kind of ammunition did you use in them?

A. Fifty calibre.

Q. Who issued you those bullets?

A. We got them from our Ordnance Department.

Q. Out on the field over there in Italy and Sicily?

A. Yes, sir.

Q. Did you receive any from the St. Louis Ordnance Plant? A. Yes, sir.

Q. How did you know it was from the St. Louis Ordnance Plant?

A. Because the boxes were marked "St. Louis Ordnance Plant, St. Louis, Missouri."

Q. And the ammunition from boxes so marked was issued to you at that place for use in an airplane?

A. That is right.

Q. And you have used it? A. Yes, sir.

Q. And you came through all right? A. Yes, sir.

Q. Is that a discharge button you have there?

A. Yes, sir.

Mr. Bond: That is all.

[fol. 1010] Cross Examination by Mr. McRoberts.

Q. Pretty good ammunition, wasn't it? A. It was lousy.

Mr. Bond: I didn't ask him that, Your Honor.

Mr. McRoberts: That is all, Mr. Kettenbrink.

ARTHUR CLARENCE KROPP

of lawful age, produced, sworn and examined, testified on behalf of plaintiffs as follows:

Direct Examination by Mr. Bond:

Q. State your full name? A. Arthur Clarence Kropp.

Q. Where do you live?

A. 24 Sylvester Avenue, Webster Groves.

Q. Are you married? A. Yes, sir.

Q. Age? A. 36.

Q. Were you formerly employed by the United States Cartridge Company? A. I was.

Q. At the St. Louis Ordnance Plant? A. Yes, sir.

Q. You entered their employment on the 2nd day of Deeember, 1941, according to Plaintiffs' Exhibit A, and you left their employment April 7, 1945. Is that right?

[fol. 1011] A. Yes, sir.

Q. During that time what positions did you hold?

A. I started with the U. S. Cartridge Company as adjuster trainee on September 7th. I became an adjuster in Building 103 on December 7, 1941, and I became a safety inspector on January 19, I believe is when I talked with Mr. Strickland.

Q. What was your conversation with Mr. Strickland in reference to employment in the safety department?

A. I had been injured in Building 103 and had been hospitalized in St. Luke's Hospital. After I was released from the hospital I went to Mr. Strickland in regard to just what the procedure was to get back to work. And in talking to him I made the statement I would like to be in the safety department. He agreed immediately that he would get me in the safety department and turned me over to Mr. McKitrick, the assistant director of safety.

Q. Were there any requirements made of you in reference to training? A. None whatsoever.

Q. You then went to work as safety inspector?

A. Yes, sir.

Q. Do you remember how long it was before there was any change in your title?

A. I believe it must have been almost two years.

Q. According to Exhibit A you remained in the safety [fol. 1012] inspector's department until the 27th day of February, 1944? A. Yes, sir.

Q. When the title given you was foreman, assigned?

A. Yes, sir.

Q. And you remained foreman assigned until March 25, 1945, which is two weeks before you left; when you were given a different title, Expediter and Coordinator? Is that right? A. Yes, sir.

Q. Now then, getting back to the start of your occupation, did you get one of those pamphlets, "Your job with the Ordnance Plant?" A. Yes, sir.

Q. Was there anything said to you about salary and what it was for?

A. You mean after I went to the safety department?

Q. Yes, sir.

A. Nothing was said about salary. I didn't know what I was to make until I received my first check.

Q. And you were safety inspector from January 25, 1942, until you came along here to be a foreman—no, sir, you did get raised. You started with a gross pay—in the safety department your gross wages were $46.15 a week?

A. That is right.

Q. Now then tell us, do you know if this book here containing instructions describing the duties of the safety engineers, which I have introduced as Plaintiffs' Exhibit [fol. 1013] F, was sent to all safety engineers? A. It was.

Q. And you got one? A. I got one.

Q. Tell me then, describe your duties as you performed them out there as a safety inspector or engineer. In the first place, in what unit were you located?

A. I was located at the start in Building 104, 50 calibre manufacturing unit.

Q. Go ahead and tell what you did there.

A. The job that I performed was mainly to inspect the building, the storage areas and the production departments for good housekeeping conditions, to inspect machines and among others to see the guards were in place, to inspect and observe personnel working on the machinery and around the machines, to make sure that they wore the proper safety equipment, and to visit the first aid stations periodically and pick up accident reports written by the nurses; to go out and contact a person who had had an accident, find out what the case was, to offer suggestions to prevent them from having a recurrence, write up the

accident report and turn it in to a supervisor at the end of the shift.

Q. That is a general statement of the duties you performed during all the time you were safety engineer or supervisor—I mean inspector, safety inspector or safety [fol. 1014] engineer? A. That is right.

Q. Sticking to the time when you were safety inspector or safety engineer and performing the duties you have just outlined, tell us what you would do when you found there would be any infraction of safety rules by employees, and also tell us what you would do in case of accidents, to differentiate between the two, if there is a difference.

A. In walking around through the plant each unit had nine different departments, and each department was supervised by a foreman of production. In observing an employee that wasn't following safety practices you would contact the foreman of that department and ask the foreman to correct the condition. In accidents, you might be anywhere in the unit when an accident occurred. After you picked up an accident report from the nurse you would go out and contact the employee and find out what the cause of the accident was and offer suggestions to prevent recurrence of the accident.

Q. So it was in case of accidents you would talk to the employee and make suggestions to the employee and make recommendations? A. Yes, sir.

Q. But in case of violation of the safety regulations resulting in accident, would you have any words with the employee?

A. No, sir, we were forbidden to talk to an employee in a condition like that, we would talk to the foreman.

[fol. 1015] Q. The responsibility of making the correction was with whom?

A. Foreman of the employee under which the employee was working.

Q. And would you then include that infraction that you had noted in your report to the supervisor? A. I would.

Q. Would he include it in reports to the director? The safety director? A. Yes, sir.

Q. And you in that case made mimeograph copies of those? A. Yes, sir.

Q. Similar to the one entitled "Plaintiffs' Exhibit H", is that right? A. That is right.

Q. Mr. Kropp, these computations which have been offered in evidence, you heard Mr. Harris describe those Exhibits A and B, and you heard him point out the fact that there frequently occurred instances in both those exhibits where the employee—where deductions had been made where the employee had not worked a full 40-hour week? A. Yes, sir.

Q. I will show you Exhibit A. Let me see if there are any in your case, first. No, I don't believe I see any of your case; but I believe you assisted Mr. Harris in making [fol. 1016] these computations, didn't you? A. I did.

Q. And tell us whether or not in these computations there are frequent occurrences [were] such deductions were made?

Mr. McRoberts: I think those computations will speak for themselves.

Mr. Bond: Well, he asked me when I asked Harris, his suggestion was that I not take the time to go through but have Harris say they frequently occurred. And I did. If that was proper practice there, it ought to be here.

Mr. McRoberts: And those papers are in evidence. They will speak for themselves.

The Court: Sustained.

Q. I will ask you if in cases where there were such deductions made, did you observe how the computation was made? A. Yes, sir.

Q. Tell us how the hourly rate was computed.

Mr. McRoberts: I think those documents speak for themselves.

Mr. Bond: The figures are there and in evidence, and I am asking him what the figures are in reference to the method of computation. He has been over them.

A. The gross weekly wage was divided by a 40-hour week, which would give an hourly rate of pay for the plaintiff or the employees.

Q. And that hourly rate was multiplied by the hours of less than forty that the employees worked?

[fol. 1017] A. That is right.

Q. And the result was his deduction? A. That is right.

Q. Now you say you participated in the computations which Mr. Harris made? A. I did.

Q. Was that same method used by Mr. Harris in computing the hourly rate on which you base your claim?

A. It was.

Q. Do you know all the plaintiffs in this case? A. I do.

Q. Personally? A. Personally.

Q. And do you know whether or not they were all in the safety department out there at the plant? A. I do.

Q. In what capacity? A. Inspectors and safety engineers.

Mr. McRoberts: You are not attempting by that answer to limit them to those capacities, are you?

A. No, sir, I am not.

Q. (Mr. Bond) Some of them became foremen?

A. Yes, sir.

Q. And some became supervisors? A. That is right.

[fol. 1018] Mr. Bond: I believe that is all.

The Court: Adjourn until tomorrow morning at 10 o'clock.

Thereupon, at 4:10 P. M., July 9, 1946, adjournment was taken to 10 A. M., July 10, 1946. The proceedings then were resumed as follows:

The Court: Proceed with the case on trial.

Q. (Mr. Bond) Mr. Kropp, I see here from Plaintiffs' Exhibits A and B that you served as a safety inspector until the 27th day of February, 1944, when you received the title of foreman. Upon receiving that title, what if any difference did it make in your duties?

A. There was no difference whatsoever.

Q. Did you continue to patrol as you did in the past?

A. I did.

Q. And to report as you did in the past?

A. I reported to a new superintendent. That is the only thing.

Q. Who?

A. Mr. Coyt, who was assistant engineer of the plant.

Q. Thereafter you reported to the assistant engineer?

A. Yes, sir.

Q. On the same forms that you used A. I did, yes, sir.

Q. And in the same manner that you had before?

A. Yes, sir.

Q. Both as to infractions of the safety rules and as to [fol. 1019] accident cases? A. Yes, sir.

Q. Now I will ask you, Mr. Kropp, I will show you here a document entitled Interdepartmental Memorandum and purporting to be signed by Mr. Clyde E. Strickland, dated May 2, 1942, and ask you what that is and what you know about it.

A. This is an interdepartmental memorandum that I received. I didn't receive this, I received one like it while I was serving as safety inspector out of training school at 3000 Locust Street, St. Louis.

Q. Is that Mr. Strickland's signature? A. It is.

Q. And who was Mr. Strickland?

A. Mr. Strickland was the director of safety at the United States Cartridge Company.

Mr. Bond: I ask that be marked "Plaintiffs' Exhibit L." (The Exhibit is marked as requested.) And I offer Plaintiffs' Exhibit L in evidence.

Mr. McRoberts: Your Honor please, I fail to see the relevancy of this exhibit.

Mr. Bond: It sustains our contention that the authority did not go below the director's office, and it is an express statement over the director's signature that all problems are to be routed through his office. And it is certainly relevant on the question of where the authority existed.

[fol. 1020] Mr. McRoberts: The trouble is, the exhibit doesn't prove that particular point, if it is offered for that purpose.

Mr. Bond: I think it does. It is a statement of the director in reference to how problems are to be handled, which seems to me relevant to his defense of exemption.

The Court: Admitted subject to the objection.

Mr. Bond: "Department of Safety." This particular one is addressed to Mr. Ledru Trimble.

"Subject: Safety Department Personnel. From Mr. Clyde E. Strickland, dated May 2, 1942.

"Effective Monday May 4th the Safety Department Personnel will be as follows: Mr. J. T. McKittrick will remain assistant director of safety. Mr. S. L. Hartling will be assistant to director. All problems of the Safety Department will be routed through these two men, and any orders, instructions or procedures of this department shall be followed. Your fullest cooperation is expected.

"The following men will be Chief Inspectors of Plants. No. 1 and 2:

Homer Hoffman
Robert Williams
Alfred Kemp
Paul Jamison
Paul Johnson

"These men will be responsible for the safety inspectors on the shifts which they supervise. Cooperation of inspectors is fully expected.

CLYDE E. STRICKLAND."

[fol. 1021] Mr. Bond: You may cross examine.

Cross Examination by Mr. McRoberts:

Q. Mr. Kropp, you were originally hired at the St. Louis Ordnance Plant in September of 1941? A. That is right.

Q. As a trainee. And I [believed] you worked until some time in January of 1942 on various hourly pay jobs? A. Yes, sir.

Q. And during all of that time while you were on an hourly rate you were paid for all overtime that you worked in excess of forty hours per week? A. Yes, sir.

Q. And during all of that time you worked a 48-hour a week shift, is that correct? Or substantially all of the time? A. Yes, sir.

Mr. Bond: Your Honor, this is an awfully involved question.

A. I don't really remember whether I did or not.

Q. The plant was working three shifts a day, wasn't it?

A. No, sir, not when I started.

Q. It was working three shifts a day while you were still on an hourly basis, wasn't it? A. No, sir.

Q. You were working 8-hour shifts six days a week?

A. Yes, sir.

Q. And you worked 8-hour shifts six days a week during [fol. 1022] all the time you were on an hourly basis?

A. No, sir, I was injured.

Q. While you were working, then.

A. While I was working, yes, sir.

Q. Disregarding any time that you were laid off?

A. Yes, sir.

Q. And then you were transferred to the safety department? A. Yes, sir.

Q. And what were you told as to what your hours would be as a safety inspector?

A. I wasn't told what my hours would be until after I had worked approximately three or four days.

Q. When you were transferred to be a safety inspector, were you told that you would work on the same shift with the men that worked there? A. Yes, sir.

Q. And the same number of days? A. Yes, sir.

Q. When you say you were not told your hours, you mean you were not told about reporting a half hour ahead of the shift until—

A. I was told what time to report, but I don't know whether that was a half hour before the regular shift or not, at that time.

Q. And you were not told that until a day or two or [fol. 1023] three after you started to work? A. No, sir.

Q. But you were told that you would work six days a week? A. Yes, sir, I was.

Q. And you were told that your salary would be $200 per month.

A. No, I wasn't at that time. As I stated yesterday, I didn't know what my salary would be until after I had received my first pay check. And at that time I found out what I was making. I didn't realize I was working on a salary basis until I had received about three pay checks because I was continuing to ring in a time-card and ring out a time-card, and I figured it was on the same basis as when I was an hourly employee.

Q. Well, you did realize you were on a salary basis and continued on a salary basis as long as you were with the company? A. Yes, sir.

Q. And your salary started at $200 a month and gradually increased until you received $280 a month?

A. Yes, sir.

Q. And the details of these increases are shown in the tabulation, Exhibit A? A. Yes, sir.

Q. Now, Mr. Kropp, when you were employed as a safety engineer you were furnished with a copy of the general instructions similar to Plaintiffs' Exhibit F, were you not? [fol. 1024] A. When I started—sometime after I had started in the safety department.

Q. About how long afterwards?

A. I would say it was a week after.

Q. And you were told that those were your instructions as to your duties and responsibilities, were you not?

A. Yes, sir.

Q. And among the duties which you were given by these instructions were to observe and correct unsafe methods and conditions, and to observe and correct any unsanitary or unhealthy condition? A. Yes, sir.

Mr. Bond: Object. What he is reading from is not in this exhibit. At least, I haven't been able to find it. Oh, I beg your pardon, I am wrong.

Q. How did you go about carrying out that particular part of your instructions?

A. As I said yesterday, the building in which I was first assigned, Building 104, had nine departments, each department was under a foreman of production. Whenever we found an unsafe condition in housekeeping or any machine we would contact the foreman in whose department the condition was found and request that it be corrected.

Q. To interrupt, that would also apply to unsafe methods of operation by the employees? A. Yes, sir.

[fol. 1025] Q. Unsafe manual operations, unsafe handling of tools and equipment? A. Yes, sir.

Q. And when you found any of these conditions you would go to the supervisor, to the foreman in charge of that particular part of the plant and you would tell him about the unsafe condition which you had observed? Is that correct? A. That is correct.

Q. And you would tell him what should be done about correcting it, and how it should be corrected or what particular— A. We would make recommendations.

Q. You would make recommendations to him as to the method which he should use in correcting the unsafe condition? A. Yes, sir.

Q. Those recommendations or those instructions you didn't give to the employees themselves? A. No.

Q. You dealt with supervision? A. That is correct.

Q. And you reported the conditions to the supervision and advised the supervision as to what should be done to correct it?

Mr. Bond: Object to the word "advise." He said "recommend."

Q. You recommended it? A. Yes, sir.

[fol. 1026] Q. Now that particular part of your work, in general that was the bulk of your work? The bulk of your time was spent in doing that sort of thing, wasn't it?

A. Yes, sir. On some days the bulk of our time was taken on accident reports.

Q. But on the average? A. On the average.

Q. On the average the greater part of your time was spent in inspecting and observing unsafe conditions, unsafe operations and recommending—to use that word—to supervision what should be done about correcting that condition? A. Yes, sir.

Q. Mr. Kropp, when you would go through the plant and you would see an employee performing some operations which you thought were unsafe, how would you determine whether it was unsafe or not? What would make you conclude that it was or was not unsafe?

A. I had been at the training school for three months training on these machines and we had been taught down there the proper method in which to work at these machines. That is the way I would determine whether it was unsafe or not.

Q. You would decide from your observation whether this man was doing his work in a safe or an unsafe way?

A. Yes, sir.

Q. If you thought it was unsafe, you would recommend [fol. 1027] correction to the supervisor? A. Yes, sir.

Q. Among your instructions, for example, was to prevent horse-play, I believe? A. Yes, sir.

Q. What did you understand the term "horse-play" to mean? That was considered an unsafe, hazardous prank, wasn't it?

A. Yes, sir, wrestling, throwing things at each other, cutting up with each other around machines.

Q. How did you determine when just ordinary high spirits ended and horse-play began?

A. If an employee was working, high spirits or anything like that would be considered horse-play. He was supposed to be working at the machines.

Q. Let me put it this way, Mr. Kropp: You would exercise your best judgment as to whether the thing that an employee was doing went over the line of safety and into dangerous horse-play? Is that it?

A. Anything that was out of the ordinary that was cutting up, or anything like that.

Q. Anything you concluded was out of the ordinary, you would consider as horse-play and therefore dangerous?

A. Yes, sir.

Q. And made recommendations for its correction?

A. Yes, sir.

[fol. 1028] Q. Those recommendations being made to supervision? A. That is correct.

Q. You were told to watch and see if employees working there operated at unsafe speeds, I believe.

A. That is correct.

Q. How did you determine whether a speed was safe or unsafe.

A. Later, speed limits were posted in the building for the high, low lift trucks and tractors, and the times they were to be operated were handed down to us.

Q. Originally, how did you determine? Was it a matter of your own judgment?

A. There was no running allowed in the plant whatsoever. Anybody running—

Q. I am talking about while they were doing their work at unsafe speeds.

A. That was only relevant to the vehicles that were operated in the production areas.

Q. Now Mr. Kropp, you too made reports from time to time of accidents that came under your jurisdiction, did you not? A. Yes, sir.

Q. And made recommendations as to what should be

done to correct the unsafe condition and sometimes issued orders and instructions in that connection, didn't you?

A. Yes, sir.

[fol. 1029] Mr. Bond: I submit—You asked him what was contained in the report. The report is the best evidence.

Mr. McRoberts: I will withdraw it.

Q. You made these reports from [——] to time, and these reports correctly describe what you did on the different occasions? A. Yes, sir.

Q. In the performance of those duties as a safety engineer? A. Yes, sir.

Q. Now will you follow this with me, and I will try to make this as speedy as possible to put into the record these statements of what you did on different occasions; and correct me if I am wrong or tell me if I am correct: 12/16/43, had large pieces of scrap sheet metal picked up from the floor. Suggest the two metal scrap boxes in rear be combined into just one large box, so that large pieces of metal will stay in box. Is that correct?

A. Correct.

Q. 8/28/43, this tractor was taken out of service and was taken to the garage at once to have the brakes repaired.. A. Is that the same?

Q. No, a different report.

A. I mean is it the same as this one I have my signature on? These typewritten reports are not identified.

[fol. 1030] Q. All right, I will confine it to the ones that have your signature on them. I am reading above your signature now: "This tractor was taken out of the service and was taken to garage at once to have brakes repaired." Is that correct? A. Yes, sir.

Q. 12/18/42, I have spoken to Mr. St. Mary about the need of adequate instructions be given to employees loaned from one department to another. These people should also be given gloves or any other protective devices used by the department. A. Correct.

Q. 12/30/42, This is the third accident of similar nature on this machine. With the help of millwright Machine Shop Department we have been trying to make a guard for this part of the jacket turn machines. A. Correct.

Q. Did you make recommendations from time to time

for the transfer or disciplining of employees in connection with safety matters? A. I think I did, yes, sir.

Mr. McRoberts: Then I will not bother you to read specific examples where that was done.

Q. And on numerous occasions you make recommendations for new guards or safety guards which had to be or should be applied to the different machines in operation? A. Yes, sir.

[fol. 1031] Q. You did this sort of thing on occasions, did you not? 2/10/45, Mr. Percival, superintendent of porters, was asked to reprimand employee for failure to report accident immediately. And again you asked that he also do this sort of [this]: IRP 43, requested that failure to report injury at time of happening. IRP 43 was a form used by the company to make record of any type of disciplinary action that was taken? Is that correct? A. Yes, sir.

Q. And you from time to time when an accident occurred instructed the employee yourself as to how to conduct himself in the future so as to avoid similar action, did you not? A. Yes, sir.

Q. And to sum up the type of work that you did out there, did you regularly inspect the entire property in your area for the purpose of eliminating safety hazards of all kinds, inspecting machinery, lighting, floors, exits and storage of materials?

Mr. Bond: Just a moment. Object to that as calling for a conclusion, and it is grouping a whole lot of things in one question. I think he ought to be asked what he did. Also object because it assumes what the purpose of the performance of the duty was.

The Court: He may answer.

A. Yes, sir, I did.

Q. Did you also recommend changes, such as additional [fol. 1032] machine guards, additional safety service, new storing methods and new types of equipment? A. I did.

Q. To whom would those recommendations be made? To your superiors, or to the production supervision, or both? A. Both.

Q. Did you check the manual movement of employees pointing out unsafe practices to the supervisors of such employees? A. I did.

Q. And make recommendations for their corrections?

A. Yes, sir.

Q. And using your knowledge of safe practices, did you recommend changes calculated to decrease working hazards? A. Yes, sir.

Q. Did you make report recommending general safety procedure not connected with a particular accident? What I am trying to do is to distinguish between the specific recommendations that you made in the case of each individual accident. But did you on occasions make some general recommendation that didn't arise out of an accident but arose out of your general observation and experience out there?

A. I don't remember any such instances.

Q. Did you ever hold meetings of unit and safety committees promoting adherence to safety regulations through employee cooperation?

[fol. 1933] A. I was an observer in the meetings, I didn't hold the meetings.

Q. Did you give advice, instructions and recommendations with respect to safety in those meetings? A. No, sir.

Q. Who did?

A. The meeting was under supervision of a chairman and a vice-chairman and recording secretary, and the discussion was all among the members in the meeting.

Q. Those were the employees, the workers and all?

A. Yes, sir.

Q. And you were there as a safety engineer to discuss safety matters with them?

A. We were not supposed to hold a meeting. We were not supposed to do anything unless a question was asked, and answer.

Q. In other words, you were there to answer questions with respect to safety matters that the workers and employees would ask?

Mr. Bond: Object to that form of interrogation. Let him ask him what he was there for.

The Court: Objection sustained.

Q. What did you do at those meetings?

A. We were observers, that is all. We were on the side line.

Q. What did you do with respect to any questions that [fol. 1034] were asked on safety matters?

A. Quite often we would take them to our supervisors of the safety department.

Q. If you knew the answer, did you give the answer right then and there? A. Give the answer.

Q. If you didn't know the answer you would go to your superior and try to find out? A. That is right, yes, sir.

Q. Did you also see that injured employees received immediate attention and care?

A. That was up to the medical department or the nurses in the building.

Q. Did you see that they got to the medical department or nurses? A. Yes, sir.

Q. Did you submit a written report of every case, suggesting preventive measures?

A. No, sir; only the hospital cases.

Q. You did that in the hospital cases? A. Yes, sir.

Q. By "hospital cases" you mean cases that went up to the company hospital to have a cut dressed or treatment of some sort given? A. Yes, sir.

Mr. McRoberts: I think that is all.

[fol. 1035] Redirect Examination, by Mr. Bond:

Q. Mr. Kropp, Mr. McRoberts called your attention to certain extracts in the number of some six or eight—the record will show the exact number—of your safety inspection reports as safety inspector at the plant. About how many of those safety inspection reports did you make during the four years you worked?

A. You mean accident reports?

Q. Yes, sir, accident.

A. There were some days when you made forty or fifty of such reports.

Q. You mean written ones?

A. Yes, sir, my total number must run up in the hundreds.

Q. And those reports are in the records of the corporation? A. Yes, sir.

Q. And the ones that he picked out and called your attention to here all relate to accidents, don't they?

A. Yes, sir.

Q. Where you spoke to the employee? A. Yes, sir.

Q. Now in the cases where you would observe infractions of safety rules or safety practices, would you reprimand or speak to the employee in those cases? A. No, sir.

[fol. 1036] Q. You would leave that disciplinary action to his foreman? Is that right? A. Yes, sir.

Q. And you would report it to your own supervisor who would pass it up to the director.

A. I believe I showed you an example of such report, "Plaintiffs' Exhibit H".

Q. Now in the cases where you made the recommendations that you called their attention to or at other times, did you have anything to do with putting those recommendations in effect? A. No, sir.

Q. Now in this matter of whether or not an employee—or making a decision as to whether or not an employee was engaged in an unsafe practice, did you have some standard safety rules out there? A. Yes, sir.

Q. Were you familiar with them? A. Yes, sir.

Q. And in determining whether or not he was guilty of an unsafe practice, you were guided by whether or not he conformed to those rules? Isn't that so? A. That is correct.

Q. And in reference to operation of machines, were you advised as to the correct way that a machine should operate?

[fol. 1037] Mr. McRoberts: Object. It is very leading and suggestive, cross examination of his own witness.

Mr. Bond: Well, I don't know. It is directing him to a matter.

(Last preceding question was read)

The Court: He may answer.

A. I was.

Q. And whether or not you reported an infraction was whether or not that practice was followed? Isn't that so?

Mr. McRoberts: Object as leading.

The Court: He may answer.

A. I would say, yes, sir.

Q. Did you have any part in the making of these safety rules? A. No, sir.

Q. Did you have any part in the determination of how those machines should operate? A. No, sir.

Mr. Bond: I believe that is all.

Recross Examination by Mr. McRoberts:

Q. These safety rules that you speak of, those were rules made by the management and not by you safety engineers?

A. I don't know who made the rules, sir.

Mr. McRoberts: That is all.

Mr. Bond: That is all.

[fol. 1038] WALTER L. SCHULTE,

of lawful age, produced, sworn and examined, testified on behalf of plaintiffs as follows:

Direct Examination by Mr. Bond:

Mr. Bond: I am calling Mr. Schulte as an officer of the defendant corporation for cross examination as my witness, and for the production of records.

Q. Mr. Schulte, state your full name, please?

A. Walter L. Schulte.

Q. And where do you live?

A. 449 Foreston Place, Webster Groves, Missouri.

Q. What is your occupation? A. Controller.

Q. For what corporation?

A. United States Cartridge Company.

Q. How long have you held that position?

A. Over five years.

Q. All during the period of operation of the St. Louis Ordnance plant?

A. I will correct that. I have been Controller since December 1, 1943.

Q. Oh, I see. Prior to that were you in the employ of the company? A. Yes, sir.

Q. And in what capacity?

[fol. 1039] A. Assistant Controller.

Q. So all your employment has been in connection with the records and files, or at least that has been part of your duty? A. Yes, sir.

Q. Now I believe I have caused to be served upon you a subpoena duces tecum asking you to produce, among other things, the records of all inbound shipments of material into that plant during its operation. Is that right?

A. Yes, sir.

Q. And I called upon you in reference to your compliance with that subpoena? A. Yes, sir.

Q. And we discussed the volume of records and I told you that I discussed that question with your counsel, and you made it clear to me that they were very voluminous, didn't you? A. That is correct.

Q. And bringing all the records covering all independent shipments into that plant would be, if not impractical, a very burdensome, difficult operation? A. That is right.

Q. And so we selected illustrative records, did we not?

A. That is correct.

Q. As to certain leading materials. I believe we took [fol. 1040] brass, lead, steel and powder. A. Yes, sir.

Q. As being among the important raw materials that were used by the plant in the manufacture of bullets. Isn't that right? A. That is right.

Q. Now taking up the brass first, have you there the illustrative records that were picked out? A. Yes, sir.

Q. I believe we found that some of those purchases of brass were made by the United States Cartridge Company and some of the purchases were made by the Army Ordnance, isn't that so? A. That is correct.

Q. You have brought in records covering both?

A. Yes, sir.

Q. Now describe for the record the nature and character and the amount of the records which you have brought in here in reference to inbound shipments of brass paid for by the United States Cartridge Company, stating where they came from and who they were bought from.

A. I have a purchase order covering 16,000,000 pounds of coil brass in the amount of $2,720,000 to the Western Cartridge Company, East Alton, Illinois.

Q. Go ahead.

A. This brass was paid for by a check drawn on funds furnished by the United States Government and received—

[fol. 1041] Q. Wait a minute. I asked you first about the purchases made by the corporation. That was paid for by your corporate check, wasn't it?

A. It was paid for by a corporate check drawn on a special advance fund on funds furnished by the Government.

Mr. McRoberts: Let the witness finish his answer.

Mr. Bond: The source of these funds doesn't appear from the records.

Mr. McRoberts: The witness knows what the facts are.

Mr. Bond: I am limiting my cross examination to certain features. He is an adverse witness, and I ask him now to tell what is in the records and he is putting in facts that do not appear on the records, and I object.

Mr. McRoberts: Let the records speak for themselves.

Q. Does the source of that money speak from those records that you have in front of you there? A. It does.

Q. Where? A. Here.

Q. And the United States Cartridge Company special account, Contract WD, according to this record shows that followed a check "United States Cartridge Company special advance account, Contract WD 491." A. Yes, sir.

Q. And that was the check used in payment for that ma-
[fol. 1042] terial? A. That is a copy of the check.

Q. And the material was purchased by a department of the United States Cartridge Company?

A. That is correct.

Q. And shipped on your instructions into the plant? Is that right? A. That is correct.

Q. From East Alton, Illinois? A. That is correct.

Q. Now then, have you any more such?

A. I have a shipment of 432 coils of sheet bronze from the American Brass Company, Waterbury, Connecticut.

Q. And that was received in the plant, was it?

A. Received in the St. Louis Ordnance plant.

Q. Tell us some more. Have you any more, or are they all on brass?

A. I have receiving inspection reports covering numerous shipments of brass received from the Bridgeport Brass Company, purchased by the United States Government.

Q. You put in all you have on the purchases from the American Brass Company and Western Brass Company, have you?

A. No, sir; there is a shipment received from the Chase Brass & Copper Company, Waterbury, Connecticut.

Q. You and I dictated a memorandum of what you were [fol. 1043] to bring in, didn't we? A. Yes, sir.

Q. That first one, which one have you described here? Look at the memorandum and check it for me. Suppose you follow that memorandum?

A. This is the first one that appears on the list here. Here is one here, but they are not in order.

Q. Suppose you describe that one, then.

A. I have a copy of a purchase order to the Western Cartridge Company, East Alton, Illinois, covering 14,370,000 pounds of brass for calibre 50 case cups.

Q. From where?

A. From the Western Cartridge Company, East Alton, Illinois.

Q. Is there a check in payment there?

A. Copy of the check is not here, no, sir.

Q. All right, now, take the next item on that list.

A. I have a purchase order to the Western Cartridge Company, East Alton, Illinois, for 16,000,000 pounds of brass for 30 calibre cartridge cases in the amount of $2,720,000.

Q. Where did that come from? A. East Alton, Illinois.

Q. And what is the next check, the next item?

A. I have a copy of a purchase order to the Western Cartridge Company, East Alton, Illinois, covering 3,900,000 pounds cartridge brass for calibre 30 case strip in the [fol. 1044] the amount of $612,250.

Q. Are there any other items there on brass bought by United States Cartridge Company?

A. I have a copy of a check in the amount of $273,803.86.

Q. With the same notation on it as you just read in the record? A. That is right.

Q. Covering what? Is that a different shipment?

A. Covering a different shipment.

Q. What is the shipment?

A. I don't have the total quantity here computed, but it represents $273,803.86.

Q. From where?

A. From the Western Cartridge Company, East Alton, Illinois.

Q. And shipped into the plant in Missouri. Is that right? A. That is right.

Q. Did it come by rail or truck? A. Truck.

Q. Would it be that Anderson Trucking Company?

A. That is correct.

Q. Is that all you have on brass? A. No.

Q. Oh, you have some bought by the Government on brass?

A. I have the receiving and inspection reports on brass purchased by the Government. That is all the papers I [fol. 1045] have on that.

Q. Some brass. That brass you are talking about now, that was bought by the Government? A. That is not.

Q. Oh, isn't it? This file of papers you have now covers purchase of brass or consists of receiving and inspection reports covering receipts of brass from the Bridgeport Brass Company of Bridgeport, Connecticut? Isn't that right? A. Yes, sir.

Q. The shipments being made from Indianapolis, Indiana. Is that correct? A. That is correct.

Q. And the material is described in the reports, and there is a notation in the corner, "purchased under purchase order No. 'Government free issue'"?

A. That is correct.

Q. That means it was bought by the Government and came into the plant. A. On a free issue basis.

Q. That covers brass, doesn't it?

A. Well, there are three additional here.

Q. These are bills of lading. Well, just tell us what they are, the three of them. Bills of lading?

A. I have copy of a check, bills of lading, invoices and receiving reports covering shipment of 432 coils sheet [fol. 1046] bronze from the American Brass Company, Waterbury, Connecticut.

Q. All right.

A. I have a copy of a check and bills of lading, and invoice and receiving report covering 598 coils of brass from the American Brass Company, Waterbury, Connecticut. I have copy of a check, receiving report and bills of lading, and invoices, covering 637 coils of sheet brass from the Chase Brass & Copper Company, Waterbury, Connecticut.

Q. And those checks bear that same notation that we read in the record? A. That is correct.

Q. And they relate to purchases made from these companies as you described by the United States Cartridge Company? A. That is correct.

Q. Now, then, I believe the fact is, Mr. Schulte, that these papers which we have just offered in evidence are illustrative of the purchases of brass during the period of operation of this plant? A. That is correct.

Q. And that if all the records were produced it would show a very large movement of this material from points outside the State of Missouri both on purchases by the corporation as you described and on Government free issue purchases as you have described? A. Correct.

[fol. 1047] Mr. McRoberts: Are you offering those papers in evidence?

Mr. Bond: No, sir, I am not going to do that. I don't want to burden the record with the material.

Mr. McRoberts: You made a statement a while ago of these things you would offer in evidence. I think the record should have—

Mr. Bond: I say we brought them down here as illustrative, and I have had your controller state the character of them into the record, and I think it wouldn't be necessary to go beyond that and burden the record with all of this material, which would be very difficult to assimilate in any record or to incorporate in any record, which I do not think it is necessary.

Mr. McRoberts: I have no objection to typical copies of these papers being offered in evidence and the witness testifying that they are typical, but I do object if the record is going to be left simply with a summary statement as to what these documents are.

Mr. Bond: Well, I suppose if you insist on having these tabulations in the record I will have to put some of them in, but I cannot see what purpose it is. If there is any matter or description on these papers that you think is helpful to your defense, that the witness hasn't pointed out or I haven't read into the record, I would be glad

to have you do so. I have put in all that these records [fol. 1048] show, that I think have a bearing for the purpose of which I am offering them. If there is anything in them which you think has a bearing on your defense, I ask you to point it out. But do you think, Your Honor, that we ought to go further than that and put in all of this material or even part of it in the record, when it is purely a collateral question in the case?

The Court: Am I expected to answer?

Mr. McRoberts: I suggest perhaps the Court would like to control the matter somewhat—

Mr. Bond: Well, you won't agree that there can be stated into the record what the records show without putting in the actual records themselves.

Mr. McRoberts: I am not insisting that all papers go on. I have no objection to a typical one of this file being offered in evidence and the witness testifying whether it is or is not typical of the balance and a similar procedure being followed with respect to the other documents.

Mr. Bond: That will take a whole lot because here on brass alone there will be 6 or 7, and there are 4 or 5 others. There will be 25 or 30 of these tabulations that will have to go into the record even if we only use the top paper. And if we use the whole file it would make 50 or 60 pages of material altogther. I can't understand Counsel's purpose exactly but I suppose I will have to be guided by it.

The Court: It is time for recess. I wonder if Counsel [fol. 1049] cannot come to some agreement on that, just what is necessary to put in? Counsel themselves ought to be able to have an agreement.

(Brief discussion by Counsel off the record.)

The Court: Announce a 5-minute recess.

Thereupon, at 11:15 A. M., July 10, 1946, a brief recess was taken. The proceedings were then resumed as follows:

Mr. Bond: Where are those records we have assembled together? (The witness procures some papers.)

Q. (Mr. Bond) Mr. Schulte, I believe during recess we have selected from the material that you brought down here certain documents which we think can be used as typical. Is that correct? A. That is correct.

Q. Now then, here are the ones that we took, covering —we were talking about brass. We will stick to the brass for a moment, covering brass. In the first place, how many typical documents have we there? (Witness produces some papers.)

Mr. Bond: I will have those three documents marked for identification as "Plaintiffs' Exhibits M-1, M-2 and M-3.

(The documents were marked as requested.)

Plaintiffs' Exhibit M-1.

Pl. Ex. M1

3 TRIPLICATE

GENERAL ACCOUNTING DEPT.

THE UNITED STATES CARTRIDGE COMPANY
ST. LOUIS ORDNANCE PLANT
ST. LOUIS, MISSOURI

PURCHASE ORDER

PURCHASE ORDER NO. 11/20/44 AP
ST. L. B 53625

DATE 9/23/44

TO. WESTERN CARTRIDGE COMPANY

ADDRESS. EAST ALTON, ILLINOIS 2920

FACTORY LEDGER CONTROL ACCOUNT 6000
EXPENSE A/C
EXPENSE A/C

ENTER THIS ORDER IN ACCORDANCE WITH THE TERMS OF YOUR BID DATED _____ AND IN CONFORMITY WITH TERMS OF THE UNITED STATES GOVERNMENT CONTRACT W-ORD-491 AND WITH CONDITIONS AND INSTRUCTIONS ON THE REVERSE SIDE HEREOF. ANY CHANGE MADE IN THIS PURCHASE ORDER EXCEPT UPON WRITTEN AUTHORITY FROM OUR PURCHASING AGENT WILL RENDER IT VOID. A VARIANCE IN QUANTITIES NOT TO EXCEED _____ % OF THE STATED AMOUNT WILL BE ACCEPTED AS COMPLIANCE WITH THE TERMS OF THE PURCHASE ORDER.

CERTIFICATION

THE UNDERSIGNED PURCHASER HEREBY REPRESENTS TO THE SELLER AND TO THE WAR PRODUCTION BOARD THAT HE IS ENTITLED TO APPLY OR EXTEND THE PREFERENCE RATING ____1____ FOR ALL ITEMS SHOWN ON THIS PURCHASE ORDER, THAT SUCH APPLICATION OR EXTENSION IS IN ACCORDANCE WITH PRIORITIES REGULATION NO. 3 AS AMENDED, WITH THE TERMS OF WHICH THE UNDERSIGNED IS FAMILIAR, AND THAT THE MATERIAL ORDERED HEREIN IS TO FILL ORDERS IN GROUP CLASSIFICATION:
ARMY: 8.20 AMMUNITION (SMALL ARMS BELOW 20 MM).

ITEM	QUANTITY	DESCRIPTION	PRICE	AMOUNT
1.	14,370,000 LBS.	CARTRIDGE BRASS FOR CAL. .50 CASE CUP, STRIP IN ACCORDANCE WITH U.S.C.C. SPEC. #1101-1, ISSUE 6, DATED DECEMBER 24, 1942. SIZE - .254" TO .259" X 5-1/16"	CWT 15.75	2,263,275 00

ISSUE 6, DATED DECEMBER 24, 1942.
SIZE - .254" TO .259" X 5-1/16" CWT 15.75
2,263,275 00

DC/ SHIP TO: ST. LOUIS ORDNANCE PLANT FOR ACCOUNT OF: THE UNITED STATES CARTRIDGE COMPANY

4300 GOODFELLOW ( ) ST. LOUIS, MISSOURI

SHIP BY _____ VIA _____ F. O. B. OUR PLANT

TERMS: NET 30 DAYS - LESS 1 % 10TH AND 25TH DAYS, AS DEFINED ON REVERSE SIDE.

REQUIRED DELIVERY: START BY DURING OCTOBER AS SCHEDULED END OR COMPLETED BY

MARK PACKAGES, CASES AND CRATES WITH ABOVE PURCHASE ORDER NUMBER AND NUMBER OF EACH PACKAGE, WEIGHT OF EACH PACKAGE, VENDOR'S NAME, AND THE FOLLOWING SPECIAL MARKINGS → DELIVERY POINT BUILDING 215

ACCOUNT NUMBER RAW MATERIAL

REQUISITION NO.

IM) APPROPRIATION 10673

CONTRACT W-ORD-491 ART. 11-A PAR. 1

PURCHASE APPROVED BECAUSE OF REASONS NUMBERED 6 BELOW
1. LOWEST PRICE
2. EARLY DELIVERY
3. BETTER QUALITY
4. BETTER OR REQUIRED DESIGN
5. ONLY AVAILABLE SOURCE
6. [illegible]

THE UNITED STATES CARTRIDGE COMPANY

PURCHASING AGENT

APPROVED

CONTRACTING OFFICER'S REPRESENTATIVE
Major,
For the Chief acting Officer's Representative

REDIFORM-AMERICAN SALES BOOK CO., INC., COLUMBIA AND NIAGARA FALLS, N.Y. FORM P-13 H REV. 12-42

Plaintiffs' Exhibit M-2.

Pl Ex M2

Form 2066 [redacted]

Uniform Straight Bill of Lading Adopted by Carriers in Official, Southern, Western and Illinois Classification Territories, March 15, 1922, as amended August 1, 1930, and June 15, 1941.

Uniform [redacted]ight Bill of Lading—Original—Not Negotiable.

N[redacted]H&H RR

Shipper's No. N 26880

Agent's No.

COMPANY

RECEIVED, subject to the classifications and tariffs in effect on the date of the issue of this Bill of Lading.

At Waterbury, Conn., 11/30/43 **184** **From** THE AMERICAN BRASS CO

the property described below, in apparent good order, except as noted (contents and condition of contents of packages unknown), marked, consigned, and destined as indicated below, which said company (the word company being understood throughout this contract as meaning any person or corporation in possession of the property under the contract) agrees to carry to its usual place of delivery at said destination, if on its own road or its own water line, otherwise to deliver to another carrier on the route to said destination. It is mutually agreed, as to each carrier of all or any of said property over all or any portion of said route to destination, and as to each party at any time interested in all or any of said property, that every service to be performed hereunder shall be subject to all the conditions not prohibited by law, whether printed or written, herein contained, including the conditions on back hereof, which are hereby agreed to by the shipper and accepted for himself and his assigns.

(Mail or street address of consignee—for purposes of notification only.)

Consigned to THE UNITED STATES CARTRIDGE CO ST LOUIS ORD PLANT 4300 GOODFELLOW /20/

Destination ST LOUIS **State of** MO **County of**

Route NH-L&H-CNJ-RDG-[redacted]M-B&O-MBT

Delivering Carrier **Car Initial** CB&Q **Car No.** 15182

NO. PACKAGES	DESCRIPTION OF ARTICLES, SPECIAL MARKS, AND EXCEPTIONS	*WEIGHT (Subject to Correction)	CLASS OR RATE	CHECK COLUMN
432	COILS SHEET BRONZE WA 5046	77411		
	ORDER STL B 45868			
	SEALS ABCO WN 1014-1015			
	DUNNAGE	900		
	#114			
	.8 B. & S. GAUGE OR THICKER .004 OF AN INCH OR THICKER OTHER THAN PERFORATED OR SILVER PLATED.			

Subject to Section 7 of conditions, if this shipment is to be delivered to the consignee without recourse on the consignor, the consignor shall sign the following statement:
The carrier shall not make delivery of this shipment without payment of freight and all other lawful charges.

(Signature of Consignor.)

If charges are to be prepaid, write or stamp here, "To be Prepaid."

Received $_____ to apply in prepayment of the charges on the property described hereon.

Agent or Cashier

At Waterbury, Conn., 11/30/43 **184** **From** THE AMERICAN BRASS CO

the property described below, in apparent good order, except as noted (contents and condition of contents of packages unknown), marked, consigned, and destined as indicated below, which said company (the word company being understood throughout this contract as meaning any person or corporation in possession of the property under the contract) agrees to carry to its usual place of delivery at said destination, if on its own road or its own water line, otherwise to deliver to another carrier on the route to said destination. It is mutually agreed, as to each carrier of all or any of said property over all or any portion of said route to destination, and as to each party at any time interested in all or any of said property, that every service to be performed hereunder shall be subject to all the conditions not prohibited by law, whether printed or written, herein contained, including the conditions on back hereof, which are hereby agreed to by the shipper and accepted for himself and his assigns.

(Mail or street address of consignee—for purposes of notification only.)

Consigned to THE UNITED STATES CARTRIDGE CO ST LOUIS ORD PLANT 4300 GOODFELLOW /20/

Destination ST LOUIS **State of** MO **County of**

Route NH-L&H-CNJ-RDG-[redacted]M-B&O-MBT

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	ORDER STL B 45868			
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	.8 B. & S. GAUGE OR THICKER .004 OF AN INCH OR THICKER OTHER THAN PERFORATED OR SILVER PLATED.			

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If charges are to be prepaid, write or stamp here, "To be Prepaid."

Received $_____ to apply in prepayment of the charges on the property described hereon.

Agent or Cashier

*If the shipment moves between two ports by a carrier by water, the law requires that the bill of lading shall state whether it is "carrier's or shipper's weight."

NOTE.—Where the rate is dependent on value, shippers are required to state specifically in writing the agreed or declared value of the property. The agreed or declared value of the property is hereby specifically stated by the shipper to be not exceeding

per _____

Per _____ (The signature here acknowledges only the amount prepaid.)

Charges Advanced: $_____

1 Per THE AMERICAN BRASS CO **Shipper,** Howard S. Palmer, W. M. Daniels, James Lee **Agent**

Per _____

Permanent post-office address of shipper, WATERBURY, CONN. MC

NOV 30 1943

Plaintiffs' Exhibit M-3.

Pl Ex M3

1 ORIGINAL

RECEIVING DEPT. OFFICE

ST. LOUIS ORDNANCE PLANT
ST. LOUIS, MISSOURI

RECEIVING AND INSPECTION REPORT

DATE 9-17-43

NO. A-859625

BUILDING NUMBER 105

RECEIVING STATION Central Stores

QUALITY INSPECTION YES ☐ NO ☐

PURCHASE ORDER NO. Govt Invitation

DEPT. NO. 525

FINAL ☐ PARTIAL ☐

REIMBURSEMENT BY FINANCE OFFICER AT Columbus, Ohio

GOV'T B L OR PRO NO. [illegible]

SHIPPING WEIGHT 82,210

FREIGHT CHARGES $ ☐ PREPAID ☐ COLLECT

DRAYAGE CO. RAIL

DRAY TICKET NO. OR PACKING SLIP NO.

U. S. C. CO. CONTRACT W-ORD-491 ☐ W. C. CO. CONTRACT W-ORD. 481 ☐

RECEIVED FROM (SHIPPER) Bridgeport Brass Co

VENDOR (WHEN NOT SHIPPER)

CAR NUMBER [illegible] SEAL NUMBER [illegible]

CARRIER RAIL

F.O.B. POINT Indianapolis, Ind

SHIPPING POINT Indianapolis, Ind.

SHIPPED TO:

OTHER PURCHASE ORDERS COVERED BY THIS SHIPMENT.

ARTICLES INSPECTED, ACCEPTED AND RECEIVED

NO. OF PKGS.	QUANTITY RECEIVED	QUANTITY ACCEPTED	STOCK NUMBER	DESCRIPTION (MUST AGREE WITH PURCHASE ORDER)	UNIT
640	82,653	82,653	MS	2 3/4" x .59 x 5 4/16 CARTRIDGE BRASS FOR .50 CAL. CASE CUPS U.S.E.C. Spec. 1104-1 ITEM 1 - LOT # 415	LB
				CONTRACT # W-794-ORD-888	

LIST OVERAGES, SHORTAGES, DAMAGES AND REJECTIONS - * MUST SHOW DISPOSITION CODE

QUANTITY	ARTICLE	REMARKS	SHIPPER NO. OR WORK ORDER	DISPOSITION CODE
		Quan. Wt. 82,653 lbs Their Wt. 82,210 lbs OVER 443 lbs		

I CERTIFY THAT THE ARTICLES LISTED ON THIS REPORT WERE INSPECTED AND ACCEPTED BY ME AND THAT THEY CONFORM TO THE CONTRACT REQUIREMENTS; THAT THE ARTICLES SHOWN AS REJECTED WERE REJECTED FOR THE REASONS STATED AND THAT THE FOREGOING IS CORRECT.

9/17/43 [signature]
DATE AUTHORIZED INSPECTOR

DATE APPROVED

DATE DEPARTMENT APPROVAL

DATE PURCHASING DEPT. FOR CODES B, C, J

MATERIAL RECEIVED BY POSTED TO STORES RECORD

STOREKEEPER STORES RECORD CLERK

MEMORANDUM RECEIPT

RECEIVED FROM ORDNANCE DEPT. MATERIALS LISTED

AS PER VOU. NO.

RECEIVED SEP 20

NAME OF CONTRACTOR

PER
AUTHORIZED SIGNATURE

DATE

*DISPOSITION CODE - USE ONE CODE LETTER ONLY

A CLAIM AGAINST CARRIER FOR DAMAGE OR SHORTAGE
B REJECTED - NOT TO BE REPLACED
C FOR USE ON CRITICAL TYPES & MACH. PARTS ONLY
D REJECTED - RETURN TO SELLER
G OVER - TO BE ACCEPTED AND PAID FOR
H OVER - TO BE RETURNED TO SELLER
J SUBSTITUTION - TO BE ACCEPTED AND PAID FOR
K SUBSTITUTION - NOT ACCEPTABLE - RETURN TO VENDOR

W. W. Dillon ORD. DEPT Sec 2

I CERTIFY THAT THE ARTICLES LISTED ON THIS REPORT WERE RECEIVED BY ME IN THE QUANTITY AND CONDITION STATED, AND THAT THE SAME HAVE BEEN TAKEN UP ON THE STOCK RECORD CARDS OF THIS STATION.

SIGNATURE OF ACCOUNTABLE OFFICER

RANK AND DESIGNATION

DATE

D. V. NO.

SHEET OF SHEETS

Plaintiffs' Exhibit O-3.

Pl - ✓ 03

1 ORIGINAL

RECEIVING DEPT. OFFICE

ST. LOUIS ORDNANCE PLANT
ST. LOUIS, MISSOURI

RECEIVING AND INSPECTION REPORT

GOV'T B/L OR PRO. NO.

SHIPPING WEIGHT

FREIGHT CHARGES $ ☐ PREPAID ☐ COLLECT

DRAYAGE CO. [redacted] RR

DRAY TICKET NO. OR PACKING SLIP NO.

U. S. C. CO. CONTRACT W-ORD. 491 ☐ W. C. CO. CONTRACT W-ORD. 481 ☐

RECEIVED FROM (SHIPPER) [redacted]

VENDOR (WHEN NOT SHIPPER)

CAR NUMBER [redacted] SEAL NUMBER [redacted]

CARRIER [redacted]

F.O.B. POINT [redacted]

SHIPPING POINT [redacted]

DATE [redacted]

NO. [redacted]

BUILDING NUMBER [redacted]

RECEIVING STATION [redacted]

QUALITY INSPECTION YES ☐ NO ☒

PURCHASE ORDER NO. [redacted]

DEPT. NO. [redacted]

FINAL ☐ PARTIAL ☐

REIMBURSEMENT BY FINANCE OFFICER AT [redacted]

SHIPPED TO:

OTHER PURCHASE ORDERS COVERED BY THIS SHIPMENT.

ARTICLES INSPECTED, ACCEPTED AND RECEIVED

NO. OF PKGS	QUANTITY RECEIVED	QUANTITY ACCEPTED	STOCK NUMBER	DESCRIPTION (MUST AGREE WITH PURCHASE ORDER)	UNIT
[redacted]	60,131	60,131	M8	Powder, Smokeless, .30 Ball [redacted] Lot No [redacted] Ins [redacted]	lb.

LIST OVERAGES, SHORTAGES, DAMAGES AND REJECTIONS . • MUST SHOW DISPOSITION CODE

QUANTITY	ARTICLE	REMARKS	SHIPPER NO. OR WORK ORDER	DISPOSITION CODE
[redacted]	[redacted]	[redacted]		

4-2

I CERTIFY THAT THE ARTICLES LISTED ON THIS REPORT WERE INSPECTED, ACCEPTED BY ME AND THAT THEY CONFORM TO THE CONTRACT REQUIREMENTS; THAT THE ARTICLES SHOWN AS REJECTED WERE REJECTED FOR THE REASONS STATED AND THAT THE FOREGOING [redacted]

DATE [redacted] AUTHORIZED INSPECTOR [redacted]

DATE APPROVED

DATE DEPARTMENT APPROVAL

DATE PURCHASING DEPT. FOR CODES B-C-J

MATERIAL RECEIVED BY — POSTED TO STORES RECORD

STOREKEEPER — STORES RECORD CLERK

MEMORANDUM RECEIPT

RECEIVED FROM ORDNANCE DEPT. MATERIALS LISTED

AS PER VOU. NO.

NAME OF CONTRACTOR

PER AUTHORIZED SIGNATURE

DATE

RECEIVED SEP 4 ST. LOUIS ORD. PLANT

*DISPOSITION CODE (USE ONE CODE LETTER ONLY)

I CERTIFY THAT THE ARTICLES LISTED ON THIS REPORT WERE RECEIVED BY ME IN THE QUANTITY AND CONDITION STATED, AND THAT THE SAME HAVE BEEN TAKEN UP ON THE STOCK RECORD CARDS OF THIS STATION.

SIGNATURE OF ACCOUNTABLE OFFICER

RANK AND DESIGNATION

DATE

D. V. NO

SHEET OF SHEETS

A. CLAIM AGAINST CARRIER FOR DAMAGE OR SHORTAGE
B. SCRAPPED — NOT TO BE PAID FOR
C. REWORK CRITICAL TOOLS & MACH. PARTS ONLY
D. REJECTED (RETURN TO VENDOR UNLESS OTHERWISE DIRECTED)
G. OVER — TO BE ACCEPTED AND PAID FOR
H. OVER — TO BE RETURNED TO SELLER
J. SUBSTITUTION — TO BE ACCEPTED AND PAID FOR
K. SUBSTITUTION — NOT ACCEPTABLE — RETURN TO VENDOR

REDIFORM PAD AMERICAN SALES BOOK CO. NIAGARA FALLS, N. Y.

FORM GS 27 REV (3-43)

[fol. 1053] Q. I show you these documents which have been marked Plaintiffs' Exhibits M-1, M-2 and M-3. Tell us what they are, will you please, and describe them.

A. M-1 is a copy of a purchase order to Western Cartridge Company, East Alton, Illinois, covering purchase of 14,370 pounds of cartridge brass for caliber 50 cases, in [fol. 1054] the amount of $2,263,275.

Q. Is that document which you have just explained typical of many other purchase orders which took place between Western Cartridge Company and this United States Cartridge Company during the operation of this plant, covering that material? A. Yes, sir.

Q. And there was during the four years a substantial amount of material purchased in the fashion described in this order? A. Yes, sir.

Q. And it all moved from East Alton, Illinois, to St. Louis, Missouri?

A. Yes, sir, that is from Western Cartridge Company.

Q. And shipments from Western Cartridge Company were from East Alton, Illinois? A. That is right.

Q. All right now. Now, what is two?

A. I have a bill of lading covering a shipment of 432 coils of sheet bronze from the American Brass Company, Waterbury, Connecticut, to the St. Louis Ordnance plant.

Q. That is typical of a shipment of brass purchased by United States Cartridge Company from an industry outside the State of Missouri, is it not? A. Yes, sir.

Q. Other than the Olin interest at East Alton?

A. Yes, sir.

[fol. 1055] Q. And there was a substantial amount of such purchases during the four years? A. Yes, sir.

Q. Now then, what is the other?

A. I have a receiving and inspection report covering the receipt of 82,653 pounds of cartridge brass for 50 calibre case cups received from the Bridgeport Brass Company, Indianapolis, Indiana, at the St. Louis' Ordnance plant, and as covered by a Government purchase order on Government free issue.

Q. And that document is typical of shipments of brass which moved from out-state industry into the St. Louis Ordnance Plant on purchases by the United States Army Ordnance, called the Government free issue. Is that right?

A. That is correct.

Q. And there was a substantial amount of such purchases? A. Yes, sir.

Mr. Bond: I offer these three in evidence relating to the matter of brass.

[fol. 1056] Q. Now then, take up the next item, it is lead. I hand you here one bunch of papers and ask you what they are.

A. I have a copy of a check covering the purchase of 120,973 pounds of lead from the National Lead Company, St. Louis, Missouri, and shipped from Granite City, Illinois, to the St. Louis Ordnance Plant.

Q. And that check and these accompanying papers are typical of purchases of lead by the United States Cartridge Company from National Lead Company for shipment from its Granite City plant into the St. Louis Ordnance Plant? Is that correct? A. Yes, sir.

Q. And there was a substantial movement of that material into the plant during the four years, from this company? A. Yes, sir.

Mr. Bond: Mark paper "Plaintiffs' Exhibit N". (Paper is marked as requested.)

Mr. Bond: I offer that document in evidence, relating to the matter of lead.

[fol. 1063] Mr. Bond: Now then, we have covered what appears lead and powder. It leaves only steel.

Q. I show you these documents and ask you what they are?

A. I have a copy of a check covering purchase of 20 bundles of steel bars in the amount of $90,048.61 from the Crucible Steel Company of America, and shipped from Pittsburgh, Pennsylvania, to the St. Louis Ordnance Plant.

Mr. Bond: I will ask the reporter to mark that for identification "Plaintiffs' Exhibit P". (The paper is marked as requested)

Q. And that document, Plaintiffs' Exhibit P, is typical of the out-state purchases by the Cartridge Company of steel during the operation of this plant? A. Tool steel.

Q. Tool steel. And there was a substantial amount of such purchases during the four years?

A. That is correct.

Mr. Bond: I offer in evidence "Plaintiffs' Exhibit P".

Plaintiffs' Exhibit N.

P1 Ex N

VOUCHER NO. A 10385

THE UNITED STATES CARTRIDGE COMPANY
ST. LOUIS, MISSOURI

7/9/43 AP60

SAINT LOUIS, MISSOURI, [redacted] 010360
DATE

TO THE BOATMAN'S NATIONAL BANK
ST. LOUIS, MO. 43

PAY [redacted]

TO THE ORDER OF

[redacted]

THE UNITED STATES CARTRIDGE COMPANY
SPECIAL ADVANCE ACCOUNT CONTRACT W-ORD-491

[redacted]

VOID AFTER 90 DAYS FROM DATE

VOUCHER NO. A 10385

THE UNITED STATES CARTRIDGE COMPANY, ST. LOUIS, MISSOURI
THE ATTACHED CHECK IS IN FULL PAYMENT OF THE ACCOUNT STATED BELOW

PURCHASE ORDER NO.	VENDOR'S INVOICE DATE	VENDOR'S INVOICE NUMBER	AMOUNT OF INVOICE	DISCOUNT	CREDITS	NET AMOUNT	TOTAL
[redacted]	[redacted]	[redacted]				[redacted]	
						24,156.65	24,156.65

REIMBURSEMENT RECEIVED
D. G. VOUCHER NO. 128124.
DATE PAID 4/6/43 & 4295

MAR 9 1943

MANTEL
ST. LOUIS

C.T.

ORDER NO.	DATE	NUMBER	AMOUNT OF INVOICE	DISCOUNT	CREDITS	NET AMOUNT	TOTAL
[redacted]	[redacted]	[redacted]				[redacted]	
						24,156.65	24,156.65

REIMBURSEMENT RECEIVED
D. G. VOUCHER NO. 128124
DATE PAID 4/6/43 & 4295

MAR 9 1943

MANTEL
ST. LOUIS

C.T.

DISTRIBUTION

ACCOUNT	AMOUNT	ACCOUNT	AMOUNT
511-000	24,121.2		
671-00	35.45		

PROOF READ BY

CALCULATIONS CHECKED BY

ACCOUNT DISTRIBUTION MADE BY

APPROVED BY

APPROVED BY

☐ FORM CA-38

DEPARTMENT

FILE COPY

STOREKEEPER STORES RECORD CLERK

DISPOSITION CODE - USE ONE CODE LETTER ONLY

A CLAIM AGAINST CARRIER FOR DAMAGE OR SHORTAGE
B SCRAPPED — NOT TO BE PAID FOR
C REWORK AT OUR EXPENSE
D REWORK AT SELLER'S EXPENSE
E RETURN TO SELLER FOR REPLACEMENT
F RETURN TO SELLER FOR CREDIT
G OVER — TO BE ACCEPTED AND PAID FOR
H OVER — TO BE RETURNED TO SELLER
J SUBSTITUTION — TO BE ACCEPTED AND PAID FOR
K SUBSTITUTION — NOT ACCEPTABLE — RETURN TO VENDOR

FORM GS-27 A REV (10 42)

[fol. 1058] Q. Now then, powder. Explain these documents which I offer to you.

A. I have a copy of a check covering the purchase of 2,200 pounds of PETN special explosive received from the Trojan Powder Company, Allentown, Pennsylvania, shipped from Seiple, Pennsylvania, into Missouri.

Q. A branch of that plant?

A. That is correct. I also have a copy of check covering the purchase of 2,600 pounds of PETN Class B explosive, shipped from the Trojan Powder Company, Allentown, Pennsylvania, from the Seiple, Pennsylvania, shipping point to the Tyson Valley Park Powder Farm, Missouri.

Q. That Tyson Valley Park Powder Farm is a department of the United States Cartridge Company?

A. It is a part of it.

Q. Part of the plant where they stored that powder?

A. That is correct. I have a receiving and inspection report covering receipt of 60,131 pounds of smokeless powder from the Badger Ordnance Works, Baraboo, Wisconsin. And it represents Government purchase and issued on Government free issue.

Mr. Bond: Now then, I will ask these be marked "Plaintiffs' Exhibits O-1, O-2, O-3." (Papers are marked as requested)

Q. I call your attention to the two documents which have been marked "Plaintiffs' Exhibits O-1 and O-2" and [fol. 1059] ask you if it isn't correct that they are typical or illustrative—if they are typical documents illustrative of the out-state purchases of powder by United States Cartridge Company and the shipment thereof into the plant in Missouri? A. That is correct.

Q. And I show you Plaintiffs' Exhibit No. 3 and ask you if that is typical of an out-state purchase of powder by the United States Army Ordnance on what is called Government free issue for shipment from Baraboo, Wisconsin, to the plant in Missouri? A. Yes, sir.

Q. And if all the records were produced they would show a substantial movement of both kinds of purchases during the four years? A. That is correct.

Mr. Bond: I offer these in evidence.

Plaintiffs' Exhibit P.

P1 Ex P
7/16/46 tb

THE UNI ED STATES CARTRIDGE CO. ANY
ST. LOUIS, MISSOURI

TO THE BOATMAN'S NATIONAL BANK
ST. LOUIS, MO. 4-3

SAINT LOUIS, MISSOURI, [redacted]

NO. 2-31462

PAY [redacted] DOLLARS $ [redacted]

TO THE ORDER OF

[redacted]

THE UNITED STATES CARTRIDGE COMPANY
SPECIAL ADVANCE ACCOUNT CONTRACT W-ORD. 491

COMPTROLLER

(VOID AFTER 90 DAYS FROM DATE)

SECRETARY ASST. TREASURER

VOUCHER NO. 2-31462

THE UNITED STATES CARTRIDGE COMPANY ST. LOUIS, MISSOURI
THE ATTACHED CHECK IS IN FULL PAYMENT OF THE ACCOUNT STATED BELOW

PURCHASE ORDER NO.	VENDOR'S INVOICE DATE	VENDOR'S INVOICE NUMBER	AMOUNT OF INVOICE	DISCOUNT	CREDITS	NET AMOUNT	TOTAL
[redacted]	8-31-42	111750-1	[redacted]	6.81		[redacted]	
[redacted]	8-27-42	11169	[redacted]	194.92		[redacted]	
[redacted]	8-31-42	111750-4	[redacted]	119.36		[redacted]	
[redacted]	8-31-42	111749	[redacted]	136.85		27,311.79	
[redacted]	9-9-42	9-3857	513.92	2.57		511.35	
							30,046.61

4/25/42 MS 4405

PURCHASE ORDER NO.	VENDOR'S INVOICE DATE	VENDOR'S INVOICE NUMBER	AMOUNT OF INVOICE	DISCOUNT	CREDITS	NET AMOUNT	TOTAL
[redacted]	8-31-42	111750-1	[redacted]	6.81		[redacted]	
[redacted]	8-27-42	11169	[redacted]	194.92		[redacted]	
[redacted]	8-31-42	111750-4	[redacted]	119.36		[redacted]	
[redacted]	8-31-42	111749	[redacted]	136.85		27,311.79	
[redacted]	9-9-42	9-3857	513.92	2.57		511.35	
							30,046.61

4/25/42 MS 4405

DISTRIBUTION

ACCOUNT	AMOUNT	ACCOUNT	AMOUNT

PAID
SEP 18 1942
UNITED STATES CARTRIDGE CO.
ST. LOUIS, MO.

PROOF READ BY

CALCULATIONS CHECKED BY

ACCOUNT DISTRIBUTION MADE BY

APPROVED BY

APPROVED BY

REDIFORM PATD —AMERICAN SALES BOOK CO., INC., NIAGARA FALLS, N.Y.

FORM CA-3B REV. 3-42

SIGN CERTIFICATE ONLY ON THE FIRST COPY.
SEND THE FIRST SIX (6) COPIES TO
THE UNITED STATES CARTRIDGE COMPANY.

PER: N. L. McJunkin

TITLE Comptroller

FORM CA-41

Note

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SUPREME COURT, U.S.

Vol. II

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1949

No. 96

R. M. POWELL, ET AL., PETITIONERS,

vs.

THE UNITED STATES CARTRIDGE COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITION FOR CERTIORARI FILED JUNE 3, 1949.

CERTIORARI GRANTED OCTOBER 10, 1949.

RECORD.
Vol. II.

United States Circuit Court of Appeals,
EIGHTH CIRCUIT.

No. 13,663.
CIVIL.

THE UNITED STATES CARTRIDGE COMPANY,
A CORPORATION,
APPELLANT,

vs.

R. M. POWELL ET AL.,
APPELLEES.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF MISSOURI.

FILED NOVEMBER 19, 1947.

United States Circuit Court of Appeals,
EIGHTH CIRCUIT.

No. 13,663.
CIVIL.

THE UNITED STATES CARTRIDGE COMPANY,
A CORPORATION,
APPELLANT,

vs.

R. M. POWELL ET AL.,
APPELLEES.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF MISSOURI.

FILED NOVEMBER 19, 1947.

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[fol. 1065] Mr. Bond: Now then, let the record show that Plaintiff's' Exhibits M-1, M-2 and M-3, N, O-1, O-2 and O-3, and P, are given to Mr. McRoberts who undertakes to have them photostated and photostatic copies supplied to the reporter and Counsel and may be used in lieu of the originals for all purposes of this case.

Mr. McRoberts: Will you substitute Mr. Schultz's name for Mr. McRoberts?

Mr. Bond: All right, substitute Mr. Schultz's name.

The Witness: I will take care of that.

Mr. Bond: That is all.

Cross Examination by Mr. McRoberts:

Q. Mr. Schultz, referring to Plaintiffs' Exhibit M-1, being the purchase order for brass addressed to Western Cartridge Company, I see down in the bottom right-hand corner a signature in the space which bears the legend "Contracting Officer's Representative." Whose signature is that? Not the individual but what is his capacity?

A. His capacity is representing the Commanding Officer of the St. Louis Ordnance Plant.

Q. And did the representative of the Commanding Officer at the St. Louis Ordnance Plant approve in writing every purchase order, not only for brass but for everything else that was purchased during the operation of that plant? A. Yes, sir.

Q. And that approval was obtained before the purchase [fol. 1066] order was issued? A. Yes, sir.

Q. That was the restriction or limitation under which you operate? Is that correct? A. Yes, sir.

Q. If you wanted to be reimbursed for this purchase you had to get the approval—

Mr. Bond: Object to that as not being germane to my examination. This is an adverse witness I put on for cross examination as to certain files. Now he is going into the matter of what has to be done to get reimbursement.

The Court: Objection sustained.

Q. Now Mr. Schultz, referring to Plaintiffs' Exhibit P, that is a copy of a check which was used to pay for one of these purchases, is that correct? A. That is correct.

Q. On direct examination you started to say something about the funds which were used to pay for these purchases.

Mr. Bond: Object to any testimony from this witness in reference to funds that are not shown on the face of these papers for the reason it is not germane to my direct examination.

Mr. McRoberts: You had no direct examination.

Mr. Bond: No, sir. I brought out the check and what was shown on the face of the check. I didn't inquire into [fol. 1067] where the funds came from, I didn't ask him anything about it at all.

The Court: He may answer.

Mr. Bond: We except.

A. The funds covering the issuance of this check were obtained from the United States Government to be used solely for the purpose of paying for purchases made under our contract.

Q. In what account were those funds deposited?

A. In the special advance account, Contract WD 491.

Q. And that is the account referred to on the face of the check? A. That is correct.

Q. Was that an account which you use or could use for the general business of the United States Cartridge Company? A. No, sir.

Mr. McRoberts: I am not going to ask the witness to testify as to the limitations that are set forth in the contract which will be introduced in evidence later on, Your Honor please.

Q. Those were the Government funds that were used to pay for those purchases? A. Yes, sir.

Mr. Bond: Object to that as calling for a conclusion of the witness. The witness has stated the facts.

A. I think that is an ultimate fact.

The Court: He may answer if he knows.

A. Yes, sir.

[fol. 1068] Mr. Bond: I want to make the further record, according to the testimony of this very witness on his own version those funds were advanced by the Government to the United States Cartridge Company, deposited by the United States Cartridge Company in their name under a special account, and checked out by the United States Cartridge Company on its checks drawn on that account. Therefore, I say that it would be correct to say that, its funds or Government funds, the title and control of these funds were in the defendant.

Q. (Mr. McRoberts) Now, is that true with respect to the payment that was made in each of the purchase orders, not only the ones which were introduced in evidence but all of the other purchase orders used at that plant of which you have testified the ones offered in evidence are typical?

A. That is correct, with the exception of the Government free issue.

Q. But where you paid for the purchases you paid for them with funds out of those of a similar special account and funds of the character which you have described?

A. Yes, sir.

Q. Now, if you know, who held title to the property so purchased?

Mr. Bond: Object to that, if the Court please, as not being germane to [anyting] I touched on in direct examination. And further, as being utterly irrelevant and immaterial to the case. It is certainly not germane to these records.

[fol. 1069] Mr. McRoberts: That may be true, Your Honor.

Q. I note, Mr. Schultz, on some of these papers, I am not sure whether it is on copies introduced in evidence, a rubber stamp which reads Ralph Charles, Captain Ordnance Department, accountable officer, being in this particular case K. M. Henry, Assistant. What does that rubber stamp indicate?

A. That the material covered by this receiving report is accountable by Ralph Charles, Captain of Ordnance Department, Accountable Office, United States Government.

Q. He is an officer of the United States Government?

A. Yes, sir.

Q. Did the United States Government or the Ordnance Department check into the plant the purchases covered by these various purchase orders and documents which you have identified and which have been offered in evidence?

Mr. Bond: Objected to as not germane to the direct examination and irrelevant and immaterial.

(Last preceding question read.)

Mr. McRoberts: I might point out that the occasion for the question is the appearance on these documents of the stamp of a Government property accountable officer.

Mr. Bond: I asked the witness only as custodian of the records to bring them here and explain their nature.

The Court: Objection sustained.

Mr. McRoberts: One final question.

[fol. 1070] Q. Mr. Schultz, there was some reference to powder here. Was all of the powder, as such, smokeless powder furnished by the Government? A. Yes, sir.

Q. But where the term has been used with respect to powder, in speaking of purchases from other persons you really mean explosives used for priming?

A. That is correct.

Q. And not smokeless powder? A. That is correct.

Q. The powder itself was all furnished by the Government? A. That is correct.

Mr. McRoberts: I think that is all, Your Honor.

Mr. Bond: I would like to call Mr. Russell Casteel, an officer of the defendant corporation, for cross examination on just one subject.

RUSSELL RONAINE CASTEEL,

of lawful age, produced, sworn and examined, testified on behalf of plaintiffs as follows:

Direct Examination by Mr. Bond:

Q. Mr. Casteel, will you state your full name?

A. Russell Ronaine Casteel.

Q. Where do you live? A. Alton, Illinois.

[fol. 1071] Q. You are an officer of the defendant corporation? A. Yes, sir, Secretary.

Q. Secretary of the defendant corporation? A. Yes, sir.

Q. I will ask you if you know the correct corporate name of the defendant? A. I do.

Q. What is it?

A. The United States Cartridge Company.

Q. "The" is part of the title? A. Yes, sir.

Mr. Bond: That is all. Thank you.

Mr. McRoberts: I can't cross examine on that. You will be excused.

Mr. Bond: I noted that, Your Honor, from the fact that all the papers filed by Mr. McRoberts had the word "the" in it. My information which I got from the Secretary of State's office didn't have the word "the" in the title. In conformity with this proof I ask leave to amend.

The Court: The word "the" isn't as important as it was.

Mr. Bond: Yes, sir, I was thinking of that in view of the recent depositions. I will ask leave, if the Court please, to amend the first amended petition by interlineation by writing in the word "the" in front of the corporate title of the defendant. I will give the Clerk a minute and ask [fol. 1072] him to so amend my first amended complaint.

Mr. Bond: I desire, if the Court please, to offer in evidence from the files in this case—they may be matters of record but, anyhow, I formally offer them.

Mr. McRoberts: Before you actually close your case, I would like to recall Mr. Harris for a question.

Mr. Bond: I would like to introduce in evidence the following from the answers served upon me by defendant April 19, 1946, to the amended and additional interrogatories which I had served upon them shortly prior thereto. The exact date will appear from the record copy. The answers are as follows:

> "Answer to Interrogatory No. 1. Defendant is incorporated under the laws of the State of Maryland. Was licensed to do business in Missouri September 11, 1941.

"Answer to Interrogatory No. 2. Defendant operated a manufacturing plant in St. Louis for the manufacture of ammunition."

I will say that I am only offering such parts of the answers as I use as an admission.

Mr. McRoberts: He is offering part of the sentence. I object to that.

Mr. Bond: Well, I offer so much of it as I desire to use as admission. Now there are [interpollated] a great many things which I didn't ask for and which I don't care for. You can't by adding light or irresponsive matter bind or [fol. 1073] keep me from using the part which is admission. I am offering only the part that I want to use as an admission. The question I asked him was, "Did the defendant operate a manufacturing plant in St. Louis for the manufacture of ammunition." And of his answer I offer the following: "Defendant operated a manufacturing plant in St. Louis for the manufacture of ammunition." Now the part that I do not offer is, "Under the terms and provisions of a certain contract between the defendant and the United States of America, dated December 5, 1940, and identified as Contract No. W Ordnance 491 and various supplements thereto over a period beginning in the month of December, 1941, and ending August 31, 1945." I did not ask him about that contract. I know nothing about it. I do not care to offer his statement thereof as part of my case. But the fact he [interpollated] that, I do not think deprives me of the right to use such parts of the answer as is an admission.

Mr. McRoberts: We admit the whole admission as made and not a part of it, when we make an admission.

(Discussion at Court's Bench between Court and Counsel.)

The Court: I will permit you to read the portion of the answer in this particular case, but not to be a precedent.

Mr. Bond: Interrogatory No. 3, I asked him. "Describe the product produced at the plant." That is all I asked him, "what did you produce." Now I read this much of his answer. "Thirty, fifty and sixty calibre ball tracer and armor-piercing small arms ammunition." Now he [interpollated] some other matter.

[fol. 1074] The Court: Let me see it.

Mr. Bond: He [interpollated] what follows.

The Court: All right, you may offer the part you have there.

Mr. McRoberts: The point I am trying to make clear is, in both of these answers we are not producing material, we are not operating a plant in the ordinary commercial sense, nor are we producing materials and products in the ordinary sense. We are actually operating on war processing goods owned by the United States of America. The raw materials of this plant, the machinery, equipment and raw materials from the very beginning clear on through until it was a finished product were owned by the United States. In that sense we did not produce the ammunition, we were processing materials owned by the Government. And that is what I am trying in my answer to clarify.

The Court: You asked him to describe the product produced at the plant.

Mr. Bond: That is right, I didn't ask him to say he produced, I asked him what was produced at the plant.

The Court: It seems the part the Judge wants to offer is all—

Mr. Bond: All I want to offer is what was produced out there. I didn't ask him who produced it. Read my question, "Describe the product."

The Court: Read just the amount you have there.

Mr. Bond: Interrogatory No. 5, I asked him "For what [fol. 1075] [pur] purpose."

The Court: If he was a witness on the stand and volunteered the answer, the Court would strike the irresponsive part.

Mr. Bond: I asked him this question: "What raw materials were used by the defendant in the manufacture of this product?" Now then, I read this much from the answer: "Brass, powder, lead, steel and various other raw materials," and that is all I want. That answers my question. In addition he comes in—

The Court: All right, let me see it.

Mr. Bond: All right, so the rest about the title to that and all about it.

Mr. McRoberts: Note that he asks what was used by the defendant.

Mr. Bond: I asked you what raw materials were used at this plant. That is what I asked you.

Mr. McRoberts: No, sir, the question is here, "What raw materials were used by defendant in the manufacture of its product?" Used by our employees, it was our material.

The Court: You may offer just the amount that you have offered, Judge.

Mr. Bond: Interrogatories No. 6 and No. 7, I am going to read all of those:

> "No. 6. Where and from whom were those raw materials obtained?" "From various places both in the State of Missouri and in other states of the United States and from the United States Government and [fol. 1076] more than two thousand other vendors."
>
> "No. 7. What method of transportation or common carrier was used to deliver raw materials to defendant's plant?" "Railroads, trucks, automobiles and airplanes."
>
> "No. 8. What facilities did the defendant maintain on its premises for the receipt of materials and the shipments of its products?"

Now then, I am going to read this much of the answer, starting at the beginning of the second sentence:

> "On the said premises belonging to the United States of America and constituting part of said plant, there were various facilities for the receipt of material including (1) bulk receiving dock and approximately thirteen individual receiving stations. On the said premises there were various facilities for the shipment of the products produced at this plant, including approximately thirteen shipping docks located at the separate production units and storage warehouse. The said facilities were maintained by employees of defendant."

He put in something about the contract, that they were pursuant to some contract with the government. I don't

want to bring that in my case at all. I do not think it is binding on us. My clients didn't sign as a party to this contract.

Mr. McRoberts: The question is, "What facilities did the defendant maintain on its premises for the receiving of [fol. 1077] material and shipment of its product."

The Court: That is Question No. 8?

Mr. McRoberts: Question No. 8.

Mr. Bond: I didn't say "own," Your Honor; "maintain".

Mr. McRoberts: In answer to that we make it clear that we had no premises.

Mr. Bond: I didn't say you had. I asked you what facilities you maintained on those premises. I didn't say you owned them. I proved the employees maintained those facilities and operated those switch engines.

The Court: You want to leave out the first of the answer?

Mr. McRoberts: He leaves out the first sentence and the last seven words of the last sentence.

Mr. Bond: That is right, I don't know anything about it and don't want to put it in as part of my case, but I want the admission that their men maintained those facilities.

The Court: The testimony in this case, Judge Bond—

Mr. Bond: May I offer the whole answer with the qualification that I am offering it only for the purpose of admission that they maintained the facilities?

Mr. McRoberts: I think if it is offered he has to take it or leave it with all responsibilities that go with it.

The Court: He may offer it.

Mr. Bond: I will offer the entire answer only for the purpose of admission that the defendant maintained those facilities.

[fol. 1078] Mr. Bond: Now then, No. 9.

Mr. McRoberts: Don't you think the whole answer should be read into the record? Only a part has been read.

Mr. Bond: The whole answer I am offering only that part heretofore read, with the following preliminary sentence:

The Court: Read the whole thing throughout.

Mr. Bond: "Defendant had no premises. The entire manufacturing plant included land, buildings, machinery at all times belonging to and being in the possession of the United States of America and constituting a military reservation. On the said premises belonging to the United States of America and constituting part of said plant there are various facilities for the receipt of material, including, one, bulk receiving dock and approximately thirteen individual receiving stations. On the said premises there were various facilities for shipment of the products produced at said plant, including approximately thirteen shipping docks located at the separate production units and storage warehouses. The said facilities were maintained by employees of the defendant."

And then the answer concludes, being the part I didn't read,

"Pursuant to the terms of said contract."

Mr. Bond: I want to read this whole answer except for the last part, "pursuant to the terms of the contract." [fol. 1079] And if Your Honor wants it read, I will.

Mr. Bond: "Describe the switching facilities in use"—that is nine—"particularly, where were the tracks located, who maintained them, whose crews operated them, with what railroads did they connect, and at what points did they so connect?"

Mr. McRoberts: The answer should be read.

Mr. Bond: I want to read the whole answer except the last seven words, "pursuant to said terms of the contract," and if Your Honor wants me to read the whole answer I will do it on the understanding I am only offering it for the admissions.

"Switching facilities in use at the said manufacturing plant consist of four switch engines and various railroad tracks, all of which were at all times owned by the United States of America. The tracks were adjacent to all large

production and storage warehouse units and connected with the lines of the Terminal Railroad Association at the West Belt Yards of said administration. The tracks were maintained by employees of the defendant, and the crews who operated said switch engines were also employees of the defendant."

Then he adds the part: "Pursuant to the terms of said contract," which I didn't ask for and I contend is irresponsive and do not intend to be bound by it.

Mr. Bond: Interrogatory No. 10. I want to read all the answer to that for the admissions contained in said answer, except one sentence which occurs about the middle and [fol. 1080] which reads as follows: "And maintained by the defendant under the terms of the contract," and I don't offer as part of my case. I offer the answer only for the admission. He admits they maintained them, but he adds "the maintenance was under the terms of the contract," which I don't want.

The Court: I think you ought to read it all.

Mr. Bond: I want to offer in evidence that answer in Interrogatory No. 11. I ask leave to read from so much of that answer as admits that the employees of defendant unloaded incoming freight and loaded outgoing freight.

The Court: That is—

Mr. Bond: "Employees of defendant unloaded incoming freight and loaded outgoing freight."

Mr. McRoberts: He left out "they did that under the direct supervision, directions and instructions of agents of the United States of America."

Mr. Bond: Yes, sir, but I didn't ask for that and I don't want to be bound by it.

Mr. McRoberts: I think the answer is misleading. We did have our employees that did that hand hooking independently.

The Court: I think he should read that.

Mr. Bond: Then I withdraw the answer.

Mr. Bond: No. 15, answer to "who did the actual loading of outbound shipments?" I will read that answer as they give it: "Employees of defendant acting under the supervision, direction and instructions of employees or agents of the United States of America," excepting the portion of [fol. 1081] "pursuant to the terms of said contract." I don't read that part.

Mr. McRoberts: Then I object to it, Your Honor please.

Mr. Bond: In fact, I will withdraw it. I won't offer that answer at all as part of mine.

Mr. Bond: No. 16. I will read the whole answer. I withdraw the 15, I think it is in conflict with the evidence. I have proved, as I understand my proof, that the Cartridge Company employees loaded these outgoing shipments and they were not under any supervision of anybody. And I don't propose to admit that answer.

Mr. McRoberts: I don't think we will have any dispute about the admission of part of the answer to Item 16. The answer is, Yes.

The Court: Well, it is the usual time for recess now. Announce a recess until two o'clock.

Thereupon, at 12:30 P. M., July 10, 1946, a recess was taken until 2:00 P. M. The proceedings were then resumed as follows:

The Court: Proceed.

Mr. Bond: I believe I was reading in evidence admissions from some of the answers made to my amended interrogatories. I desire to read Interrogatory No. 25:

"Do the columns headed 'total' show all the time that appears on the time cards?" The answer is—

Mr. McRoberts: Your Honor, that is the one in which we filed a proposed amendment.

Mr. Bond: There has been no evidence that the first [fol. 1082] answer is incorrect, and proof in my case shows it was correct. All my witnesses testified they were ordered to report there a half hour ahead of time.

Mr. McRoberts: That is the interrogatory to which we have filed a proposed amended answer, Your Honor, and we think the true facts should be brought out rather than the erroneous statement here.

Mr. Bond: They will shortly have a chance to put on evidence, Your Honor.

The Court: Let me read the answer.

(A paper is passed to the Court.)

Mr. Bond: I added such a half hour in a separate column in my computations on the face of this admission; there is the answer, 25.

The Court: Objection is overruled.

Mr. Bond: The interrogatory is, "Do the columns headed 'total actual hours' show all the time that appears on the time-cards?" And the answer is, "The information in the columns headed 'total actual hours' on the computations heretofore delivered to plaintiffs' attorney does not show the time elapsed between the punching of the time-card and the beginning of the shift. Otherwise, it shows all the time that appears on the time-card."

Mr. Bond: Now, Your Honor, there are on file two requests for admissions under Rule 36; one served on the [fol. 1083] defendant the 24th day of April, 1946, and I offered that in evidence, and the responses thereto served on me. The date of service does not appear, but it was filed in court and the Clerk's minutes will show. The responses speak for themselves as to the second admission. There is one point I want to make for the record on their responses to the first request for an admission. And in this paper I asked them to admit, in Item 1 of my request, that the bills of lading, in effect, where the bills of lading covered outbound shipments, contained recitals and statements showing that at least the greater part of the ammunition produced there at the manufacturing plant at 4300 Goodfellow Avenue, while same was being operated by defendant, and during the time the plaintiffs were employed therein, was billed and shipped out of such plant by railroad or other form of transportation to destinations

outside the State of Missouri. And the response is that they could neither admit nor deny that request. I wish to make the complaint that the response is insufficient for the reason it is not sworn to by the corporation or by any officer thereof, nor in fact by any individual, of his own knowledge, as the rule requires, nor by an attorney for the defendant on information and belief. Now the rule requires a certain statement by the party, or else the matter is admitted. And I contend that means a particular statement under oath by the responsible party that the fact did not exist, not on information or belief by an attorney. If [fol. 1084] that were so, all a client would have to do would be to tell his lawyer in conference that it was not so. The lawyer could deny on information and belief, and you would have a direct denial. Therefore, I say the denial is insufficient.

Mr. McRoberts: The answer which we made is that these records are in the possession of the Government and not our records. And that is what the testimony shows, as Judge Bond has just brought out: the very records about which he has spoken were produced in court by an employee of the Government.

Mr. Bond: I say in response that such an affidavit is an insufficient response and that the request under the rule stands admitted on the record, because the rules say that if you neither admit nor deny it must be accompanied by a certain sort of affidavit, which this is not. I think, Your Honor, that while it may be they do not know where this ammunition went, there was not anybody out there in that plant that wanted to say that he didn't know it went out of the State of Missouri.

Mr. McRoberts: There are no disputed facts. The ultimate fact called for by the admission has been proved by the records themselves. They were not our records, but the case records.

Mr. Bond: I make the point that it is also admitted.

The Court: What are you asking at this time, Judge?

Mr. Bond: I am offering in evidence at this time and make the point in the record that on the face of the re-

sponses the admissions as requested stand admitted. And [fol. 1085] I suppose that will be taken for consideration along with the case. I have proved it by other proof.

And the additional request, No. 36, I offered in evidence, but Counsel admitted the genuineness requested therein, and they have done so by making no response whatever.

Mr. Bond: That, Your Honor, is the plaintiffs' case.

Mr. McRoberts: I wish to recall Mr. Harris for a couple of questions before the case is closed.

The Court: Yes, sir, you called attention to that before.

Mr. Bond: That is perfectly all right. I can't make any objection to that.

FRANK N. HARRIS

previously sworn, recalled for further cross examination, testified as follows:

Recross Examination by Mr. McRoberts:

Q. I believe you testified when you were first employed as a safety engineer, you were instructed that you would report half an hour before the shift of the production employees and work to the end of that shift?

A. That is correct.

Q. And those instructions were later changed, were they not, so that you were not required to report a half an hour ahead of the production employees' shift but merely to [fol. 1086] report at the same time that the production employees reported?

A. When you say "later," what do you mean by that?

Q. Well, some months after your original employment.

A. Six months?

Q. Some months. I will produce evidence as to the exact date.

Mr. Bond: We have in our computation, it was sometime in October, 1943, I think our evidence shows.

The Court: October 25, 1943, wasn't it?

Mr. McRoberts: October.

Mr. Bond: It was some date in October, 1943, that ceased to be in effect.

The Witness: May I elaborate on that?

The Court: Yes, sir.

A. I believe to the best of my recollection it was at the time—the day after I believe in the mass meeting, and that came about as a result of dissatisfaction of the employees in our department, at which time I brought up the question of determining our status. And at that time I brought it up with the Director who was present in that meeting which was attended by all members of the department. It was the following day, if I remember correctly, after a bulletin was placed on the bulletin-board to the effect that the original requirement by the company that we report one-half hour before the regular production shift was then cancelled and, therefore we would not be required to report until on the day shift, for example, at eight [fol. 1087] o'clock, or on the 4 to 12 shift, four o'clock and midnight shift, 12 o'clock. Then that bulletin wasn't up a whole day, not one whole day did they leave that bulletin up when they replaced it with another bulletin cancelling that one and telling us that order was in effect and we must report one-half hour before the regular production shift; or, in other words, 7:30 on the day shift, 3:30 on the afternoon shift, and 11:30 on the night shift. And that remained in effect until, as far as I was concerned and the majority of the department was concerned, who were sometime about October, 1943, transferred to production, after which we were not required to come in thirty minutes before.

Mr. Bond: It was in effect from the beginning of the plant until this day in October where we have terminated noting that half hour on our computations?

The Witness: It was with the exception of the one day I mentioned.

Note

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[fol. 1140] Q. (Mr. McRoberts) Mr. Harris, at the request of Judge Bond, we have produced in court time-cards of the plaintiffs named in this case for a designated week in February of 1943 and for a designated week in November of 1943.

Mr. Bond: Three days only, wasn't it? A designated three days in February and November?

Mr. McRoberts: Time-cards are on a weekly basis including those three days.

[fol. 1141] Q. (Mr. McRoberts) And I will show you a paper which has been identified as "Defendant's Exhibit 9" and ask you if that is your time-card for the pay period ending 11/14/43?

A. It appears to be my time-card, but as to its being 1943, I couldn't tell.

Q. Look in the upper right-hand corner and see the date.

A. I can't tell whether that is a five or three. Can you?

Q. Will it help you to look at these other three where the top is cut off? Does that help you to fix that number?

Mr. Bond: It can't be 1945, the plant wasn't operating; so that may help you.

A. I would say that it is possible and probable.

Q. That is your time card? Does that correctly indicate the times when you punched in and punched out during that week?

Mr. Bond: Your Honor, of course the time-card is a document kept by the defendant in its file. We assume what they produce are our time-cards, but you can't prove by this witness that is his time-card; he doesn't know.

Mr. McRoberts: He punched it.

Mr. Bond: Oh, did he? Well, I am not familiar with the mechanics of it. I think it was a document that never came in the hands of the employee.

(Last preceding question was read.)

The Court: Well, Mr. McRoberts, I don't think after that long time--

[fol. 1142] Mr. McRoberts: I will withdraw the question.

Mr. Bond: I think they ought to prove that is his time-card.

Mr. McRoberts: I think that is all.

Mr. Bond: That is all, Mr. Harris.

The Court: Is that Plaintiffs' case?

Mr. Bond: That is the Plaintiffs' case, Your Honor.

Mr. McRoberts: Your Honor please, I am not sure what your practice is under the new rules. If the Court please, at the close of Plaintiffs' case defendant moves to dismiss the complaint for the reason Plaintiffs' evidence fails to show sufficient grounds for the granting of the relief prayed, or for any relief.

Mr. Bond: I take it the matter is not to be argued.

Mr. Bond: Your Honor ruled on it.

Thereupon, defendant to sustain the issues in its behalf, offered and presented the following evidence:

HARRY P. MILLER,

of lawful age, produced, sworn and examined, testified on behalf of defendant as follows:

Direct Examination by Mr. McRoberts:

Q. Will you state your name, please, Harry?

A. Harry P. Miller.

Q. Where do you live?

[fol. 1143] A. 3530a Connecticut, St. Louis.

Q. Where are you employed?

A. At the St. Louis Administration center, formerly St. Louis Ordnance Plant.

Q. And by whom are you employed?

A. United States Cartridge Company.

Q. How long have you been connected with that company? A. Since February 1, 1942.

Q. And in what capacity are you presently employed?

A. Personnel Director.

Q. And how long have you held that position?

A. Since July 17, 1944.

Q. And before that, what position did you hold?

A. Assistant Director Industrial Relations.

Q. And how long did you hold that position?

A. From July 1, 1943, to July 17, 1944.

Q. And before that what was your position?

A. Personnel supervisor.

Q. How long did you have that position?

A. From February 1, 1942, to July 1, 1943.

Q. And that was when you went to work for the company, was it, February 1st? A. Yes, sir.

Q. Mr. Miller, under those various positions, what connection have you had with the safety department of the company?

[fol. 1144] A. I have been, in the first two positions, assistant to the personnel director who was in charge of the Personnel Division. As such I had the director of safety and his assistants reporting directly to me since February 1, 1942.

Q. And then in your other positions what were your duties with respect to the safety department?

A. The duties were the same.

Q. So that [feom] February, 1942, up to [day], or up until the end of the operation of the plant, the safety department functioned under your general supervision and direction? A. That is true, yes, sir.

Q. It functfoned through the chief safety engineer who was directly in charge of the department.

Mr. Bond: I would rather you would tell about how the department functioned.

Mr. McRoberts: The point is well taken.

Note:

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[fol. 1146] Q. (Mr. McRoberts) I show you a paper which has been identified as Defendant's Exhibit 10 and ask you what that is?

A. That is an organization chart showing the safety department and the various subsections of the safety department.

Q. And disregarding the names and dates shown on there, does that organization chart show the organization of the safety department during substantially the entire [fol. 1147] period of operation of the plant?

A. Yes, sir, it does.

Q. Now, using that to guide you or refresh your recollection, will you describe the organization of the safety department?

A. The safety department was originally organized and set up as one of the six departments within the Personnel Division. The safety department was set up as a staff advisory organization reporting to the assistant director of personnel, and through him to the director. The department functioned through a chief safety engineer who was in charge of the department, and he had at various times from one to three assistants. Under his direct supervision were various sub-departments: the Fire Department, Sanitation and Public Health, Scrap Burning Grounds for the disposal of all explosive scrap, Educational Statistics, records and safety stores, laundry, placement of handicapped or disabled employees, research and specifications, electrical, mechanical and [structureal] subdivision, and explosives, handling and manufacture. Those were the various subheads that functioned directly under the chief safety engineer. All of those sub-departments were set up and established on a staff [supervsory] basis with the exception of two. Those two were the fire department and the burning grounds for the disposal and burning of explosive scrap.

Q. Proceed, Mr. Miller, to describe the engineers or in- [fol. 1148] spectors who operated under and in these various divisions.

A. The fire department was under the direct supervision of a fire chief; sanitation and public health was under the direction of a supervising staff safety engineer with a number of safety engineers working under him on a three-shift basis.

Q. Stop right there. The safety engineers operating under him, those were the kind of safety engineers that we have been talking about in the evidence in this case? Is that right?

A. That is right, yes, sir. The powder disposal unit was in direct charge of a staff safety engineer; the education, statistic records and safety stores were under the direction of a staff safety engineer, and he had other safety engineers under his supervision. The laundry was under the direction of a staff safety engineer.

Q. And no safety engineers under his supervision?

A. No, sir. The Placement Section for the placing of handicapped or disabled employees was under the direct supervision of a staff safety engineer, and he had other safety engineers working under his supervision. The research and specifications was directly under the supervision of a staff safety engineer, and he had other safety engineers working under his supervision. The electrical, mechanical and structural subsection was under the direction of a staff safety engineer, the safety engineers operating three shifts under his supervision. The explosive, handling and manufacturing was likewise under the direction [fol. 1149] of a staff safety engineer with other safety engineers working three shifts under his supervision.

Q. Is it correct that the bulk of the safety engineers was employed in these last two groups? A. That is right.

Q. The majority? A. Yes, sir.

Q. You made the statement that the safety engineering department was set up and operated as a staff advisory organization, with two exceptions: the fire chief and the burning grounds? A. Yes, sir.

Q. Now, what do you mean by that term "staff advisory"? And the other words, the corresponding term for a line operation? A. Line organization, yes, sir.

Q. And in a manufacturing plant you distinguish between a staff function and a line function?

A. You distinguish in this way—

Q. I was going to ask you. Will you please explain what the distinction is?

A. A line function is a function whereby that department actually operates or does the work. For instance, the fire department was not in any sense advisory. It was their job to fight fires and prevent fires, and they worked

[fol. 1150] at it. That was a line job or function. The same thing is true of the scrap at the burning grounds where actual disposal was made of all this explosive scrap. Burning of scrap powder and other explosives was an actual operating function that was carried on there. And so they are set up as a line function. All of the other functions and other subsections of the safety department were considered staff advisory, the reason being that from the beginning we looked to the supervision in the operating units to be responsible for the conditions and for the manufacture of ammunition, and for the protection of their employees. They were responsible for the carrying out of safety in their departments, and the other departments of the safety organization here were advisory to them.

Q. And that is why the rule was established? And I take it from the testimony following that in cases where the safety engineers observed the dangerous conditions or hazardous operations, or anything of that sort, instead of taking it up direct with the employee they took it up with the employee's supervisor in the production branch? Is that correct?

Mr. Bond: That assumes a reason for a thing that the witness hasn't testified about.

The Court: Objection sustained.

Q. What is the reason that the safety engineers were instructed to take up matters of hazardous conditions and unsafe operations and infractions of the safety practices [fol. 1151] with the supervision instead of with the employees themselves?

Mr. Bond: I think the reason is immaterial, the question is what was done out there, what duties were assigned to them and what the character was. The reason that the management might have had in doing that has no bearing on their right to pay overtime.

Mr. McRoberts: The theory of the question is the reasons for requiring the operation to be done in a certain manner, also to indicate the nature and character.

The Court: Objection overruled.

A. The reason was as I just stated, that from the beginning the entire organization was set up so that the supervision in the various departments had full and direct control over all of the conditions in the department. They had direct control of all the employees, the machinery, working conditions, raw material, and so forth, and the direct supervisor of the department was held responsible for safety, for operating safety, and for the safety of its employees. That is the reason that these safety engineers were instructed not to take up any infraction or violation of hazardous practices direct with the employee. It was felt that that would be going over the supervisor's head and would result really with his losing control both of the employees and of the conditions within his department.

Q. Mr. Miller, were the duties and functions of the safety [fol. 1152] department ever reduced to writing?

A. Yes, sir, they were.

Q. Is that true of every department in the plant?

A. Yes, sir, it is.

Q. What do you call those particular documents and papers?

A. Well, in the safety department they wrote up a booklet covering the general duties and functions of the safety engineer. They also wrote up a booklet of what was required from the line supervisory staff in maintaining safety in their department.

Q. May I stop for a moment there, Mr. Miller? Is the first of those booklets, the one which has been identified by Judge Bond here as Plaintiffs' Exhibit F, entitled General Instructions? A. Yes, sir, it is.

Q. And is the second of those booklets the one which has been identified as "Defendant's Exhibit 1"?

A. Yes, sir.

Q. And this second booklet is the booklet that was directed to your line production men to tell them what they should do in keeping their departments and their operations safe?

A. Well, that is true except of course that copies were given to the safety engineer so that the safety engineer would know what the line supervisors should do.

Q. Now, what else was done before reducing the duties [fol. 1153] and functions of the safety engineering department to writing?

A. Job description was written up, job classifications.

Q. Before we come to the individual jobs, I want to get the department itself and to direct your attention: were those documents called Manuals of Procedure with respect to the safety engineering department?

A. Yes, sir, they were.

Q. And some documents were prepared with respect to all departments in the plant? A. To all departments.

Q. What was the general nature of these manuals of Procedure? What were they supposed to be? What functions did they serve?

A. They served the function of setting forth the rules and regulations and requirements of the manner and the way, and the records each department should keep to function properly.

[fol. 1154] Defendant's Exhibit 11.

Date Issued 4/7/43	The United States Cartridge Co.	Bulletin Number 16-I
Date Effective 4/7/43	St. Louis, Missouri	Unit Safety Engineering
Revised	Manual of Procedure	Page 1 of 4
	Departmental Procedure—Safety Department	
	Accident Prevention and Reporting	

Purpose

The purpose of this bulletin is to outline the procedure to be followed by the safety inspection section of the safety department for the prevention and reporting of accidents.

Inspection Function

A safety engineer will be assigned to each manufacturing unit and to each special function of plant operation on each working shift, whose duty it will be to make inspection of each department in his unit. These inspections will cover the building structure, the machinery used in the manufacturing processes, tools, equipment and materials, and the working methods of personnel, in an effort to discover and eliminate any existing or potential hazard that may exist, by the development and application of corrective measures.

Inspection of Tunnels

There also will be a safety engineer assigned to the inspection of atmospheric conditions of all tunnels and crawl spaces. In all places where there is poor circulation of air, the safety engineer assigned to this function will take regular daily atmospheric readings with an explosimeter and carbon monoxide indicator. If these readings indicate a dangerous concentration of gases, the safety engineer will immediately evacuate the area, ventilate it, and notify his supervising safety engineer to have the plant maintenance department correct the hazard at its source. In any situation where gas masks are necessary, the supervising safety engineer will determine the proper kind of mask to be used and will arrange for the supervision of its use. If gas masks are to be used, a minimum of two masks will be issued to each person required to wear one.

Special Investigations

The safety engineer will conduct a special investigation of each accident [occuring] in the area assigned to him to determine the reason for the accident, in order that corrective steps may be taken to prevent [occurence] of similar accidents in the future. In like manner, special studies will be made of cases of occupational illness in order that the facts obtained may be used for the prevention of the illness of other employees.

Rehabilitation of Employees

Another function of the safety engineer will be to assist in the rehabilitation of employees in his area who have been partially disabled. When such an employee returns to work, the safety engineer will contact the supervisor of the unit to which the injured person is assigned and will assist in placing the disabled person in some type of productive operation which will not further his disability.

Checking for Unsafe Conditions or Acts

In striving for the prevention of accidents, the safety engineers will watch particularly for the following:

1. Failure of employees to wear proper clothing, and failure to use safety equipment provided.
2. Unsafe conduct on the part of the employee.
3. Any unsafe condition that might possibly cause an accident or injury to an employee or damage to material and equipment.

Reporting Employee Violations of Safety Regulations.

When a safety engineer observes an unsafe condition or an unsafe act that presents no immediate danger, he will call it to the attention of the foreman and will enter such infraction or condition on the "Report

[fol. 1155]

of Employee Violations of Safety Regulations" (Form IRS-25—Rev. 2/43) which will be submitted to his supervising safety engineer at the end of the shift. Form IRS-25 will show the following information:

1. The number of the department in which the infraction occurred.

2. Badge number of the person who was performing the unsafe act.

3. The name and badge number of the foreman or supervisor of the employee concerned.

4. Remarks relative to the action taken by the foreman or supervisor for the correction of the unsafe condition, and other information pertinent to the case.

Violations reported by each safety engineer will be compiled into a comprehensive daily report showing all of the violations in the plant for that day. This comprehensive report will be duplicated and sent to division heads, department heads, superintendents of operating units, and other production agencies concerned, and all safety engineers.

Daily Summary

In addition to this comprehensive report, a daily summary report will be compiled showing the frequency and type of violations for each building, by shifts. This report will be sent to the Director of Personnel, with a copy to the Chief Safety Engineer.

Correction of Hazardous Conditions

When a safety engineer discovers what he considers to be the existence of an extremely hazardous condition, he is authorized to take immediate direct action

to eliminate the hazard. Any unsafe condition in the restricted area also will fall under this category. The safety engineers will use discretion in the exercise of this authority so that there will be no unnecessary interruption of production. A report of the circumstances and of the action taken will be promptly made to the foreman or supervisor in charge. Cases of this type also will be reported on Form IRS-25.

Occurrence of Accidents

If an accident occurs to an employee, regardless of how slight it may be, the employee will be required to report to the first aid station for treatment, after obtaining the verbal consent of his foreman or supervisor. After treating the injuries, the nurse on duty will prepare a "Case Record" (Form IRM-13—Rev. 2-42). This form will completely identify the employee as to name, badge number, and location. It also will carry a complete description of the nature of the injury and the treatment given (See Bulletin Number 14-3).

Use of Form IRS-39-A

Several times during the day, the safety engineer will call at the first aid stations located in the unit to which he is assigned and collect the triplicate copies of Forms IRM-13 prepared by the nurse. For every Form IRM-13 except those marked "Revisit", or those covering illness, the safety engineer will prepare in original only a "Report of Employee's Accident" (Form IRS-39-A—Rev. 2-43). The safety engineer will contact any employees who were involved in the accident in order that the preparation of Form IRS-39-A may be as complete as possible. Form IRS-39-A will show personal information pertaining to the employee and the following analysis of the accident:

[fol. 1156]

1. Occupational group.
2. Agency causing accident.
3. What employee was doing.
4. Type of accident.
5. Unsafe condition.
6. Unsafe personal factor.
7. Unsafe act.
8. Location and nature of injury.

The safety engineer will sign the form and attach to it the corresponding Form IRM-13. At the end of the shift, the safety engineer will turn in all Forms IRM-13 and IRS-39-A to his supervising safety engineer in Building 222B.

Use of Form IRS-5

In addition to Form IRS-39-A, the safety engineer also will prepare a "Safety Inspection Report" (Form IRS-5—Rev. 5/42) on all lost time accidents, and on other than lost time accidents when, in the opinion of his supervising engineer, an additional report is required. Form IRS-5 will show the following information:

1. Name and badge number of employee.
2. Occupation.
3. Date and time.

4. Location.

5. Injury.

6. Treatment.

7. Complete details of the accident.

8. Detailed steps taken for correction.

Form IRS-5 will be turned in to the supervising safety engineer's office at the end of the shift.

Distribution of Form IRS-5

The supervising safety engineer's office then will use the information on the long-hand copy of Form IRS-5 to prepare in four copies a typewritten report, also on Form IRS-5. Distribution of the typed Form IRS-5 will be as follows:

Original and Duplicate—Sent to the safety department clerical office.

[fol. 1157]

Triplicate—To be transmitted from the general safety engineer in charge of safety engineering to the assistant chief safety engineer, then to the chief safety engineer who will pass it on to the superintendent or department head of the building or department in which the accident occurred.

Fourth Copy—Retained by the supervising safety engineer.

Additional Use of Form IRS-5

Form IRS-5 also will be used by the safety engineer to prepare and submit a daily log of the activities on his shift and to report any unusual accident, occurrence, or condition that the safety engineer thinks should be covered by a special report. From the individual daily logs turned in by the safety engineers, each supervising safety engineer will prepare a daily log of his shift, consisting of the most important items noted by the safety engineers. This report will be turned in to the general safety engineer in charge of safety engineering.

Forms Mentioned

The following forms are mentioned in this procedure:

Form IRS-25 (Rev. 2 43) "Report of Employee Violations of Safety Regulations"

Form IRM-13 (Rev. 2 42) "Case Record"

Form IRS-39-A (Rev. 2-43) "Report of Employee Accident"

Form IRS-5 (Rev. 5-42) "Safety Inspection Report"

Bulletin Referred To

The following bulletin is referred to in this procedure:

Bulletin Number 14-3 "Accident and Illness Procedures"

Departments Affected

The following departments are affected by this procedure:

Safety Department

Plant Maintenance Department

Medical Department

Production Control Department

Manufacturing Department

[fol. 1158]

Date Issued 3/25/43 Date Effective 3/25/43	The United States Cartridge Co. St. Louis, Missouri Manual of Procedure Departmental Procedure—Safety Department Educational Program	Bulletin Number 16-2 Unit. Instruction, Stores & Records Page 1 of 3

Purpose

The purpose of this bulletin is to outline in a general way the program of safety education.

Class Room Instruction

The greater part of the educational program will consist of class room sessions designed for the various occupational groups as follows:

1. All adjuster trainees, building inspector trainees, inspector trainees, machine tool trainees, and supervisory trainees will be given an instruction course consisting of ten hours of first aid and six hours of safety.

2. In addition to the above, all supervisory trainees will be given an additional eight hours of instruction on safety in foremanship.

3. Female gagers will be given six hours of instruction on first aid and safety.

4. All plant guards will be given a preliminary course consisting of ten hours of instruction on first aid. This ten hour course will include a small amount of training in safety. At some time after the completion of this preliminary course, all plant guards will be given an additional ten hours of instruction on first aid and safety.

5. Firemen will be given a standard Red Cross first aid course of twenty hours. This course will be supplemented by weekly meetings, at which time the firemen will be given instruction on prob-

lems of first aid, disaster procedure and firemanship.

6. Drivers of explosive trucks will be given 10 hours of instruction on safety in the handling of explosives. This will include the Interstate Commerce Commission and Ordnance Department motor carrier safety regulations.

7. Powder handlers will be given 10 hours of instruction in the handling of explosives. This course also will include some fundamentals of first aid and instruction in the use of emergency fire equipment.

8. Operators of electric trucks will be given 6 hours of instruction on safety in the operation of industrial power trucks.

9. Weekly meetings will be held for electricians during which they will be given instruction on the prone pressure method of resuscitation, control of bleeding, and safe practices in the operation and handling of electrical equipment.

[fol. 1159]

10. Special courses will be inaugurated from time to time for instructions on special hazards for certain occupational groups.

All of the above courses will be designed to meet the needs of the individual groups and will include instruction on accident hazards that will be encountered on the job.

Safety Manual

A safety instruction manual covering the subject matter will be loaned to each employee who attends instruction classes under the direction of the safety department. These manuals will be returned to the safety department by the trainees within a reasonable time. However, supervisors, guards, drivers of explosive trucks, powder handlers, and firemen will be allowed to keep the instruction manuals in their possession as long as they remain with the company.

Use of Form IRS-44

A "Certificate of First Aid Instructions" (Form IRS-44—Rev. 6/42) will be issued to each trainee who completes an instruction course in first aid. This certificate will show the employee's name and badge number, the date on which the course was completed, and will be signed by the instructor. Trainees who complete a standard Red Cross first aid course will be issued a Red Cross first aid certificate.

Employee's Training Record

Each month, the names of all of the employees who have attended training courses during the month will be alphabetically posted in an "Employee's Training Record" (Form IRS-12-A). This card will show the

name, badge number and address of each employee, his occupation code, date attended, courses taken, and the grade. When an employee takes more than one training course, an individual record will be kept on Form IRS-12-A.

Safety Engineers' Weekly Meetings

There will be a continuous process of education within the safety department by means of weekly meetings. These meetings will be designed to give the safety engineers a broader understanding of their jobs, and will consist of the discussion of such topics as industrial organization, industrial psychology and safety engineering.

Posters

As part of the educational program, there will be one safety engineer in charge of safety posters. He will be responsible for the allocation and the issuing of posters supplied by the National Safety Council, as well as those created by the safety department. A "Record of Bulletin Boards and Postings" (Form IRS-32) will be kept for each bulletin board. This card will show the number of each poster assigned to that bulletin board and the date upon which it was posted. The use of this card record will enable the safety engineer to rotate postings so that one poster will not remain for too long a time on any one board. In addition to the posters on the regular bulletin boards, original posters created by the safety department will be placed on easels and rotated among the various units. The safety engineer in charge of posters also will handle the issuance of safety bulletins and bulletins concerning any new ordnance regulations.

Forms Mentioned

The following forms are mentioned in this procedure:

Form IRS-44 (Rev. 6-42) "Certificate of First Aid Instructions"

Form IRS-12-A "Employee's Training Record"

Form IRS-32 "Record of Bulletin Boards and Postings"

Departments Affected

The following departments are affected by this procedure:

Safety Department

Plant Protection Department

[fol. 1161]

Date Issued 12/14/43 Date Effective 12/14/43	The United States Cartridge Co. St. Louis, Missouri Manual of Procedure Departmental Procedure—Safety Engineering Department Placement of Physically Handicapped Employees	Bulletin Number 16-3 Unit Placement Page 1 of 4

Purpose

The purpose of this bulletin is to outline the procedure to be followed by the placement unit of the safety engineering department in the placement and transfer of employees classified in "B" or "C" medical classification by the medical department.

Placement Schedule

A schedule of all hourly rated job classifications, indicating the particular physical deficiency that will be allowed in the placement of physically handicapped employees is set forth in detail in safety engineering department Standard Practice Instruction Bulletin Number 16-3.

Medical Examination and Classification

As outlined in Bulletin Number 14-2, prospective employees will be sent by the employment department interviewer to the medical department for a pre-employment examination. As a result of this examination, the employee will be classified as class "A", class "B", or class "C", depending upon how he measures up to the medical standards specified in Bulletin Number 14-1. Employees receiving a class "B" or class "C" medical classification will be assigned a badge number in the series from 60,000 to 69,999. A badge number in this series will serve as a reminder to the employee's supervisor that the employee cannot be transferred from his present job to a position other than one indicated on the medical placement list without approval by the placement unit and the medical department.

Placement of Class "B" and "C" Employees

At the time of induction employees having a class "B" or class "C" medical classification will present

their "Notice of Employment" (Form IRP-1—Rev. 6 43) to the safety engineer in the placement unit, Building 107. The safety engineer will review the medical department's summarization of the employee's physical deficiency as shown on Form IRP-1. From the recommendation of the medical department the safety engineer will check the position that the employee has been hired to fill and will contact the unit superintendent or department head under which the employee will work to ascertain the exact extent of his duties. If the employee's physical condition is such that he can satisfactorily perform the duties that are required of the prospective position, a record will be made on a 3 x 5 card showing the employee's name, badge number, physical deficiency and his location in the plant.

Re-Examination of Class "C" Employees

A class "C" employee is one hired on the condition that he visit his private physician to have a medical deficiency removed or treated within a certain specified period. When a class "C" employee clears through the safety engineer in the placement unit, the safety engineer will establish a follow-up card file from which he will notify the medical department by memorandum within a period of from thirty to sixty days after employment of the individual that the employee should be re-examined. The medical department will prepare an "Introduction to Medical Department" (Form IRM 9—Rev. 9-42) to call the employee in for an examination. If, in the opinion of the medical department, the physical disability has either been corrected or materially improved, the medical department may recommend to the placement unit that the conditional employee be placed in either a class "A" or class "B" classification. If such a change in classification is recommended, it will be handled as described in the following paragraph. If the physical disability or the condition of the employee has not been treated or has not shown the necessary improvement, the medical department will report its recommendations to the placement unit, which will arrange with the unit superin-

[fol. 1162]

tendent or department head that the recommendations of the medical department be carried out.

Change of Medical Classification

When a class "B" or class "C" employee is changed to a class "A" employee the placement unit will request the employee service department to assign him a new badge number in place of the number in the 60,000 series originally assigned. If a class "A" employee should be reclassified by the medical department as a class "B" employee, he will be referred to the placement unit for a check of his established job, to see if his physical condition is such that he can remain on the same job. If a transfer is indicated it will be handled as outlined in the paragraph below and the placement unit will request the assignment of a new badge number in the 60,000 series.

Transfer of Class "B" and Class "C" Employees

Whenever a class "B" or class "C" employee is to be transferred to a different department or job classification, the "Request for Rate Change or Transfer" (Form G-49—Rev. 1/43) must be forwarded to the placement unit for entry on the employee's record. Form G-49 then will be returned to the originator for handling as outlined in Bulletin Number 53-3. In no case will a transfer involving a class "B" or class "C" employee to an occupation not indicated on the approved medical placement list be completed without a medical re-examination and without the joint approval of the safety engineering department and the medical department.

Special Arrangements for Injured Employees

When an employee receives an injury which the medical department feels is too severe to permit him to return to his regular job, but not severe enough to warrant sending the employee home, the medical department will turn its recommendations over to the placement unit. This unit will contact the employee's department head or supervisor and arrange for the employee to be placed on some established job that he can perform for the duration of the injury or until the medical department advises that he may resume his regular job. Each day the placement unit will prepare in four copies a memorandum which will show the case history of each injured employee who returned to work to prevent lost time and will outline the agreement reached with the employee's supervisor for placing him on a different job for the duration of the injury. This memorandum will be distributed as follows:

Original—To the chief safety engineer.

Duplicate—To the medical department.

Triplicate—To the labor relations department which will forward it to the personnel assistant in the building in which the employee works. The personnel assistant will check to see that the agreement made by the supervisor is being followed and will report his findings to the manager of the labor relations department.

Fourth Copy—Retained by the placement unit.

[fol. 1163]

Date Issued 12/14/43 Date Effective 12/14/43	The United States Cartridge Co. St. Louis, Missouri Manual of Procedure Departmental Procedure—Safety Engineering Department Placement of Physically Handicapped Employees	Bulletin Number 16-3 Unit Placement Page 3 of 4

Lost Time Injuries

In the event an employee has been injured to such an extent that he must be sent to an outside hospital or physician, or to his home, the safety engineer in the placement unit will obtain as much information regarding the accident as possible from the employee, or from the plant guard or medical department before the employee leaves the plant premises. The safety engineer will prepare in triplicate a "Preliminary Employee's Injury Report" Form IRS-28—Rev. 3 42] which will show pertinent information about the employee and facts regarding the accident and the nature of the injury. Form IRS-28 will be distributed as follows:

Original—To the chief safety engineer

Duplicate—To the commanding officer

Triplicate—To the plant protection division.

Investigation by Safety Inspector

After the preparation and distribution of Form IRS-28, the safety engineer then will call, by telephone, the superintendent of the unit in which the accident occurred and inform him of the extent of the injuries so that he, in turn, may inform the unit safety inspector. The unit safety inspector then will make a complete investigation of the accident and report it as outlined in Bulletin Number 16-1.

Checking Amount of Lost Time

On all lost time accidents, the safety engineering department clerical office will assemble the following

documents and send them to the placement unit for checking.

1. A copy of "Safety Inspection Report" (Form IRS-5—Rev. 5/42) obtained from the unit safety inspector.

2. Duplicate copy of "Report of Examination" (Form IRM-4) obtained from the medical department.

3. Fifth copy of "Surgeon's Report" (Form IRM-11A) obtained from the medical department.

The placement unit will hold the above papers until the injured employee returns to work, at which time it will record the amount of lost time and return the papers to the clerical office.

Return to Work of Injured Employee

When an employee who has been absent because of an injury returns to work, he will be required to clear through the medical department as outlined in Bulletin Number 14-3. When it is the opinion of the medical department that the employee can return to an established job in the plant (not necessarily his regular job), he will be referred to the placement unit for assignment. This unit will check his condition with available positions and recommend his assignment to a job suitable to his physical condition from the standpoint of safety. The placement unit will turn its findings over [the] the employee service department with recommendations for reinstatement or, if the employee has not been terminated, for transfer, the arrangements for which then will be made by the employee service department.

[fol. 1163-A]

Forms Mentioned

The following forms are mentioned in this procedure:

Form IRP-1 (Rev. 6/43) "Notice of Employment"

Form IRM-9 (Rev. 9/42) "Introduction to Medical Department"

Form G-49 (Rev. 1/43) "Request for Rate Change or Transfer"

Form IRS-28 (Rev. 3/42) "Preliminary Employee's Injury Report"

Form IRS-5 (Rev. 5/42) "Safety Inspection Report"

Form IRM-4 "Report of Examination"

Form IRM-11A "Surgeon's Report"

Bulletins Referred To

The following bulletins are referred to in this procedure:

Standard Practice Instructions—Bulletin Number 16-3 "Medical Placement Schedule"

Bulletin Number 14-2 "Pre-Employment Examination"

Bulletin Number 14-1 "Medical Standards"

Bulletin Number 53-3 "Rate Changes or Transfers—Hourly and Salary Rated Employees"

Bulletin Number 16-1 "Accident Prevention and Reporting"

Bulletin Number 14-3 "Accident and Illness Procedure"

Departments Affected

The following departments are affected by this procedure:

Safety Engineering Department

Medical Department

Employee Service Department

Employment Department

Labor Relations Department

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[fol. 1164]

Date Issued 4/7/45	The United States Cartridge Co.	Bulletin Number 16-3
Date Effective 4/7/45	St. Louis, Missouri	Reference Procedure No.
	Departmental Instructions	Page 1 of 4
	Safety Engineering Department	
	Placement of Physically Handicapped Employees	

Purpose

The purpose of this departmental instructions bulletin is to outline the procedure to be followed by the job placement section of the safety engineering department in the placement and transfer of employees classified in "B" or "C" medical classification by the medical department.

Placement Schedule

A schedule of all hourly rated job classifications, indicating the particular physical deficiency that will be allowed in the placement of physically handicapped employees is set forth in detail in safety engineering department standard practice instructions Bulletin Number 16-3.

Medical Examination and Classification

As outlined in departmental instructions Bulletin Number 14-2, prospective employees will be sent by the employment department interviewer to the medical department for a pre-employment examination. As a result of this examination, the employee will be classified as class "A", class "B" or class "C", depending upon how he measures up to the medical standards specified in Departmental Instructions Bulletin Number 14-1. Employees receiving a class "B" or class "C" medical classification will be assigned a badge number in the series from 60,000 to 69,999. A badge number in this series will serve as a reminder to the employee's supervisor that the employee cannot be transferred from his present job without approval of the job placement section or the medical department.

Placement of Class "B" and "C" Employees

At the time of induction, employees having a class "B" or class "C" medical classification will present their "Notice of Employment" (Form IRP-1—Rev.

6-43) to the safety engineer in the job placement section, Building 107. The safety engineer will review the medical department's summarization of the employee's physical deficiency as shown on Form IRP-1, and from the recommendation of the medical department, will check the position that the employee has been hired to fill. If the employee's physical condition is such that he can satisfactorily perform the duties that are required of the prospective position, a record will be made on a 3 x 5 card showing the employee's name, badge number, physical deficiency and his location in the plant.

Re-Examination of Class "C" Employees

A class "C" employee is one hired on the condition that he visit his private physician to have a medical deficiency removed or treated within a certain specified period. When a class "C" employee clears through the safety engineer in the job placement section, the safety engineer will establish a follow-up card for the employee, from which he will notify the medical department by memorandum within a period of from thirty to sixty days after employment of the individual that the employee should be re-examined. Upon receipt of such notification, the medical department will prepare an "Introduction to Medical Department" (Form IRM-9—Rev. 9-42) to call the employee in for an examination. If, in the opinion of the medical department, the physical disability has either been corrected or materially improved, the medical department may recommend to the job placement section that the "Conditional" employee be placed in either a class "A" or class "B" classification. If such a change in classification is recommended, it will be handled as described in the following paragraph. If the physical disability or the condition of the employee has not been treated or has not shown the necessary improvement, the medical department will report its recommendations to the job placement section which will arrange with the unit superintendent or department head that the recommendations of the medical department be carried out.

[fol. 1165]

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Change of Medical Classification

When a class "B" or class "C" employee is changed to a class "A" employee, the job placement section will request the plant protection division to assign him a new badge number in place of the number in the 60,000 series originally assigned. If a class "A" employee should be reclassified by the medical department as a class "B" employee, he will be referred to the job placement section for a check of his established job to see if his physical condition is such that he can remain on the same job. If a transfer is indicated it will be handled as outlined in the paragraph below and the job placement section will request the assignment of a new badge number in the 60,000 series.

Transfer of Class "B" and Class "C" Employees

Whenever a class "B" or class "C" employee is to be transferred to a different department or job classification, the "Request for Rate Change or Transfer" (Form G-49 Rev. 1-43) must be forwarded by the originator to the job placement section for entry on the employee's record. Form G-49 then will be returned to the originator for handling as outlined in Departmental Instructions Bulletin Number 53-3.

Special Arrangements for Injured Employees

When an employee receives an injury which the medical department feels is too severe to permit him to return to his regular job, but not severe enough to warrant sending the employee home, the medical department will turn its recommendations over to the job placement section. This section will contact the

employee's department head or supervisor and arrange for the employee to be placed on some established job that he can perform for the duration of the injury or until the medical department advises that he may resume his regular job. Each day the job placement section will prepare, in five copies, a memorandum which will show the case history of each injured employee who returned to work to prevent lost time, and will outline the agreement reached with the employee's supervisor for placing him on a different job for the duration of the injury. This memorandum wil be distributed as follows:

Original—Routed to the chief safety engineer

Duplicate—Routed to the medical department

Triplicate—Routed to the labor relations department

Fourth Copy—Routed to the safety engineering department clerical office

Fifth Copy—Retained by the job placement section.

Preparation and Distribution of Form IRS-28

In the event an employee has been injured to such an extent that he must be sent to an outside hospital, the safety engineer in the job placement section will obtain as much information regarding the accident as possible from the employee, or from the plant guard or medical department before the employee leaves the plant premises. The safety engineer will prepare in five copies, a "Preliminary Employee's Injury Report" (Form IRS-28—Rev. 1/44) which will show pertinent information about the employee and facts regarding the accident and the nature of the injury. Form IRS-28 will be distributed as follows:

[fol. 1166]

Original—Routed to the chief safety engineer

Duplicate—Routed to the safety and security division of the ordnance department

Triplicate—Routed to the plant protection division.

Fourth Copy—Routed to the safety engineering department clerical office

Fifth Copy—Routed to the general superintendent.

Investigation of Accident

After the preparation and distribution of Form IRS-28, the job placement section will telephone the superintendent of the unit in which the accident occurred, and inform him of the extent of the injuries so that he in turn may inform the employee's supervisor. The employee's supervisor then will make a complete investigation of the accident and report it as outlined in Departmental Instructions Bulletin Number 16-1.

Checking Amount of Lost Time

On all lost time accidents, the safety engineering department clerical office will assemble the following documents and send them to the job placement section for checking.

1. A copy of "Accident Investigation Report" (Form IRS-5—Rev. 5-42) obtained from the employee's supervisor.

2. A copy of "Report of Examination" (Form IRM-4) obtained from the medical department.

3. A copy of "Surgeon's Report" (Form IRM-11A) obtained from the medical department.

The job placement section will review the above papers and record the amount of lost time, after which the papers will be returned to the clerical office.

Return to Work of Injured Employee

When an employee who has been absent because of an injury returns to work, he will be required to clear through the medical department as outlined in Departmental Instructions Bulletin Number 14-3. When it is the opinion of the medical department that the employee can return to an established job in the plant (not necessarily his regular job), he will be referred to the job placement section for assignment. This section will check his condition with available positions and recommend his assignment to a job suitable to his physical condition from the standpoint of safety. The job placement section will turn its findings over to the employee service department with recommendations for reinstatement, or if the employee has not been terminated, for transfer, the arrangements for which then will be made by the employee service department.

Forms Mentioned

The following forms are mentioned in these instructions:

Form IRP-1 (Rev. 6/43) "Notice of Employment"

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Form IRM-9 (Rev. 9-42) "Introduction to Medical Department"

Form G-49 (Rev. 1-43) "Request for Rate Change or Transfer"

Form IRS-28 (Rev. 1-44) "Preliminary Employee's Injury Report"

Form IRS-5 (Rev. 5-42) "Accident Investigation Report"

Form IRM-4 "Report of Examination"

Form IRM-11A "Surgeon's Report"

Bulletins Referred To

The following bulletins are referred to in these instructions:

Standard Practice Instructions Bulletins Number 16-3 "Medical Placement Schedule"

Departmental Instructions

Bulletin Number 14-2 "Pre-Employment Examination"

Bulletin Number 14-1 "Medical Standards"

Bulletin Number 53-3 "Rate Changes or Transfers—Hourly and Salary Rated Employees"

Bulletin Number 16-1 "Accident Prevention and Reporting"

Bulletin Number 14-3 "Accident and Illness Procedure"

Departments Affected

All departments are affected by these instructions.

[fol. 1168]

Date Issued 4/9/45 Date Effective 3/1/45 Revised	The United States Cartridge Co. St. Louis, Missouri Standard Practice Instructions— Safety Engineering Department Medical Placement Schedule	Bulletin Number 16-3 Reference Procedure No. Page 1 of 14

Purpose

The purpose of this bulletin is only to list the physical defects which are permissible in each of the standard company job classifications outlined in Departmental Instructions Bulletin Number 1-17. For detailed explanation of the placement procedure, see Departmental Instructions Bulletin Number 16-3.

Schedule of Defects

Defect Code	Physical Defect
1	Vision
2	Color Discrimination
3	Hearing
4	Monocular Vision
5	Back
6	Varicose Veins
7	Allergy
8	Chest
9	Heart and Blood Pressure

Explanation of Placement Schedule

The symbol "x" in any column on the following pages indicates that the defect coded at the head of the corresponding column is acceptable in the occupation listed in the column headed "Occupation Name." Physical defects not listed must be given individual consideration.

Transfers

The defects listed above are the more frequent types of disabilities, and employees having these disabilities can be transferred temporarily according to the following charts. However, all such transfers made, must be reported to the job placement section of the safety engineering department.

[fol. 1169]

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Occupational Code	Occupation Name	Physical Defect Code 1	2	3	4	5	6	7	8	9
	Production Operators									
10	Blank and cup operator		X	X			X	X		
11	Draw press case and bullet jacket operator		X	X		X	X	X		
13	Bump, pocket and head operator		X	X			X	X	X	
14	Taper and plug operator		X	X			X	X	X	
18	Case trim operator	X	X	X			X	X	X	X
19	Head turn operator	X	X	X			X	X	X	X
21	Primer assembly operator		X				X	X		
22	Primer insert, inserting operator		X	X			X			
23	Primer charge operator		X				X			
27	Lead extrusion press operator		X				X			
28	Lead slug forming machine operator		X				X			
29	Bullet assembly machine operator		X	X		X	X	X	X	X
30	Bullet-cannelure-trim-chamfer operator	X	X	X		X	X	X	X	X
31	Tracer bullet cannelure, trim, chamfer operator (explosive)						X			
32	Tracer charge operator		X				X			
33	Jacket insert girl		X				X			
34	Plate loading cartridge machine operator			X						
35	Straight line cartridge loading machine operator			X			X			
36	Gage and weigh machine operator—.50 caliber	X	X	X	X		X	X	X	X
36	Gage and weigh machine operator—.30 caliber	X		X	X			X	X	
37	Plate loading bullet turner operator			X			X			
38	Cartridge clip assembly fixture operator			X		X	X	X	X	X
40	Blank-clip body and spring operator	X		X				X	X	
41	Cartridge packing operator	X	X	X	X		X	X	X	X

[fol. 1170]

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Occupational Code	Occupation Name	Physical Defect Code 1	2	3	4	5	6	7	8	9
	Production Operators—(Continued)									
42	Solderer—test, seal, and pack chests	x		x	x			x		
45	Annealing machine operator	x	x	x			x	x	x	
48	Tracer bullet polisher (explosive)						x			
49	Anneal, pickle and wash operator	x	x	x	x	x	x			
50	Primer mixer		x				x			
51	.50 caliber case gage operator	x	x	x	x	x	x	x	x	x
57	Sort-lubricate case operator		x	x		x	x	x	x	x
62	Tracer mixer						x			
66	Cartridge verify operator (explosive)			x		x	x	x	x	x
67	.30 caliber breakdown operator (explosive)	x		x	x	x	x			
69	.50 caliber breakdown operator (explosive)	x		x	x	x	x			
	Gagers									
120	Gager			x						x
121	Gager instructress		x			x	x	x	x	x
122	Female gager (explosives)									
	Chief Adjusters									
150	Blank, cup and draw (case) chief adjuster	x	x	x	x		x	x	x	x
151	Case—first and second trim chief adjuster	x	x	x	x	x	x	x	x	x
152	Case—bump, pocket and head chief adjuster	x	x	x	x	x	x	x	x	x
153	Case—head turn and finish trim chief adjuster	x	x	x	x	x	x	x	x	x
154	Taper and plug and anneal chief adjuster	x	x	x	x	x	x	x	x	x
155	Bullet jacket—draw chief adjuster	x	x	x	x	x	x	x	x	x
156	Bullet jacket—trim and cannelure chief adjuster	x	x	x	x	x	x	x	x	

[fol. 1171]

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Occupational Code	Occupation Name	Physical Defect Code 1	2	3	4	5	6	7	8	9
	Chief Adjusters—(Continued)									
157	Bullet assembly chief adjuster	x	x	x	x	x	x	x	x	x
158	Primer insert chief adjuster	x	x	x	x	x	x			
159	Cartridge loading chief adjuster	x	x	x	x	x	x			
160	Gage and weigh chief adjuster	x	x	x	x	x	x	x	x	x
161	Clip manufactura chief adjuster	x	x	x	x	x	x	x	x	x
162	.50 caliber case gage chief adjuster	x	x	x	x	x	x	x	x	x
163	Lead slug chief adjuster	x	x	x	x	x	x			x
164	Primer assembly chief adjuster	x	x	x	x	x	x			
165	Tracer charge chief adjuster	x	x	x	x	x	x			
166	Primer cup and anvil chief adjuster	x	x	x	x	x	x	x	x	
167	Reload chief adjuster	x	x	x	x	x	x			
	Adjusters									
200	.30 caliber blank and cup adjuster	x	x	x	x		x	x	x	
201	.30 caliber draw press adjuster	x	x	x	x	x	x	x	x	
203	.30 caliber bump pocket and head adjuster	x	x	x	x	x	x	x	x	x
204	.30 caliber taper and plug adjuster	x	x	x	x	x	x	x	x	x
206	.30 and .50 caliber primer cup & anvil blank & form press adjuster	x	x	x	x	x	x			x
208	.30 caliber case trim adjuster	x	x	x	x	x	x	x	x	x
209	.30 caliber head turn adjuster	x	x	x	x	x	x	x	x	x
210	.30 caliber primer insert adjuster	x	x	x	x	x	x			x
211	.30 caliber and .50 caliber primer assembly adjuster	x	x	x	x	x	x			x
213	.30 caliber cartridge — clip assembly adjuster	x	x	x	x	x	x	x	x	x
214	Lead slug forming machine adjuster	x	x	x	x	x	x			x

[fol. 1172]

Date.	The United States Cartridge Co.	Bulletin
Issued 4/9/45	St. Louis, Missouri	Number 16-3
Date	Standard Practice Instructions—	Reference
Effective 3/1/45	Safety Engineering Department	Procedure No.
Revised	Medical Placement Schedule	Page 5 of 14

Occupational Code	Occupation Name	Physical Defect Code 1	2	3	4	5	6	7	8	9
	Adjusters—(Continued)									
215	.30 caliber bullet assembly adjuster	x	x	x	x	x	x	x	x	x
216	.30 caliber bullet cannelure — trim chamfer adjuster	x	x	x	x	x	x	x	x	x
218	.30 caliber tracer charge adjuster	x	x	x	x	x	x			
219	.30 caliber plate loading adjuster	x	x	x	x	x	x			
220	.30 caliber straight line loading adjuster	x	x	x	x	x	x			
221	.30 caliber gage and weigh adjuster	x	x	x	x	x	x	x		
222	Cartridge clip body and spring adjuster	x	x	x	x	x	x	x	x	x
223	.30 caliber packing machine adjuster	x	x	x	x	x	x	x	x	
224	.30 caliber annealing machine adjuster	x	x	x	x	x	x	x		
227	Adjuster trainee (new employees)	x	x	x	x	x	x	x	x	x
228	Adjuster trainee (transferred from other codes)	x	x	x	x	x	x	x	x	x
229	Adjuster trainee — explosive (transferred from other codes)	x	x	x	x	x	x			
230	.50 caliber blank and cup press adjuster	x	x	x	x		x	x	x	
231	.50 caliber draw press adjuster	x	x	x	x	x	x	x	x	
232	.50 caliber pocket and head adjuster	x	x	x	x	x	x	x	x	x
233	.50 caliber taper and plug press adjuster	x	x	x	x	x	x	x		x
234	.50 caliber case trim adjuster	x	x	x	x	x	x	x	x	x
235	.50 caliber head turn adjuster	x	x	x	x	x	x	x	x	x
236	.50 caliber primer insert adjuster	x	x	x	x	x	x			
237	.50 caliber cartridge-clip assembly adjuster	x	x	x	x	x	x	x	x	
238	.50 caliber bullet assembly adjuster	x	x	x	x	x	x	x	x	x
239	.50 caliber bullet cannelure, trim, chamfer adjuster	x	x	x	x	x	x	x	x	x
240	.50 caliber tracer charge adjuster	x	x	x	x	x	x			

[fol. 1173]

Date Issued 4/9/45	The United States Cartridge Co.		Bulletin Number 16.3
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Occupational Code	Occupation Name	Physical Defect Code 1	2	3	4	5	6	7	8	9
	Adjusters—(Continued)									
241	.50 caliber straight line loading adjuster	x	x	x	x	x	x			
242	.50 caliber gage and weigh adjuster	x	x	x	x	x	x	x	x	x
243	.50 caliber annealing machine adjuster	x	x	x	x	x	x	x	x	x
244	.50 caliber packing machine adjuster	x	x	x	x	x	x	x	x	x
	Unit Machine Repair Shop									
275	Machinist class B unit repair shop	x	x	x			x	x	x	x
276	Machinist class C unit repair shop	x	x	x			x	x	x	x
280	Machinist helper unit repair shop		x	x			x	x	x	x
285	Repair shop working foreman	x	x	x	x		x	x	x	x
	Inspection									
300	Roving inspector (case and bullet)	x	x	x		x	x	x	x	x
301	Roving inspector (explosives)	x		x		x	x			
303	First case inspection visual	x	x	x		x	x	x	x	x
304	Finish case inspector	x	x	x		x	x	x	x	x
305	Bullet inspector	x	x	x			x	x	x	x
306	Primer cup insert inspector	x	x			x	x			
310	Primer inspector (cup and pellet)		x	x		x	x	x	x	x
315	Finish cartridge inspector	x		x		x	x	x	x	x
316	Tracer bullet inspector					x				
317	Production inspection trainee	x	x	x		x	x	x	x	x
318	Production inspection trainee (explosive)	x		x		x	x			
319	Inspection supervisor 100% station and roving inspection	x	x	x		x	x			x
320	Inspector supervisor explosive	x		x		x	x			

[fol. 1174]

Date Issued	4/9/45	The United States Cartridge Co. St. Louis, Missouri	Bulletin Number 16-3
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Occupational Code	Occupation Name	Physical Defect Code 1	2	3	4	5	6	7	8	9
	Inspection—(Continued)									
323	Sample girl		X			X	X			X
325	Floorman inspection	X	X	X	X		X	X		
326	Floorman inspection explosives	X		X			X			
327	Floorman—working foreman	X	X	X	X		X			
328	Floorman—explosive (inspection)	X		X			X			
	Transportation									
400	Locomotive engineer (Diesel)					X	X	X	X	
401	Locomotive maintenance mechanic		X				X	X	X	X
402	Truck dispatcher	X	X		X	X	X	X	X	X
404	Driver truck (explosive straight truck)						X			
405	Driver—car and truck (non-explosive)	X				X	X	X	X	
406	Switchman						X	X	X	
407	Yard foreman	X	X	X	X	X	X	X	X	X
408	Truck driver—helper	X	X		X		X	X	X	
409	Driver—truck (explosive tractor trailer)						X			
410	Tractor driver helper						X			
	Garage									
425	Garage foreman	X	X	X	X	X	X	X	X	X
426	Garage attendant	X	X	X	X		X			
427	Garage mechanic	X	X	X	X		X			X
429	Electric truck battery charger	X	X		X		X			
	Ballistics									
450	Chronograph operator	X	X			X	X	X	X	X

[fol. 1175]

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Occupational Code	Occupation Name	Physical Defect Code 1	2	3	4	5	6	7	8	9
	Ballistics—(Continued)									
451	Gunner—class A	x					x			x
452	Gunner—class B	x				x	x			x
453	Chief gunsmith	x				x	x			x
454	Gunsmith	x				x	x			x
456	Target house man	x					x			x
	Power House									
476	Boiler house fireman	x	x	x			x			
477	Stationary engineer	x	x	x	x	x	x	x		
478	Tunnel maintenance man	x					x			
481	Boiler house maintenance man	x	x	x	x					
	Building and Grounds Maintenance									
500	Blacksmith		x	x			x			
502	Sign painter	x		x	x	x	x			x
504	Carpenters—class A	x	x	x	x		x	x	x	x
505	Carpenters—class B	x	x	x	x		x	x	x	x
506	Electrician—class A	x	x	x	x	x	x	x	x	x
507	Electrician—class C	x	x	x	x	x	x	x	x	x
509	Electrician—class B	x	x	x	x	x	x	x	x	x
510	Painter—class A	x		x	x	x	x			x
511	Painter—class B	x		x	x	x	x			x
512	Pipefitter and steamfitter—class A	x	x	x	x	x	x	x	x	x
513	Pipefitter and steamfitter—class B	x	x	x	x	x	x	x	x	x
514	Plumber—class A	x	x	x	x	x	x	x	x	x
515	Plumber—class B	x	x	x	x	x	x	x	x	x
518	Yardman	x	x	x	x	x	x	x	x	x
519	Power sweeper driver		x			x	x			x
520	Janitor and porter	x	x	x	x	x	x	x	x	x

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Occupational Code	Occupation Name	Physical Defect Code 1	2	3	4	5	6	7	8	9
	Building and Grounds Maintenance (Continued)									
521	Matron	x	x	x	x	x	x	x	x	x
522	Matron supervisor	x	x	x	x	x	x	x	x	x
523	Instrument calibration men and radio technician	x	x	x	x	x	x	x	x	x
524	Instrument repair man and installation men	x	x	x	x	x	x	x	x	x
527	Cabinet maker	x	x	x	x		x	x	x	x
531	Maintenance foreman	x	x		x	x	x	x	x	x
533	Water treatment		x	x			x	x	x	x
537	Well pump operator	x	x	x			x	x	x	x
538	Air hammer operator	x	x	x						
539	Compressor operator	x	x				x			
541	Road grader operator	x					x	x	x	x
547	Millwright—class A	x					x	x	x	x
548	Millwright—class B	x					x	x	x	x
549	Millwright—class C	x		x			x	x	x	x
550	Welders—class A	x		x			x			x
551	Welders—class B	x		x			x			
552	Welders—class C	x		x			x			
553	Sheet metal worker—class A	x		x	x		x	x		
554	Sheet metal worker—class B	x		x	x		x	x		
555	Craft utility man	x	x	x			x	x		
556	Porter and janitor foreman	x	x	x	x	x	x	x	x	x
558	Maintenance machinist—class B	x	x		x	x	x	x	x	x
559	Maintenance machinist—class C	x	x		x	x	x	x	x	x
560	Maintenance floor repair man	x	x		x					
561	Foreman—building and grounds maintenance	x	x		x	x	x	x	x	x
562	Foreman—maintenance	x	x		x	x	x	x	x	x
563	Foreman—maintenance trades	x	x		x	x	x	x	x	x
564	Foreman—tunnel and boiler house maintenance	x	x		x	x	x			x

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Occupational Code	Occupation Name	Physical Defect Code 1	2	3	4	5	6	7	8	9
	Tool and Gage Shop									
650	Trainee—tool shop	x	x	x	x	x	x	x	x	x
651	Crane operator		x			x	x			
652	Machinist—class A	x	x	x	x	x	x	x	x	x
653	Machinist—class B	x	x	x	x	x	x	x	x	x
654	Machinist—class C	x	x	x	x	x	x	x	x	x
655	Machinist helper	x	x	x			x	x	x	x
659	Grinder operator—class A	x	x	x	x	x	x			x
660	Grinder operator—class B	x	x	x	x	x	x			x
661	Grinder operator—class C	x	x	x	x	x	x			x
664	Gage maker—class A	x	x	x	x	x	x	x	x	x
668	Lathe operator—class A	x	x	x	x	x	x	x	x	x
669	Lathe operator—class B	x	x	x	x	x	x	x	x	x
670	Lathe operator—class C	x	x	x	x	x	x	x	x	x
671	Drill press operator	x	x	x	x	x	x	x	x	x
672	Inspector—tool and gage—class A	x	x	x	x	x	x	x	x	x
673	Inspector—tool and gage—class B	x	x	x	x	x	x	x	x	x
674	Inspector—tool and gage—class C	x	x	x	x	x	x	x	x	x
675	Automatic screw machine set up man	x	x	x	x	x	x	x	x	x
675	Automatic screw machine operator—class A	x	x	x	x	x	x	x	x	x
677	Automatic screw machine operator—class B	x	x	x	x	x	x	x	x	x
678	Milling machine operator—class A	x	x	x	x	x	x	x	x	x
679	Milling machine operator—class B	x	x	x	x	x	x	x	x	x
680	Milling machine operator—class C	x	x	x	x	x	x	x	x	x

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Occupational Code	Occupation Name	Physical Defect Code 1	2	3	4	5	6	7	8	9
	Tool and Gage Shop—Continued									
681	Tool checker, junior	x	x	x	x	x	x	x	x	x
682	Hardness tester	x	x	x	x	x	x	x	x	x
683	Furnace helper—class A		x	x		x	x	x		x
684	Furnace helper—class B		x	x		x	x	x		x
685	Tool sorter	x	x	x	x	x	x	x	x	x
686	Tool checker senior	x	x	x	x	x	x	x	x	x
687	Centerless grinder	x	x	x	x	x	x			x
688	Automatic screw machine operator—class C	x	x	x	x	x	x	x	x	x
689	Tool lapper—class C	x	x	x	x	x	x			x
690	Toolmaker—class A	x	x	x	x	x	x	x	x	x
691	Toolmaker—class B	x	x	x	x	x	x	x	x	x
692	Toolmaker—class C	x	x	x	x	x	x	x	x	x
693	Machine operator—tool-gage	x	x	x	x	x	x	x	x	x
694	Gage grinder—class A	x	x	x	x	x	x	x	x	x
695	Heat treater—class A	x	x	x			x	x		
696	Heat treater—class B	x	x	x			x	x		
697	Heat treater—class C	x	x	x			x	x		
698	Tool lapper—class A	x	x	x	x	x	x			x
699	Tool lapper—class B	x	x	x	x	x	x			x
	Miscellaneous									
700	Baler operator		x	x			x	x	x	x
702	Clerk—scheduling and production control	x	x	x	x	x	x	x	x	x
703	Clerk—factory (miscellaneous)	x	x	x	x	x	x	x	x	x

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Occupational Code	Occupation Name	Physical Defect Code 1	2	3	4	5	6	7	8	9
	Miscellaneous—Continued									
704	Clerk—receiving and shipping	x	x	x	x		x	x	x	x
705	Clerk—stock record and material stores	x	x	x	x		x	x	x	x
708	Medical examiner	x	x	x	x	x	x	x	x	x
709	Warehouse clerk	x	x	x	x		x	x	x	x
710	Clerk—tool	x		x	x	x	x	x	x	x
712	Crib foreman (tool crib)	x		x	x	x	x	x	x	x
713	Crib attendant	x		x	x	x	x	x	x	x
714	Driver—electric truck		x			x	x	x	x	x
715	Fire captain	x					x			
716	Fire lieutenant	x					x			
717	Fireman (fire protection)						x	x		
718	Furnace operator lead remelt		x	x			x	x		
719	Utility man — non productive — building 110	x		x	x			x		
719	Utility man—non productive	x	x	x	x		x	x	x	x
720	Guard	x						x		
721	Laborer, powder handling	x	x	x	x			x	x	
725	Instructor—training school	x	x		x	x	x	x	x	x
726	Instructor—training school (explosive)					x	x			
728	Material handler—building 110	x		x	x			x	x	x
728	Material handler	x		x	x			x		
729	Chief oiler	x	x			x	x	x	x	x
730	Floorman manufacturing	x	x	x	x		x	x	x	x
731	Oiler	x	x			x	x	x	x	x

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Occupational Code	Occupation Name	Physical Defect Code 1	2	3	4	5	6	7	8	9
	Miscellaneous—Continued									
732	Powder recanning	x	x				x			
733	Floorman (manufacturing explosive)	x		x			x			
735	Stableman	x	x	x	x		x	x	x	
737	Equipment engineer	x	x	x	x	x	x	x	x	x
738	Machine designer	x	x	x	x	x	x	x	x	x
745	Scrap burner	x	x	x						
747	Foreman—production control (non explosive)	x	x	x	x	x	x	x	x	x
748	Foreman—production control (explosive)	x	x	x		x	x			x
749	Analyst—laboratory senior	x		x		x	x	x	x	x
750	Analyst—laboratory junior	x		x		x	x	x	x	x
754	Scrap burner foreman	x	x	x		x	x			x
755	Scrap burner helper	x	x	x	x					
757	Thermocouple tester	x			x			x		
758	Instructor—machinist training	x	x	x	x	x	x	x	x	x
760	Draftsman—class A	x	x	x	x	x	x	x	x	x
761	Draftsman—class B	x	x	x	x	x	x	x	x	x
762	Draftsman—class C	x	x	x	x	x	x	x	x	x
763	Tool engineer	x	x	x	x	x	x	x	x	x
764	Tool wrapper	x	x	x	x	x	x	x	x	x
765	Property inspector	x	x	x	x	x	x	x	x	x
766	Junior chemical engineer	x	x	x	x	x	x	x	x	x
767	Junior engineer—class A	x	x	x	x	x	x	x	x	x
768	Junior engineer—class B	x	x	x	x	x	x	x	x	x
769	Junior engineer—class C	x	x	x	x	x	x	x	x	x

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Date Issued 4/9/45	The United States Cartridge Co.	Bulletin Number 16-3
Date Effective 3/1/45 Revised	St. Louis, Missouri	Reference Procedure No.
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Occupational Code	Occupation Name	Physical Defect Code 1	2	3	4	5	6	7	8	9
	Miscellaneous—Continued									
770	Machine analyst—class A	x	x	x	x	x	x	x	x	x
771	Machine analyst—class B	x	x	x	x	x	x	x	x	x
772	Machine analyst—class C	x	x	x	x	x	x	x	x	x
773	Instructor junior machinist	x	x	x	x	x	x	x	x	x
774	Chief scheduling clerk	x	x	x	x	x	x	x	x	x

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Date	The United States Cartridge Co.	Bulletin
Issued 3/30/43	St. Louis, Missouri	Number 16-4
Date	Manual of Procedure	Unit Safety
Effective 3/30/43	Departmental Procedure—Safety Department	Engineering
	Transportation Inspection	Page 1 of 3

Purpose

The purpose of this bulletin is to outline the procedure to be followed by the transportation inspection section of the safety engineering unit for insuring safe practices in the operation of transportation equipment.

Inspection of Trucks

All transportation equipment, with the exception of trucks carrying explosives, will be inspected on a spot check basis by the transportation inspection section. If a traffic safety engineer finds any transportation equipment in a critically unsafe condition, he will direct the operator of the equipment to proceed immediately to the garage to have the condition remedied. If the unsafe condition is of no immediate danger, the traffic safety engineer will request the driver to have the condition corrected as soon as he completes his trip. In any case, the traffic safety engineer will use discretion in the exercise of his authority so that there will be no unnecessary interruption of transportation facilities.

Trucks Carrying Explosives

Under the rules and regulations of the ordnance department and the Interstate Commerce Commission, all trucks carrying explosives must be inspected for safe operating conditions before every trip on the public highways, and a certificate of inspection (see below) signed by an authorized representative of the safety department must be on the truck at all times.

Company policy requires the daily inspection of trucks carrying explosives operating in the plant area. At the time of inspection, a "Motor Truck Inspection" (Form IRS-43—Rev. 3/42) will be filled out by the traffic safety engineer. On this card he will indicate that an inspection has been made of the following:

1. Brakes
2. Steering
3. Tires
4. Electrical wiring
5. Fuel tank and piping
6. Fire extinguisher
7. Lights
8. Horn
9. Windshield wiper
10. Red flags, when required on the truck
11. Cleanliness
12. Proper condition for handling explosives
13. Road flares (electric)

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The traffic safety engineer will sign the Form IRS-43 and place it in the holder in the cab of the truck.

Convoying of TNT and PETN Shipments

In addition, it will be the duty of the transportation inspection section to convoy each shipment of TNT and PETN from the powder storage area to the plant site. Extreme care will be taken to keep all vehicles away from the truck.

Manual for Operators of Explosive Trucks

Detailed company rules and regulations as well as rules of the Interstate Commerce Commission and the ordnance department regarding the transportation of explosives by truck are contained in the "Manual for Operators of Motor Vehicles Engaged in Transportation of Explosives." The transportation inspection section will see that all operators of trucks carrying explosives thoroughly understand the information contained in this manual.

Authorization to Operate Outside Company Premises

Employees who are to operate transportation equipment outside company premises will require authorization from the ordnance department. Department heads may obtain this authorization for employees under their supervision by presenting a written request to the assistant general manager.

Authorization to Operate Within Company Premises

Employees who are to operate transportation equipment within the plant will be examined and authorized by the transportation inspection section, and it will be the responsibility of each department head to see that all employees under his supervision who operate transportation equipment are properly authorized to do so. Arrangements for this authorization may be made by

communicating with the transportation inspection section of the safety department.

"Driver's Authorization Questionnaire"

When a prospective driver presents himself to the transportation inspection section for this authorization, he will be given a "Driver's Authorization Questionnaire." One of the traffic safety engineers then will subject the candidate to a road test which will be as nearly equal to actual driving conditions as possible.

Driver's Authorization Card

If the employee is approved by the transportation inspection section he will be issued a "Driver's Authorization Card." This card will show the employee's name and badge number, his driver's license number, his building and department number, and the type of vehicle or vehicles which he will be authorized to operate. The transportation inspection section will obtain a photograph of the employee from the employment service department, and will paste it on the reverse side of the card in the space provided. When properly filled out and signed by the employee and an authorized representative of the safety department, this card will authorize the employee to operate the transportation equipment indicated on the card within company premises.

Use of Form IRS-14

At the time of issuance of the "Driver's Authorization Card," a "Driver's Safe Operating Rules" (Form IRS-14) will be given to the employee in return for a receipt acknowledging that he has received this set of rules.

Investigation of Accidents

When an accident occurs involving transportation equipment, it will be investigated by one of the traffic safety engineers. Using the "Driver's Accident Report" (Form C-2223) prepared by the driver as a guide, the safety engineer will prepare a report on a "Safety Inspection Report" (Form IRS-5—Rev. 5/42)

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as outlined in Bulletin Number 16-1. When the accident involves injury to an employee, the traffic safety engineer will prepare, in addition to Form IRS-5, a "Report of Employee's Accident" (Form IRS-39—Rev. 2/43) as outlined in Bulletin Number 16-1.

Forms Mentioned

The following forms are mentioned in this procedure:

Form IRS-43 (Rev. 3/42) "Motor Truck Inspection"

Form IRS-14 "Driver's Safe Operating Rules"

Form IRS-5 (Rev. 5/42) "Safety Inspection Report"

Form C-2223 "Driver's Accident Report"

Form IRS-39 (Rev. 2/43) "Report of Employee's Accident"

Bulletin Referred To

The following bulletin is referred to in this procedure:

Bulletin Number 16-1 "Accident Prevention and Reporting"

Departments Affected

The following departments are affected by this procedure:

Safety Department

Employment Service Department

Production Control Department

* * * * * *

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Date Issued 4/10/43 Date Effective 4/10/43	The United States Cartridge Co. St. Louis, Missouri Manual of Procedure Departmental Procedure—Safety Department Fire Prevention and Protection	Bulletin Number 16-5 Unit - Fire Protection Page 1 of 6

Purpose

The purpose of this bulletin is to outline the procedure to be followed by the fire protection unit in the prevention and investigation of fires.

Definition of Titles

The title "safety engineer" as referred to in this bulletin will refer to those safety engineers assigned to the fire protection unit, and whose principal responsibility is fire prevention and protection. The title "general safety engineer" as used in this bulletin will refer to the general safety engineer in charge of fire protection.

Fire Inspection at Plant Site

A regular fire inspection program will be carried out in every building on the plant site. There will be six safety engineers on duty at all times assigned as follows:

1. One to the primer inserting and loading buildings.

2. Four to designated areas in Plant 1 and Plant 2.

3. One to the basement of Buildings 204 and 205.

Fire Inspection Schedule

A "Weekly Time Schedule" (Form IRS-36) will be prepared in duplicate each week by the fire protection unit. This form will show the plant area that has been

assigned to each safety engineer. The original copy of Form IRS-36 will be posted on the bulletin board in the fire house and the duplicate copy will be posted in the office of the general safety engineer.

Points to Be Inspected

The safety engineers in the various fire inspection areas will pay particular attention to the following:

1. Inspection of fire extinguishers. These are sealed into the wall bracket with a red seal. If this seal has been broken, the safety engineer will inspect the extinguisher and its contents. If anything is out of order on the extinguisher or if it needs refilling, he will send it to the fire protection unit to be put back into working order.

2. Inspection of all alarm boxes and standpipe hose to see that they have not been tampered with.

3. Inspection of surroundings of standpipe hose, fire extinguishers, alarm boxes, and transformer vault doors to see that there are no obstructions that will hinder their use in case of an emergency.

4. Inspection of general housekeeping conditions.

In addition to the above points, the safety engineer assigned to the primer inserting and loading buildings will inspect all panic doors for proper operation and will inspect the straight line loading unit for the proper loading of hoppers. The safety engineer assigned to fire inspection in the manufacturing units also will check all fire doors to see that there is nothing to prevent them from closing with the exception of the fusible links.

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Correction of Unsafe Conditions

When a safety engineer observes an unsafe condition or an unsafe act that presents no immediate danger, he will call it to the attention of the foreman and will enter such infraction or condition on the "Report of Employee Violations of Safety Regulations" (Form IRS-25) which will be turned into the fire protection office at the end of the shift. Form IRS-25 will be prepared and distributed as outlined in Bulletin Number 16-1.

Correction of Hazardous Condition

When a safety engineer discovers a situation which he considers an extremely hazardous condition, he is authorized to take immediate direct action to eliminate the hazard. Any unsafe condition in the restricted area will fall under this category. The safety engineer will use discretion in the exercise of his authority so that there will be no unnecessary interruption of production. A report of the circumstances and action taken will be made to the foreman or supervisor in charge.

Hourly Report

On a pre-arranged basis, all safety engineers will phone the office of the general safety engineer once every hour during the shift. At this time the safety engineer will report any unusual occurrences on his shift and the office will inform the safety engineer of any fires in his area that he should investigate.

Daily Log

Each safety engineer will turn in to the office of the general safety engineer a daily log of his activities.

This report will be submitted in original only on a "Safety Inspection Report" (Form IRS-5—Rev. 5/42).

Inspection of Fire Hydrants

Every three months, the general safety engineer and a qualified representative of the plant engineering department will inspect every fire hydrant on the premises. This inspection will consist of actually testing the operation of each hydrant and checking for proper drainage and condition of the threads. A report of this inspection will be prepared in duplicate. The original will be sent to the chief safety engineer and the duplicate will be retained by the fire protection unit.

Use of Form IRS-21

A "Fire Protection Equipment Location" (Form IRS-21) will be prepared for each fire extinguisher in the plant, showing its exact location, the serial number, type, and size. Forms IRS-21 will be filed by building number. Every time a fire extinguisher is used or refilled, this information will be noted on the card for that extinguisher.

Extinguisher Refills for McQuay-Norris Company

Under an arrangement with the McQuay-Norris Manufacturing Company and the Ordnance Department, the fire protection unit will refill extinguishers brought to them by the McQuay-Norris Manufacturing Company. A complete record of such services will be kept and submitted to the general accounting department as outlined in Bulletin Number 51-39.

Fire Alarm System

Each building will be divided into several sections from the standpoint of fire protection and each section will contain several alarm boxes connected to a master alarm box outside the building. When an alarm is given it will sound an audible signal and record a

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coded location signal on a ticker tape in the dispatcher's office at the fire house. The signal recorded on the tape will be translated by the dispatcher to show the location of the fire.

Supervision of Fire Fighting

The general safety engineer will assume full charge of all fire fighting equipment and personnel. The sounding of an alarm will call into action Number 1 and Number 2 fire apparatus and the firemen assigned to that equipment. If a second alarm is given either for the same fire or for a different fire, the firemen left stationed in the fire house will proceed with the Number 3 fire apparatus. The chief safety engineer, the director of the medical department, or the plant protection chief will issue the order to call in outside facilities if necessary. This order must be given through the plant protection division, which will in turn call the required facilities (see Bulletin Number 1-7).

Protection Division Function

Safety engineers will be responsible for the closing of fire doors and for supervising the evacuation of personnel. In both of these functions, the safety engineers will be assisted by the plant guards. If additional guards are necessary, the general safety engineer or the chief safety engineer will notify the plant protection division which will send the required guards. Regular guard duty will be intensified rather than relaxed since the fire may be to divert attention to permit more sabotage and destruction.

Investigating and Reporting of Fires

As soon as the fire is brought under control, the safety engineer on duty in the building where the fire occurred will begin an investigation of the fire. Regardless of the size or the extent of the damage, the safety engineer will prepare in original only for each fire a "Detailed Fire Investigation Report" (Form IRS-3-A). This report will show the following information:

1. Location, date, and time of fire.
2. The number of the alarm box and the name and badge number of the person turning in the alarm.
3. Detailed location of the fire by department and machine number.
4. The name and badge number of the operator and his foreman.
5. Cause of the fire.
6. Class of fire (see explanation below).
7. Extinguishing agencies.
8. Extent of damage.
9. Injuries.
10. Remarks.

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Class of Fire

All fires will be classed as one of the following:

Class A—Ordinary combustible materials.

Class B—Highly combustible materials.

Class C—Electrical equipment.

Class X—Explosives.

Typing of Form IRS-3-A

The Forms IRS-3-A prepared by the safety engineers will be sent to the office of the general safety engineer. Using the information on Form IRS-3-A, the clerk in this office will type a report, in letter form on a "Fire Investigation Report" (Form IRS-3—Rev. 4/42). This report will be typed twice in four copies giving a total of two originals and six carbon copies.

Distribution of Form IRS-3

The eight copies of Form IRS-3 will be distributed as follows:

Original—Sent to the general superintendent.

Duplicate—Sent to the assistant general superintendent.

Triplicate—Sent to the plant protection chief.

Fourth Copy—Retained by the office of the general safety engineer.

Original—Sent to the Director of Personnel.

Duplicate—Sent to the superintendent of the manufacturing department.

Triplicate—Sent to the superintendent or department head responsible for the area in which the fire occurred.

Fourth Copy—Sent to the chief safety engineer.

Recap of Fire Investigation Report

Using the fourth copies of Forms IRS-3 which have accumulated during the week, the clerk in the office of the general safety engineer will prepare a recap each week which will list for each fire:

1. Location
2. Date
3. Injuries
4. Cause
5. Class of fire
6. Whether or not the fire department responded

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Date Issued 4/10/43	The United States Cartridge Co.	Bulletin Number 16-5
Date Effective 4/10/43	St. Louis, Missouri	Unit Fire Protection
	Manual of Procedure	Page 5 of 6
	Departmental Procedure—Safety Department	
	Fire Prevention and Protection	

This weekly report will be typed twice, once in four copies and once in three copies, giving a total of two originals and five carbon copies.

Distribution of Weekly Report

The seven copies of the weekly report will be distributed as follows:

Original—Sent to the general superintendent

Duplicate—Sent to the assistant general superintendent

Triplicate—Sent to the plant protection chief

Fourth Copy—Retained by the office of the general safety engineer

Original—Sent to the Director of Personnel

Duplicate—Sent to the superintendent of the manufacturing department

Triplicate—Sent to the chief safety engineer

Monthly Fire Analysis

Each month the office of the general safety engineer will prepare in four copies a "Monthly Fire Analysis" (Form IRS-24). This report will be prepared from and will show the same information listed on the weekly reports and will list every fire that has occurred in the previous month. The duplicate copy of Form IRS-24 will be placed in a fire register book in the office of the general safety engineer and the remaining copies will be sent to the Ordnance Department.

Ambulance Calls

When a call for an ambulance is received in the fire house, the dispatcher will send an ambulance to the proper location and then will record on the "Ambulance Assignment" (Form IRS-26—Rev. 1/43) the following information:

1. Vehicle number
2. Date
3. Destination of ambulance
4. Name and badge number of person who called the ambulance
5. Name, badge number, and department number of the patient
6. Time ambulance left

Completion of Form IRS-26

When the ambulance driver returns from a trip, the dispatcher will enter the time returned and then give the driver the Form IRS-26 to enter the following information:

1. The place to which the patient was taken

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2. The mileage of the trip

3. The driver's signature and badge number

Form IRS-26 then will be filed in the office of the general safety engineer.

Report on Ambulance Calls

At the end of each three month period the general safety engineer will send a letter to the chief safety engineer and to the head of the medical department showing the number of ambulance calls for that period.

Forms Discussed

The following forms are mentioned in this procedure:

Form IRS-36 "Weekly Time Schedule"

Form IRS-25 "Report of Employee Violations of Safety Regulations"

Form IRS-5 (Rev. 5/42) "Safety Inspection Report"

Form IRS-21 "Fire Protection Equipment Location"

Form IRS-3-A "Detailed Fire Inspection Report"

Form IRS-24 "Monthly Analysis"

Form IRS-26 (Rev. 1/43) "Ambulance Assignment"

Form IRS-3 (Rev. 4/42) "Fire Investigation Report"

Bulletins Referred to

The following bulletins are referred to in this procedure:

Bulletin Number 16-1 "Accident Prevention and Reporting"

Bulletin Number 1-7 "Disaster Procedure"

Bulletin Number 51-39 "Accounting for Supplies and Services Furnished Other Companies"

Departments Affected

The following departments are affected by this procedure:

Safety Department

Medical Department

Plant Protection Department

Manufacturing Department

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[fol. 1191]

Date Issued 5/5/43 Date Effective 5/5/43	The United States Cartridge Co. St. Louis, Missouri Manual of Procedure Departmental Procedure—Safety Department Restricted Areas	Bulletin, Number 16-7 Unit Safety Engineering Page 1 of 2

Purpose

The purpose of this bulletin is to outline the procedure to be followed by the restricted areas section of the safety department in the prevention of accidents and unsafe working condtiions in the restricted areas and in Buildings 117, 123, 134, 234, 223A and 223B.

Inspection Function

It will be the responsibility of the safety engineers assigned to the restricted areas to carry on a regularly scheduled inspection and to give constant safety supervision to the preparation, transportation, drying and charging of all explosive chemicals in the manufacture of tracer, primer, and igniter mixes. Safety engineers also will keep constant check on all buildings containing explosives (PETN, TNT, Primer Mix, Tracer Mix, and Finished Primers) to prevent any overloading or exceeding of personnel limits which have been established by the ordnance department, the safety department, and the management. These limits are contained in the Standard Manufacturing Practice Manual. There also will be a sign in a prominent location in each building which will state the explosive and personnel limits. It will be the responsibility of the safety engineer to see that these signs are kept up to date and repainted whenever necessary by the painter assigned to the area.

Correction of Unsafe Conditions

If a safety engineer should discover that the established limits for handling, transporting, or storing are exceeded, he will contact the supervisor concerned (either the assistant general inspector of the chemical

inspection section or the superintendent of the chemical units) and request that the amount of the overload be removed. The safety engineer will remain on hand to see that the proper amount of material is removed.

Transportation Handling

The safety engineers will give safety supervision to the loading and unloading of all movable equipment within the restricted areas. In this capacity they will make certain that safe practices in the handling of explosive chemicals are followed. In addition, the safety engineers will check all movable equipment to see that it is in a safe operating condition.

Safety Regulations for Personnel

Safety engineers will check all employees in the restricted areas for strict compliance with all safety regulations. These regulations will include the wearing of safety glasses, conductive sole shoes, wearing of safety apparel as furnished by the company, and in the case of certain operations in the manufacture of tracer mix and primer mix, the use of respiratory equipment provided. Safety engineers wil report any infraction of safety regulations on a "Report of Violations of Safety Regulations" (Form IRS-25—Rev. 2/43) as outlined in Bulletin Number 16-1.

Reporting of Accidents

Safety engineers assigned to the restricted areas will investigate and report any accident occurring in these areas. Accident reports will be prepared on a "Report of Employee's Accident" (Form IRS-39-A—Rev. 2/43) as outlined in Bulletin Number 16-1. If the accident involves lost time or if it is the opinion of the supervising safety engineer that an additional report is required, the safety engineer will prepare a more detailed report on a "Safety Inspection Report" (Form IRS-5—Rev. 5/42) as outlined in Bulletin Number 16-1.

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Date Issued 5/5/43 Date Effective 5/5/43	The United States Cartridge Co. St. Louis, Missouri Manual of Procedure Departmental Procedure—Safety Department Restricted Areas	Bulletin Number 16-7 Unit Safety Engineering Page 2 of 2

Checking of Maintenance Work

When maintenance crews are to perform work in the restricted area, they will be issued a "Restricted Area Pass" (Form IRPP-11—Rev. 4/43) as outlined in Bulletin Number 5-7. If the work is to be done in or around buildings in operation or in any building where explosives have been handled, it will be necessary for the safety engineer to check the area to see that it is clear of explosives and to check the equipment and methods by which the work is to be done to insure that safe practices will be followed. After performing this check the safety engineer will sign Form IRPP-11 in the space provided and the maintenance crew will be allowed to proceed with the work to be done. The plant engineering coordinator also must approve Form IRPP-11 for maintenance work and it will be his responsibility to see that the safety engineer gives the necessary approval when required.

Daily Log

Each safety engineer will prepare a daily log of his activities and submit it to his supervising safety engineer at the end of the shift. This daily log will be prepared on Form IRS-5 which also will be used to submit any special report required.

Forms Mentioned

The following forms are mentioned in this procedure:

Form IRS-25 (Rev. 2/43) "Report of Violations of Safety Regulations"

Form IRS-39-A (Rev. 2/43) "Report of Employee's Accident"

Form IRS-5 (Rev. 5/42) "Safety Inspection Report"

Form IRPP-11 (Rev. 4/43) "Restricted Area Pass"

Bulletins Referred To

The following bulletins are referred to in this procedure:

Bulletin Number 16-1 "Accident Prevention and Reporting"

Bulletin Number 5-7 "Restricted Area Passes."

Departments Affected

The following departments are affected by this procedure:

Safety Department

Production Department

Inspection Department

Plant Maintenance Department

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[fol. 1193]

Date Issued 3-30-43 Date Effective 3-30-43	The United States Cartridge Co. St. Louis, Missouri Manual of Procedure Departmental Procedure—Safety Department Powder Storage Area	Bulletin Number 16-8 Unit Work Order Sanitation & Explosives Page 1 of 2

Purpose

The purpose of this bulletin is to outline the procedure to be followed by the powder storage area section of the safety department in the prevention of accidents and the correction of unsafe conditions at the powder farm.

Storage Inspection

Safety engineers assigned to this function will carry on a constant inspection of buildings, grounds, powder storage igloos, equipment, explosive handling operations, and maintenance operations in the area for the purpose of correcting or eliminating hazardous conditions or unsafe equipment and practices. In the inspection of the storage igloos, the safety engineer will check to see that the load limits, personnel limits, and temperature limits are not exceeded and that the structure is kept in a safe condition. When a safety engineer finds that any of the established limits are exceeded, he will contact the foreman of the powder handlers and request that the situation be corrected. If the foreman is not available, the safety engineer will take action to have it corrected and then report such action to the foreman.

Transportation

Safety engineers assigned to the powder storage area section will inspect all explosive trucks before they are loaded to see that they have been cleaned out, and will check the loading of the trucks to see that the established limits are not exceeded. Plant guards

on duty at the gate will check each truck to see that it has a "Motor Truck Inspection" (Form IRS-43 Rev. 3/42) signed by a safety engineer of the transportation inspection section, as outlined in Bulletin Number 16-4. If the Form IRS-43 is not present, the guard will notify the safety engineer who will make the required inspection, prepare and sign a Form IRS-43, and place it in the cab of the truck. In addition to the inspection of trucks, the safety engineers will inspect all material handling equipment to see that it is kept in safe condition and to prevent overloading and unsafe practices.

Safety Regulations

The safety engineers will watch for infractions of safety regulations by employees at the powder farm. These infractions will include the following:

1. Failure to wear powder shoes or safety glasses in the powder igloos.

2. Smoking on the premises except at specified times in the area designated.

3. Failure of maintenance crews to use proper safety equipment when making repairs.

When a safety engineer observes infractions of the above rules, he will not contact the employee but he will make a report of the infraction on a "Report of Employee Violations of Safety Regulations" (Form IRS-25 Rev. 3/43) as outlined in Bulletin Number 16-1.

Explosive Scrap Disposal

Certain types of explosive scrap which cannot be disposed of safely or effectively at the burning grounds will be taken to the powder farm to be burned, buried, or otherwise disposed of, depending upon the type of scrap. The safety engineer assigned to this area will check these operations to see that they are carried out in accordance with safety regulations.

[fol. 1194]

Date Issued 3-30-43 Date Effective 3-30-43	The United States Cartridge Co. St. Louis, Missouri Manual of Procedure Departmental Procedure—Safety Department Powder Storage Area	Bulletin Number 16-8 Unit Work Order Sanitation & Explosives Page 2 of 2

Firing Ranges

The safety engineers will have full responsibility for clearing the firing range of personnel and for seeing that all gates to the range are closed and guarded before firing begins. Firing will not commence until a safety engineer gives notice that the range is cleared, and the firing will conform to accepted safe practices as determined by the safety department. In addition, the buttresses into which the bullets are fired will be inspected before each firing to make certain that there are no obstructions that might cause the bullets to ricochet.

Investigation of Accidents

The safety engineers assigned to this section will investigate and report all accidents at the powder farm. A report will be prepared on a "Report of Employee's Accident" (Form IRS-39 Rev. 3/43) as outlined in Bulletin Number 16-1. When the accident involves more than first aid treatment a special report will be made by the safety engineer on a "Safety Inspection Report" (Form IRS-5 Rev. 5/42).

Daily Log

Each safety engineer will submit a daily log of his activities to the supervising safety engineer on a Form IRS-5. Form IRS-5 will also be used to submit reports of unusual occurrences which warrant special attention.

Forms Mentioned

The following forms are mentioned in this procedure:

Form IRS-43 (Rev. 3/42) "Motor Truck Inspection"

Form IRS-25 (Rev. 2/43) "Report of Employee Violations of Safety Rules"

Form IRS-39 (Rev. 2/43) "Report of Employee's Accident"

Form IRS-5 (Rev. 5/42) "Safety Inspection Report"

Bulletins [Reffered] to

The following bulletins are referred to in this procedure:

Bulletin Number 16-4 "Transportation Inspection"

Bulletin Number 16-1 "Accident Prevention and Reporting"

Departments Affected

The following departments are affected by this procedure:

Safety Department

Production Control Department

Plant Protection Division

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Date	The United States Cartridge Co.	Bulletin
Issued 3/25/43	St. Louis, Missouri	Number 16-9
Date	Manual of Procedure	Unit Work Orders
Effective 3/25/43	Departmental Procedure—Safety Department	Sanitation and Explosives
	Powder Disposal	Page 1 of 3

Purpose

The purpose of this bulletin is to outline the procedure to be followed by the powder disposal section of the safety department in the collection and disposal of explosive scrap material.

Collection of Explosive Scrap

There will be a regularly scheduled program for explosive scrap collection which will be carried out on a 24 hour—7 day basis. Four specially constructed trucks assigned to the powder disposal section will be used for this purpose. There will be a collection every two hours from the restricted areas and the primer and loading buildings, and a collection twice daily from the manufacturing units. Rejected primed cartridge cases will be collected only on the first shift since the disposal of this item must have the approval of the unit superintendent. (See below).

Identification of Scrap Containers

Explosive material which has been finally scrapped will be forwarded to the nearest area designated for scrap collection. The inspector will prepare in original only a "Scrap Disposal Tag" (Form IRS-17—Rev. 5/42) for each container of explosive scrap. Form IRS-17 will show the date, building number, and type of scrap. The inspector will sign Form IRS-17 and have it approved as follows:

Rejected cartridge cases—Unit superintendent

All other explosive scrap—Unit superintendent or assistant in charge of shift

Daily Pick-up Log Sheets

The pick-up men will collect only scrap that is in the proper container and has a properly approved Form IRS-17 attached. A "Daily Pick-up Log Sheet" (Form IRS-46—Rev. 7/42) will be kept in each truck. The driver's helper will enter on Form IRS-46 the amount and kind of scrap obtained from each building on each collection trip. Form IRS-46 will be turned in to the office of the supervising safety engineer at the burning grounds at the end of each shift.

Use of Form IRS-9

In order that a record be available of the total weight of cartridge cases collected from each building during each 24 hours, the clerk in the office of the supervising safety engineer will recap the information regarding cases as shown on Forms IRS-46 turned in by the drivers, and post the building totals to the "Daily Scrap Pickup Record" (Form IRS-9). Form IRS-9 will show daily collections of cartridge cases for each building for a period of one month.

Use of Form IRS-10

Each day the clerk in the office of the supervising safety engineer will make a recap of the total amount of each kind of scrap collected from all buildings. The results of this recap will be posted on "Burning Grounds Scrap Disposal Recap" (Form IRS-10).

Disposal of Scrap

When explosive scrap is brought to the burning grounds, it will be placed in a proper storage house to be stored until it can be burned. The methods used for disposal of various types of scrap will be as follows:

1. All rejected primed cases will be passed through a gas-fired rotary Rockwell furnace which will eliminate the live charge in the primers. "Popped" cases then will be passed through a pickle and wash operation so they can be disposed of as reclaimed scrap.

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Date Issued 3/25/43	The United States Cartridge Co. St. Louis, Missouri	Bulletin Number 16-9
Date Effective 3/25/43	Manual of Procedure Departmental Procedure—Safety Department Powder Disposal	Unit Work Orders Sanitation and Explosives Page 2 of 3

2. All rejected tracer charge jackets will be passed through tracer furnaces where they will be burned free of the tracer mix so the metal can be disposed of as reclaimed scrap.

3. Rejected primers, loose powder, tracer mix, igniter mix, primer mix, magnesium, sump cleanings, and all other component chemicals used in the plant will be disposed of in burning kettles which are gas-fired and are remotely fed via chutes from the charging room.

4. Mercury scrap will be collected twice during each shift from the various metallurgy units and will be broken down at the burning grounds. The powder will be destroyed in the burning kettles, the tracer jackets will be burned in the tracer furnace, and the cases will be placed in burlap bags to be taken by the transportation sub-section to the powder storage area where they will be stored for shipment.

Disposal of Form IRS-17

When scrap is received at the burning grounds and routed to the proper furnace, Form IRS-17 will be removed from the container and turned in to the supervising safety engineer's office where it will be filed by building and by date. Form IRS-17 will be kept for a period of 30 days and then destroyed.

Record of Disposal

At the time the material is disposed of, the employee in charge of burning the scrap will prepare in original only a "Scrap Record" (Form IRS-23) which will

show the date and the quantity of each type of explosive scrap material that is burned. This form will be turned in to the office of the supervising safety engineer where it will be checked against Form IRS-10 to see that the amounts collected and the amounts disposed of are in agreement. Form IRS-23 then will be filed by date.

Weekly Report

From Form IRS-10, a weekly report will be prepared by the supervising safety engineer on which will be listed the number of pounds of each item handled and the number of bucket containers collected during the month. This weekly report will be prepared in triplicate and will be distributed as follows:

Original—To the chief safety engineer

Duplicate—To the factory accounting department

Triplicate—Retained as a file copy

Cleaning of Drop Test Machines

The powder disposal section will have the responsibility of cleaning daily the reservoir in the exhaust pipe of each drop test machine, keeping it free from explosive accumulations. This section also will clean the walls, floors, and windows of all recanning rooms, keeping them free from accumulated powder and dust.

Forms Mentioned

The following forms are mentioned in this procedure:

Form IRS-17 (Rev. 5/42) "Scrap Disposal Tag"

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Date Issued 3/25/43 Date Effective 3/25/43	The United States Cartridge Co. St. Louis, Missouri Manual of Procedure Departmental Procedure—Safety Department Powder Disposal	Bulletin Number 16-9 Unit Work Orders Sanitation and Explosives Page 3 of 3

Form IRS-46 (Rev. 7/42) "Daily Pick-up Log Sheet"

Form IRS-9 "Daily Scrap Pick-up Record"

Form IRS-10 "Burning Grounds Scrap Disposal Recap"

Form IRS-23 "Scrap Record"

Departments Affected

The following departments are affected by this procedure:

Safety Department

Factory Accounting Department

Manufacturing Department

Transportation Department

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Date Issued 1-15-43 Date Effective 1-15-43	The United States Cartridge Co. St. Louis, Missouri Manual of Procedure Industrial Relations—Safety Department Classification of Items Handled	Bulletin Number 16-10 Unit Safety Stores Page 1 of 8

Purpose

The purpose of this bulletin is to list the items handled by the safety stores unit, the stock numbers assigned these items for the purpose of stock and accounting records and the method of determining items to be handled.

Control of Items

The safety department with the approval of the management will determine:

1. The items to be carried and the quantities to be stocked.

2. The items to be sold to employees, those to be issued to employees without charge, and those to be issued to certain occupational groups and sold to others.

Type of Items to Be Stocked

The safety stores will stock certain types of wearing apparel to be worn by employees during working hours and approved types of safety equipment considered necessary to the safety of employees in certain types of work.

Stock Numbers

Each item carried in stock by safety stores will be assigned a stock number. This stock number will be shown on all transactions affecting such items.

Safety Stores Codes

Each item carried in stock also will be assigned a code letter, A, B, or C, which will designate:

A. Items to be issued without charge

B. Items to be sold only

C. Items to be sold or issued according to occupational classification

Items Carried in Stock

Following is a list of items carried in stock, showing the stock number, code letter and description:

Stock No.	Code	Description
Goggles and Helmets		
1001	A	#7828 acetate frames
1002	B	Prescription lenses
1003	A	Acetate safety goggles—complete
1004	A	Safety goggle lenses
1005	A	Leather goggle cases
1006	A	Welders' cover goggles—#5 lense
1007	A	Welders' eye cup goggles—#5 lense

Stock No.	Code	Description
1008	A	Welders' cover glass, 50 M. M. (round)
1009	A	Welders' helmets
1010	A	#10 glass plates for welders' helmets
1011	A	#7828 Calobar safety goggles
1012	A	6" acid face shields
1013	A	Super armorplate coverglass goggles
1014	A	Steel rim goggles (machinists)
1015	A	Clear cover glass plates 2 x 4¼ (oblong) welders helmets
1016	A	Cover goggle of clear lense
1017	A	Metal goggle case
1018	A	Goggle cases for cover goggles
1019	A	Cover glass plates (coated) oblong, welders helmets
1020	C	Sweat bands
1021	A	#5 welders goggle lenses (round) shaded for repairing goggles
1022	A	Slip-on-goggles
1023	A	Calobar lenses
1024	A	Frames F-3144-44

Gloves, Sleeves, and Aprons

2001	C	Cotton gloves
2004	A	All leather welders' gauntlets
2005	A	All leather welders' gauntlets with flaps
2005	A	All leather welders' gauntlets with flaps on right hand only
2007	A	All leather gauntlets with canvas cuff—heavy weight
2008	A	#615 W A black rubber linesman's gloves
2009	A	Horsehide cover gloves—linesman's

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Date Issued 1-15-43 Date Effective 1-15-43	The United States Cartridge Co. St. Louis, Missouri Manual of Procedure Industrial Relations—Safety Stores Classification of Items Handled	Bulletin Number 16-10 Unit Safety Stores Page 3 of 8

Stock No.	Code	Description
2010	A	#644 studded gloves—scrap handlers
2012	A	Ax rubber gloves—acid handlers
2013	A	#13868 welders' sleeves with bib
2014	A	Leather bib-type aprons #148, 24 x 36
2015	A	Rubber bib-type aprons
2019	A	Wrist protectors—6" sleeve guards—studded leather
2020	A	#1102 chrome leather hand pads (scrap handlers')
2021	A	Asbestos gloves--lined—#200
2022	A	8" canvas wrist protectors
2023	A	18" canvas wrist protectors
2024	B	Goatskin gloves (cash only)
2025	A	Asbestos aprons #138
2026	A	Leather gauntlet with canvas cuff (lightweight) sewed fingers
2027	A	Stanzoil rubber gloves
		Shoes, Boots and Puttees
3002	B	701-1 black calf safety Oxford
3003	B	702 black kangaroo Oxford
3004	B	706-1 black glove Neoprene sole Oxford
3005	B	721 black glove leather sole high shoe
3006	B	724 black glove electrician rubber sole high shoe
3007	B	725 retan Neoprene sole high shoe
3008	B	729 Rosite cord sole high shoe
3009	B	730-48 black calf police shoe (guards)
3010	B	741-1 tan calf safety Oxford

Date Issued 1-15-43	The United States Cartridge Co.	Bulletin Number 16-10
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Stock No.	Code	Description
3011	B	741-10 tan calf conductor sole Oxford
3012	B	751 8" tan calf high cut shoe
3013	B	755 8" Rosite high cut shoe
3014	B	6270½ black calf puttee shoe (guards) powder farm
3015	A	Rigidum Sandey toe guards
3017	A	MB-802 short legging boots
3018	A	USMB-956 legging boots
3019	A	Hood Lectro safety toe boots (Fire Dept.)
3020	A	F-509½ spring puttees black leather (powder farm)
3022	B	Shoe strings, 30"
3023	B	Shoe strings, 45"
3024	B	741-10 tan calf conductor sole Oxford EEE
3026	A	¾ rubber boots—Storm King
3027	B	H705-2 shoe cord sole high shoe
3030	B	Arch-o-graphs
3031	B	704-2 black cord sole Oxford
3032	B	741 X 10½ tan calf conductive sole ventilated Oxford
3033	B	741-1½ tan calf ventilated Oxford leather sole
3034	B	730-2 black calf guard high shoe—wire nails
3035	B	X701 black calf safety Oxford—EEE
3036	A	Fruco Hi Top rubber boots ¾
3037	A	Fruco hip boots
3038	A	Fruco knee boots
3039		Fruco black raincoat, slicker, new or used
		Fruco black raincoat, slicker, new or used (with hat)

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Date Issued 1-15-43	The United States Cartridge Co.	Bulletin Number 16-10
Date Effective 1-15-43	St. Louis, Missouri	Unit Safety
	Manual of Procedure	Stores
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	Classification of Items Handled	

Stock No.	Code	Description
3040		Fruco slicker hat
3041		Rubber hip boots
3501	B	700-2 glove conductor sole Oxford
3502	B	700-3 glove safety shoe
3503	B	700-5 kid conductor sole Oxford
3504	B	2040-2 ladies' safety shoe
3505	B	H900 rope sole shoe
3506	B	H700X11 ladies' powder shoe
3507	B	H700X14 ladies' powder shoe brown Oxford
3508	B	607 white rope sole shoes (nurses)
3509	B	Leather insoles 4 x 8
3510	B	700X12 leather tan calf Oxford—leather sole
3514	B	700X33 tan conductive sole safety Oxford
3515	B	700X43 tan leather sole safety Oxford
3516	B	700X34 moccasin with cord sole
		Uniforms and Accessories—Men
4001	C	Guard shirts (replacements sold)
4002	C	Guard pants " "
4003	C	Guard breeches " "
4004	C	Guard coats (blouse) replacements sold
4005	C	Guard ties " "
4006	C	Guard caps " "
4007	A	Sam Browne belts
4008	A	#12 cartridge holders, black
4009	A	FH-21 holsters—6" barrel
4010	A	Police whistles

Date Issued 1/27/44	The United States Cartridge Co.	Bulletin Number 16-10
Date Effective 1/27/44	St. Louis, Missouri	Unit Safety Stores
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	Industrial Relations—Safety Stores	
	Classification of Items Handled	

Stock No.	Code	Description
3039		Fruco black raincoat, slicker, new or used
		Fruco black raincoat, slicker, new or used (with hat)
3040		Fruco slicker hat
3041		Rubber hip boots
3501	B	700-2 glove conductor sole Oxford
3502	B	700-3 glove safety shoe
3503	B	700-5 kid conductor sole Oxford
3504	B	2040-2 ladies' safety shoe
3505	B	H900 rope sole shoe
3506	B	H700X11 ladies' powder shoe
3507	B	H700X14 ladies' powder shoe brown Oxford
3508	B	607 white rope sole shoe (nurses)
3509	B	Leather insoles 4 x 8
3510	B	700X12 leather tan calf Oxford—leather sole
3514	B	700X33 tan conductive sole safety Oxford
3515	B	700X43 tan leather sole safety Oxford
3516	B	700X34 moccasin with cord sole
		Uniforms and Accessories—Men
4001	C	Guard shirts
4002	C	Guard pants
4003	C	Guard breeches
4004	C	Guard coats (blouse)
4005	C	Guard ties
4006	C	Guard caps
4007	A	Sam Browne belts
4008	A	#12 cartridge holders, black

[fol. 1204]

Date Issued 1-15-43	The United States Cartridge Co.	Bulletin Number 16-10
Date Effective 1-15-43	St. Louis, Missouri	Unit Safety Stores
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	Classification of Items Handled	Page 6 of 8

Stock No.	Code	Description
4011	A	Reefer coats
4012	A	#107 yellow slicker coats
4014	A	White shirts
4015	A	White pants
4016	A	White shorts
4017	A	White athletic shirts
4018	A	White socks
4019	A	White caps
4020	A	Suntan shirts (short sleeve)
4021	A	Suntan pants (no pockets)
4022	C	Safety shirts
4023	C	Safety pants
4024	A	Jackets—all colors
4025	A	Short sleeve undershirts
4026	A	Ankle length underdrawers
4027	A	Black raincoats & hats
4028	A	Coveralls—men's suntan, long sleeve (with hats)
4029	A	Suntan shirts — long sleeve — herringbone stripe
4030	A	Suntan pants with pockets — herringbone stripe
4031	A	Rubber cover for guard caps
4032	A	Towels
4033	C	Suntan shirts (twill—low grade) Pacemaker
4034	C	Suntan pants " " " "
4035	B	Suntan coverall (short sleeves—lightweight)
4036	A	Hangar straps (for belts—guards)
4037	A	White trousers with pockets & cuffs

[fol. 1205]

Stock No.	Code	Description
4038	A	Sweat shirts
		Women's ~~Uniforms~~
4501	C	Women's coverall suits and caps
		Respirators—Gas Masks—Filters
5001	A	CR#10373 Comfo chemical respirators
5002	A	#10099 GMC cartridges for Comfo chemical respirators
5003	A	Metal fumes respirators
5004	A	Metal fumes filters
5005	A	Dust respirators—Dustfoe
5006	A	Dust filters for Dustfoe respirators (oblong filters)
5007	A	All service gas masks
5008	A	Self-contained gas masks
5009	A	Comfo dust filters used on Comfo dust respirators
5010	A	Comfo dust respirators
5013	A	All service [permissable] [cannisters] gas masks
5014		Mersorb cartridge for chemical respirator
		Miscellaneous
6001	A	Ear Defenders—HA-15369, 17227, 17225
6002	B	Hair nets
6004	A	2 cell Eveready handlight
6007	A	Stretcher outfits
6008	A	FA-2348 stretcher
6009	A	Galvanized canisters—FA2346
6010	A	Fire wool blankets—FA50094
6011	A	FA10227 fire blankets and cases
6012	A	Asbestos suits

[fol. 1206]

Date Issued 1-15-43	The United States Cartridge Co.	Bulletin Number 16.10
Date Effective 1-15-43	St. Louis, Missouri	Unit Safety Stores
	Manual of Procedure	Page 8 of 8
	Industrial Relations—Safety Stores	
	Classification of Items Handled	

Stock No.	Code	Description
6019	A	Fire extinguishers
6025	A	Foille medicated spray, complete
6028	A	2 cell flashlights—Bright Star
6030	A	Duro safety ladder shoes
6032	A	3 cell flashlight—Bright Star
		Department Expense and Items
3021	A	Pinch pads
3025	B	Heel lifts pads—felt
3028	B	Heel grip liners
3029	B	Leather insoles
5011	A	Elastic bands for Dustfoe dust respirators
5012	A	Elastic bands for Comfo chemical respirators
6005	A	Handlight batteries
6005	A	First aid kits—complete—FA12259
6020	A	Fire extinguishers refills
6026	A	Cellulose sponges—large
6029	A	Cellulose sponges—small
6033	A	Conductive rubber clogs
6021	A	Cigar lighter elements

[fol. 1207]

Date Issued 5/3/43 Date Effective 5/3/43 Revised	The United States Cartridge Co. St. Louis, Missouri Manual of Procedure Departmental Procedure—Safety Department Sale of Safety Equipment	Bulletin Number 16-12 Unit Instruction, Stores & Records Page 1 of 6

Purpose

The purpose of this bulletin is to outline the procedure to be followed in the sale of safety equipment by the safety stores section.

Sales to Employees

Sales of safety equipment to employees will be made either through payroll deductions or for cash. All payroll deduction and cash sales of $1.00 or more will be recorded on an "Employee's Sales Ticket" (Form IRS-1—Rev. 2/43) controlled by autographic registers.

Payroll Deductions for Single Sales

When sales made to employees are to be paid for through payroll deductions, a separate Form IRS-1 will be prepared for each weekly payroll deduction. Each sale under $5.00 will be deducted in total from the employee's pay check for the current payroll period, providing the sale is not made later than eight o'clock Saturday morning. If the total cost is in excess of $5.00, an employee may elect to have the entire amount deducted from one pay check or he may request that the deduction be made in amounts of approximately $5.00 from each successive payroll period. If more than one payroll deduction is to be made covering a single sale, only the first Form IRS-1 prepared will show the quantity and the code number of the item sold. The total amount of the sale along with the serial numbers of each related Form IRS-1 pertaining thereto must be indicated in the open space next to the payroll deduction date.

Payroll Deductions for the Sale of Two Items

In case two items are purchased at one time they can be recorded on one sales ticket if they are to be deducted in one payroll period. However, if the employee elects and is allowed (due to the $5.00 limit) to deduct the sale from more than one pay period, each item can be recorded on a separate Form IRS-1 and scheduled to be deducted on different pay periods.

Preparation of Form IRS-1

The following information will be shown on Form IRS-1:

1. Date
2. Description, size and stock number
3. Amount to be deducted
4. The date ending the payroll period from which the deduction is to be made
5. Building, department and badge number of employee
6. Location of the store—Building 204 or Tyson —will be shown in the space "Store Room No."
7. Sales tax.

All Forms IRS-1 involving payroll deductions will be signed by the employee and by the safety store clerk preparing the form.

Entering Amounts

The "Amount" column on all Forms IRS-1 will show only the amount to be deducted from the pay check for the payroll period indicated regardless of the total amount of the sale. The amount shown on

Form IRS-1 will include that portion of the sales tax which applies to the amount being deducted from the payroll in question.

Preparation of Form IRS-20—Payroll Deductions

At the end of each shift a "Register Recapitulation" (Form IRS-52) will be prepared for each cash register by the outgoing clerks who will sign it in the space provided. The incoming clerks will verify and accept the responsibility for the information shown thereon by signing the Form IRS-52. At the end of each day an "Autographic Register Report" (Form IRS-20—Rev. 3/43) will be prepared in three copies to transmit the Forms IRS-1 to the payroll department. Form IRS-20 will show the following information:

1. Check (√) in the square indicating "Payroll"
2. Stores location
3. Date
4. Shift
5. Serial number of Forms IRS-1 attached. In case a series of unbroken serial numbers are to be transmitted, the beginning and ending serial numbers of each unbroken series will be shown.
6. Certification by the income sales clerk that the last serial numbers shown are correct.

Distribution of Form IRS-1—Payroll Deductions

Form IRS-1 prepared for payroll deductions will be distributed as follows:

Original—Routed to the payroll department with the original and duplicate copy of Form IRS-20. The payroll department will check the Forms IRS-1 transmitted against those recorded on Form IRS-20 and, if correct, will sign the duplicate copy of Form IRS-20 in the space provided. The duplicate copy of Form IRS-20 then will be returned to the safety stores section. The original copies of Form IRS-1 and Form IRS-20 will be retained by the payroll department where they will be handled as discussed in Bulletin Number 53-6.

Duplicate—Given to the employee making the purchase.

Triplicate—Routed to the general accounting department with the triplicate copy of Form IRS-20 to be handled as discussed in Bulletin Number 51-37.

Fourth Copy—Sent to the safety control office and filed by badge number.

Fifth Copy—Used by the general accounting representative in the safety stores section to ascertain that all Forms IRS-1 are accounted for. When a series has been completed, these copies will be forwarded to the general accounting department.

Preparation of Form IRS-1—Cash Sales

Form IRS-1 covering cash sales will be marked "Paid in Full" and will be receipted by a safety stores clerk. Employees purchasing items for cash will not sign Form IRS-1. Two items, when sold to the same employee, will be recorded on a single Form IRS-1 as in the case of payroll deductions. A Form IRS-1 will not be prepared for cash sales of less than $1.00. Such sales will be rung on a Burroughs cash register and the code numbers concerned will be inserted on the tape opposite the sale to identify the item sold. Each day the cash register will be totaled, recapped by stock number and a Form IRS-1 covering such sales will be prepared.

Preparation of Form IRS-20—Cash Sales

At the end of each work day a separate Form IRS-20 will be prepared to transmit Forms IRS-1 for cash sales to the cashier. In this case Form IRS-20 will show:

1. A check (√) shown in the square indicating "Cashier".
2. Stores location
3. Date
4. Shift

5. Grand total of all the Forms IRS-1 for cash sales.

6. Serial number of Forms IRS-1 being attached. When a series of unbroken serial numbers are to be transmitted, the beginning and ending serial numbers of each series will be shown.

7. Acknowledgment of the receipt of the petty cash fund.

Distribution of Form IRS-1

Forms IRS-1 for cash sales, will be distributed as follows:

Original—Routed to the general accounting department with the triplicate copy of Form IRS-20 to be handled as discussed in Bulletin Number 51-37.

Duplicate—Given to the employee as a receipt.

Triplicate—Routed to the cashier with the cash and the original and duplicate copy of Form IRS-20. The cashier will check the cash and the Forms IRS-1 against the Form IRS-20 and, if correct, will sign the duplicate copy of Form

[fol. 1210]

IRS-20 returning it to the safety stores section. The cash and the triplicate copies of Form IRS-1 and Form IRS-20 will be handled as discussed in Bulletin Number 51-37.

Fourth Copy—Routed to safety control office and filed by badge number except when covering cash register sales, in which case this copy will be filed by serial number.

Fifth Copy—Handled by the general accounting department representative the same as for payroll deductions.

Delivery of Forms

A safety stores representative will deliver the above forms to the cashier, payroll department and general accounting department before 10:00 A. M. daily. This representative will wait for the cashier and payroll department to check Forms IRS-1 against Form IRS-20. When the forms have been checked, the representative will return with the signed duplicate copies of Form IRS-20.

Preparation of Form IRS-8

When an employee who has purchased a safety stores item returns it in good condition for credit, an "Employee's Sales Refund" (Form IRS-8—Rev. 4/42) will be prepared in four copies showing the following information:

1. Date

2. Purchase date and Form IRS-1 number upon which it was purchased. This information may be

obtained from the safety stores control office if the employee cannot furnish it.

3. Employee's badge, building, department and storeroom numbers.

4. Quantity, description, stock code number, net amount, sales tax, and gross amount. This should agree with that shown on the original copy of Form IRS-1.

5. Employee's name

6. Reason why credit is allowed

7. Approval of safety stores supervisor

The safety stores section will not refund cash for merchandise returned by employees whether or not they were originally purchased for cash.

Distribution of Form IRS-8—Payroll Deductions

The serial numbers of Form IRS-8, when the original sale was made by a payroll deduction, will be recorded on the Form IRS-20 prepared for the payroll department. When this is complete, these Forms IRS-8 will be distributed as follows:

Original—Routed to the payroll department with the Forms IRS-1 and IRS-20 for that day.

Duplicate—Given to the employee as a receipt.

Triplicate—Routed to the general accounting department with the riplicate copies of Forms IRS-1 and IRS-20.

Fourth Copy—Routed to the safety stores control office.

Cash Sales

When the Form IRS-8 covers a sale originally made for cash, the safety stores section will prepare a "Petty Cash Voucher" (Form CA-10—Rev. 5/42) in original only, showing the following information:

1. Date
2. Name of employee in the space titled "Pay"
3. Amount to be paid
4. Charge "Safety Stores" account "1251"
5. Description—"Returned Safety Equipment Sold to Employee for Cash"
6. Requested by
7. Approval of the supervisor of the safety stores section.

Form CA-10 with the first three copies of Form IRS-8 will be given to the employee. The employee will take them to the cashier where they will be handled as discussed in Bulletin Number 51-37. The fourth copy of Form CA-8 will be sent to the safety stores control office.

Preparation of Form IRS-53

When the general accounting department representative completes his "Daily Summary of Safety Stores Issues" (Form IRS-51) as discussed in Bulletin Number 51-37, he will give it to the supervisor of the safety stores section. The supervisor will use Form IRS-51 to prepare a "Weekly Sales Report" (Form IRS-53). Form IRS-53 will segregate by stock code number the daily safety stores issues between merchandise loaned to employees and merchandise sold to employees. Form IRS-53 will be used to prepare a weekly report to the head of the safety department showing the quantity of safety stores merchandise sold and/or loaned to employees during the week.

Forms Mentioned

The following forms are mentioned in this procedure:

Form IRS-1 (Rev. 2/43) "Employee's Sales Ticket"

Form IRS-52 "Register Recapitulation"

Form IRS-20 (Rev. 3/43) "Autographic Register Report"

Form IRS-8 (Rev. 4/42) "Employee's Sales Refund"

Form CA-10 (Rev. 5/42) "Petty Cash Voucher"

Form IRS-51 "Daily Summary of Safety Stores Issues"

Form IRS-53 "Weekly Sales Report"

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Bulletins Referred to

The following bulletins are referred to in this procedure:

Bulletin Number 53-6 "Employee Sales by Payroll Deductions"

Bulletin Number 51-37 "Safety Stores Accounting"

Departments Affected

The following departments are affected by this procedure:

Safety Department

Payroll Department

General Accounting Department

• • • • •

[fol. 1213]

Date Issued 5/12/43 Date Effective 5/12/43 Revised	The United States Cartridge Co. St. Louis, Missouri Manual of Procedure Departmental Procedure—Safety Department Issuing Safety Equipment at Company's Expense	Bulletin Number 16-13 Unit Instruction, Stores & Records Page 1 of 3

Purpose

The purpose of this bulletin is to outline the procedure to be followed by the safety stores section for issuing items to employees at the expense of the company.

Issues From Safety Stores

Items carried by safety stores which are issued to employees (see Bulletin Number 16-10) will be recorded on a "Loaned Safety Equipment Issues" (Form IRS-38—Rev. 3/43). Form IRS-38 will be prepared in triplicate by the employee's department head who will enter the following information:

1. Date, badge number, and employee's name
2. Building number, department number and occupation
3. Description and quantity of material to be issued
4. Signature of employee's department head
5. Material to be obtained

Approval of Form IRS-38

Safety stores will be supplied with a list of supervisors who are authorized to approve Forms IRS-38 and no issue will be made unless the signature of an authorized supervisor is on the form. Each item issued will remain charged out to the employee receiving it until the item is returned or otherwise properly accounted for.

Completion of Form IRS-38

Upon presentation of Form IRS-38 to the safety stores clerk, the following information will be added to the form:

1. Safety store number

2. Size, price, and code number of the items issued

3. Signature of safety stores clerk issuing the items

4. Signature of the employee receiving the items.

Distribution of Form IRS-38

Form IRS-38 will be distributed as follows:

Original and Duplicate—To factory accounting department which will assign an account number to both copies and forward them to the general accounting department. After verification of prices and codes, the duplicate copy will be forwarded to the tabulating department for key punching of cards. After key punching, the duplicate copy will be returned to the general accounting department where it will be matched with the original copy and filed.

Triplicate—Sent to the safety clerical office to be filed.

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Date Issued 5/12/43 Date Effective 5/12/43 Revised	The United States Cartridge Co St. Louis, Missouri Manual of Procedure Departmental Procedure—Safety Department Issuing Safety Equipment at Company's Expense	Bulletin Number 16-13 Unit Instruction, Stores & Records Page 2 of 3

Replacements

Certain items to be determined by the safety department with the approval of the management, such as guard equipment, etc., will be issued originally at the expense of the company but will be replaced only at the expense of the employee. In this case, an "Employee's Sales Ticket" (Form IRS-1—Rev. 2 43) will be prepared to cover the replacement as outlined in Bulletin Number 16-12. Certain other types of equipment will be replaced at the expense of the company when proof is presented that the original equipment is worn out or broken. This equipment or its parts should be returned to the safety stores for replacement.

Return of Loaned Equipment

When an employee returns loaned equipment to the safety stores the safety stores clerk will prepare a "Returned Safety Equipment" (Form IRS-45—Rev. 12/42) in triplicate. Form IRS-45 will show:

1. Badge number, department number, and date
2. Number of safety store and building number
3. Complete description of each item returned

Distribution of Form IRS-45

Form IRS-45 will be signed by the employee returning the safety equipment and by the safety stores clerk receiving the equipment. Form IRS-45 then will be distributed as follows:

Original and Duplicate—To the safety clerical office. The corresponding triplicate copy of Form IRS-38 will be removed from the file and stamped with an "Equipment Returned" stamp and returned to the file. Both copies of Form IRS-45 then will be forwarded to the general accounting department.

Triplicate—To the employee as a receipt for returned equipment.

Return of Used Items

Used items which are returned to the safety stores in good condition and suitable for reissue will be segregated from new stock and issued to other employees through the use of Form IRS-38 marked "Reissued".

Disposition of Unfit Stock

Used items returned to the safety store not in condition for reissue will be segregated for disposal. The inventory clerk then will prepare a "Request for Disposition of Class 'B' and 'C' Property" (Form GS-36) as outlined in Bulletin Number 30-3.

Loaning Second Pair of Safety Glasses

Occasionally employees will report to work without their safety glasses and will be required to obtain a second pair from the safety store. When this occurs, the safety stores clerk will prepare and have the employee sign a "Payroll Deduction Authorization" (Form CP-2—Rev. 6/42). At this time a clear understanding will be reached with the employee that if the second pair of glasses is not returned within five days from the date of issue, the Form CP-2 which he has signed will be processed and a payroll deduction will be made. The safety stores clerk will indicate on the face of the Form CP-2 "Loaned Glasses to Be Re-

[fol. 1215]

turned (Date)". Forms CP-2 covering this type of transaction will be placed in a pending file and if the safety glasses are not returned by the specified date, the forms will be distributed in the usual manner and the deduction will be made. If the employee returns the glasses within the specified time, the safety stores clerk will remove Form CP-2 from the pending file, write "Cancelled (Date)". Give the original copy to the employee as a receipt, and destroy the remaining copies.

Clearance in the Case of Terminations

If an employee's services are being terminated, he will present the fifth copy of "Termination of Employment" (Form IRP-3—Rev. 7-42) to the safety department clerk in Building 107. The safety department clerk will indicate clearance, sign in the space provided, and instruct the employee to report to the termination clerk in the employment service department. Form IRS-45 will be prepared and distributed as outlined above.

Forms Mentioned

The following forms are mentioned in this procedure:

Form IRS-38 (Rev. 3-43) "Loaned Safety Equipment Issues"

Form IRS-1 (Rev. 2-43) "Employee's Sales Ticket"

Form IRS-45 (Rev. 12-42) "Returned Safety Equipment"

Form GS-36 "Request for Disposition of Class 'B' and 'C' Property"

Form CP-2 (Rev. 6/42) "Payroll Deduction Authorization"

Form IRP-3 (Rev. 7/42) "Termination of Employment"

Bulletins Referred To

The following bulletins are referred to in this procedure:

Bulletin Number 16-10 "Classification of Items Handled"

Bulletin Number 16-12 "Sale of Safety Equipment"

Bulletin Number 30-3 "Release From Accountability on Class 'B' and 'C' Property"

Departments Affected

The following departments are affected by this procedure:

Safety Department

General Accounting Department

* * * * *

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Date Issued 3-2-43	The United States Cartridge Co.	Bulletin Number 16-14
Date Effective 2-1-43	St. Louis, Missouri	Unit Safety Stores
	Manual of Procedure	
	Personnel—Safety	
	Ordering Prescription Lenses	Page 1 of 1

Purpose

The purpose of this bulletin is to outline the procedure to be followed in ordering and delivering prescription lenses to employees.

Preparation of Prescription Envelope

An employee needing prescription lenses will go to the office of the oculist located in safety stores, where his eyes will be tested and examined. After noting the correction needed, the oculist will prepare a "Prescription Envelope" which will show:

1. Date
2. Prescription number
3. Name and badge number of employee
4. Price of lenses.

Preparation of Form IRS-1

The prescription envelope will be given to a safety department clerk located in the oculist's office, who will record the sale on an "Employee's Sales Ticket" (Form IRS-1) as described in Bulletin Number 16-12. The clerk preparing Form IRS-1 for prescription lenses will enter the Form IRS-1 serial number on the prescription envelope. Prescription lenses may be sold for cash or paid for through payroll deduction. In any case, the Form IRS-1 will be prepared at the time the order is entered, and if the sale is for "Cash", the cash will be collected at the time the Form IRS-1 is prepared. After preparing Form IRS-1, the safety department clerk will stamp on the prescription envelope "Payroll Deduction" or "Cash". The prescription envelope then will be returned to the oculist, who will send it to the optical company where the prescription lenses will be made. The distribution of Form IRS-1 will be the same as outlined in Bulletin

Number 16-12 except that the fourth copies will be delivered once each day to the safety stores supervisor instead of to the safety control office.

Requisitioning Goggle Frames and Cases

From time to time the safety department clerk located in the oculist's office will requisition goggle frames and cases as required from the safety stores unit. A "Loaned Safety Equipment Issues" (Form IRS-38 Rev. 9/42) will be used for this purpose (see Bulletin Number 16-13). Such goggle frames and cases will be handled as a department expense and will be issued, no charge, to employees buying prescription lenses.

Delivering Lenses to Employee

Prescription lenses will be received from the optical company by the safety stores receiving station and will be delivered to the oculist's office (see Bulletin Number 16-15). Upon receipt of the lenses in the oculist's office, they will be fitted into goggle frames, replaced in the prescription envelopes, and filed by badge number. The glasses and case will be given to the employee upon presentation of the duplicate copy of Form IRS-1.

Form Discussed

The following forms were discussed in this procedure:

Form IRS-1 "Employee's Sales Ticket"
Form IRS-38 (Rev. 9/42) "Loaned Safety Equipment Issues"

Bulletins Referred to

The following bulletins have been referred to in this procedure:

Bulletin Number 16-12 "Sale of Safety Equipment"
Bulletin Number 16-13 "Issuing Safety Equipment at Company's Expense"
Bulletin Number 16-15 "Receiving and Accounting for Prescription Lenses".

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Date Issued 3/8/43 Date Effective 3/8/43 Revised	The United States Cartridge Co. St. Louis, Missouri Manual of Procedure Personnel—Safety Receiving and Accounting for Prescription Lenses	Bulletin Number 16-15 Unit Safety Stores Page 1 of 2

Purpose

The purpose of this bulletin is to outline the procedure to be followed by the safety stores unit for receiving and accounting for prescription lenses.

Picking Up Lenses From Optical Company

The prescription lenses ordered, as described in Bulletin Number 16-14, will be picked up by company truck from the optical company with three copies of the vendor's invoice and delivered direct to the safety stores receiving station.

Vendor's Invoice

The vendor's invoice will show the following information for each item appearing thereon:

1. Name and badge number of employee for whom ordered.

2. Serial number of the "Employee's Sales Ticket" (Form IRS-1).

3. Prescription number.

4. Amount of charge.

Checking Vendor's Invoice

When prescription leases are received by the safety stores receiving station, the "Prescription Envelopes" will be checked against the vendor's invoice. Each item on the vendor's invoice will be further checked against the corresponding fourth copy of Form IRS-1

received from the safety department clerk located in the oculist's office (see Bulletin Number 16-14). If the invoice is correct and each item is represented by a corresponding Form IRS-1, all copies of the vendor's invoice will be certified to be correct and signed by the supervisor of the safety stores unit. The fourth copies of the corresponding Form IRS-1 then will be forwarded to the safety control office. However, if the invoice is incorrect, all copies immediately will be returned to the vendor with an explanation and the fourth copies of the Form IRS-1 will be retained until a corrected invoice is received.

Disposition of Vendor's Invoice

All three copies of the correct and certified vendor's invoice will be forwarded to the general accounting department of the comptroller's division where it will be handled as outlined in Bulletin Number 51-37.

Schedule of Rates

Under the terms of the contract with the optical company, effective February 1, 1943, the following rates will be charged for prescription lenses:

Plano to 4. Diopters Sphere or Cylinders	Pair Spheres	1 Sphere & 1 Compound	Pair Compounds
Single Vision	$4.30	$4.70	$5.05
Kryptok Bifocals	7.50	7.85	8.15
Ultex A Segment Bifocals	9.25	9.50	9.75

For powers above 4.00 diopter sphere and up to 7.00 diopter sphere and for cylinders above 4.00 diopters and up to 6.00, add $1.50 per pair.

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Date Issued 3/8/43 Date Effective 3/8/43 Revised	The United States Cartridge Co. St. Louis, Missouri Manual of Procedure Personnel—Safety Receiving and Accounting for Prescription Lenses	Bulletin Number 16-15 Unit Safety Stores Page 2 of 2

For Crookes, Cruxite and Calobar	Single Vision	Add $2.00
	Kryptox Bifocals	" 2.00
	Ultex A Bifocals	" 2.50

For Prisms—Single Vision and Bifocals 0.50 to 7 degrees add $1.50 per pair.

For one lense only—Deduct 50 percent.

Forms Discussed

The following form was discussed in this procedure:

Form IRS-1 "Employee's Sales Ticket"

Bulletins Referred to

The following bulletins were referred to in this procedure:

Bulletin Number 51-37. "Safety Stores Accounting"

Bulletin Number 16-14 "Ordering Prescription Lenses"

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Date Issued 5/19/43	The United States Cartridge Co.	Bulletin Number 16-16
Date Effective 5/19/43	St. Louis, Missouri	Unit Safety Stores
Revised	Manual of Procedure	Page 1 of 2
	Departmental Procedure—Safety Department	
	Shoe Repairs for Employees	

Purpose

The purpose of this bulletin is to outline the procedure to be followed in handling the repair of safety shoes for employees.

Use of Form IRS-1

When an employee leaves shoes for repair he will either pay cash or authorize a payroll deduction to be made covering the cost of the repairs. In either case a clerk in the safety stores will prepare and distribute an "Employee's Sales Ticket" (Form IRS-1—Rev. 2/43) as outlined in Bulletin Number 16-12, charging the employee for the shoe repair in accordance with the schedule of costs set up in a contract with the shoe repair company. No state sales tax will be charged on shoe repairs.

Preparation of Form IRS-41

The safety stores clerk also will prepare a serially numbered "Shoe Repair Check" (Form IRS-41—Rev. 1/43) in three parts. The parts will be numbered 1, 2, and 3 and each part will bear the same serial number. The first and second parts of the form will show the following information:

1. Employee's name and badge number
2. Department number
3. Work to be done and amount of charge
4. Serial number of Form IRS-1

The third part of Form IRS-41 will show the date received and date promised and will be signed by the safety stores clerk preparing the form.

Distribution of Form IRS-41

The first and second parts of Form IRS-41 will be attached to the shoes. The third part of the form will be given to the employee as a claim check.

Delivery of Shoes to Repair Company

The tagged shoes to be repaired will be routed to the safety stores receiving station where a transmittal list will be prepared in duplicate. The transmittal list will show the number of pairs of shoes to be sent out for repair and the first and last serial numbers of the attached Forms IRS-41. The shoes to be repaired will be delivered to the shoe repair company by company truck with both copies of the transmittal list. At the time of delivery an employee of the shoe repair company will sign the original copy of the transmittal list which will be returned by the operator of the company truck to the safety stores receiving station. The duplicate copy of the transmittal list will be retained by the shoe repair company.

Return of Shoes to Safety Stores

Repaired shoes will be picked up at the shoe repair company by company truck with the first and second parts of the Forms IRS-41 still attached and with three copies of the vendor's invoice covering the charges for repairs on the shoes being picked up.

Return of Shoes to Employee

The repaired shoes will be received by the safety stores receiving station where the second part of the Forms IRS-41 will be detached and retained for the purpose of checking the vendor's invoice. The repaired shoes with the first part of Form IRS-41 will be routed to the safety stores, where they will be held

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until called for by employees. Shoe will be delivered to an employee upon presentation of the third part of Form IRS-41. The first part of Form IRS-41 then will be detached from the shoes and the first and third parts destroyed by the safety stores clerk making delivery of the shoes to the employee.

Information to Be Shown on Vendor's Invoice

The shoe repair company will be required to show the contract number on each invoice and the following information for each item on the invoice:

1. Description of item
2. Repair work performed
3. Employee's badge number
4. Serial number of Form IRS-1
5. Amount of each item.

Checking Vendor's Invoices

Upon receiving the original and two copies of the vendor's invoice and the repaired shoes in the safety stores receiving station, the second part of Form IRS-41 will be used to verify the number of items received as shown on the vendor's invoice. The vendor's invoice will be further checked against the corresponding fourth copies of Form IRS-1. The amount charged for work performed will be verified to be correct and in accordance with the terms of the contract with the shoe repair company. If the invoice is correct, the safety stores supervisor will certify the invoice to be correct and in accordance with the terms of the con-

tract. If the invoice is incorrect, all copies will be returned to the vendor for correction. All three copies of correct and certified invoices will be forwarded to the general accounting department of the comptroller's Division where it will be handled as outlined in Bulletin Number 5137.

Disposition of Forms

After certifying the vendor's invoice, the fourth copies of the Form IRS-1 and the second part of Form IRS-41 will be forwarded to the safety control office where they will be filed.

Forms Mentioned

The following forms are mentioned in this procedure:

Form IRS-1 (Rev. 2-43) "Employee's Sales Ticket"

Form IRS-41 (Rev. 1-43) "Shoe Repair Check"

Bulletins Referred To

The following bulletins are referred to in this procedure:

Bulletin Number 16-12 "Sale of Safety Equipment"

Bulletin Number 51-37 "Safety Stores Accounting"

Departments Affected

The following departments are affected by this procedure:

Safety Department

General Accounting Department

[fol. 1221]

Date Issued April 9, 1943 Date Effective April 9, 1943	The United States Cartridge Co. St. Louis, Missouri Manual of Procedure Departmental Procedure—Safety Department Work Order Follow-Up	Bulletin Number 16-17 Unit Work Order, Sanitation & Explosives Page 1 of 2

Purpose

The purpose of this bulletin is to outline the procedure to be followed by the work order follow-up section of the safety department in initiating and following through on changes and improvements pertaining to safety matters.

Source of Work

Projects regarding safety improvements which will be initiated by the work order follow-up section will be derived from three sources:

1. Suggestions and recommendations made by the safety engineers in the course of their daily inspections, and noted on their daily log report.

2. Miscellaneous suggestions originating within the safety department.

3. Employees' suggestions regarding safety, which have been referred to the safety department by the suggestion committee.

Investigations of Suggestions

The results of the investigation of suggestions submitted through the suggestion committee will be reported in writing to the committee. Results of investigations of suggestions received from the safety engineers will be given to them through personal contact.

Use of Form GS-350.

Suggestions which have merit and which are to be put into effect will be initiated by the work order follow-up section by preparing in triplicate a "Re-

quest for Work Order" (Form GS-350—Rev. 7/42), as outlined in Bulletin Number 30-1. Form GS-350 will be signed by the general safety engineer and approved by the chief safety engineer.

Approval of Form GS-350

The triplicate copy of Form GS-350 will be retained by the work order follow-up section and filed according to the craft which will perform the work. The original and duplicate copies will be taken to the chief safety engineer who will contact the head of the department concerned to explain the nature of the work to be done and obtain his approval on Form GS-350. The approved Form GS-350 then will be sent to the plant maintenance department where it will be referred to the proper section for performing the work.

Notice of Completion

Receipt of the fourth copy of the "Work Order" (Form GS-200—Rev. 12/42) will serve as notice to the work order follow-up section that the job has been completed. The triplicate copy of Form GS-350 will be removed from the pending file, placed with the fourth copy of Form GS-200, and filed in the permanent file in the supervising safety engineer's office. In actual practice, the safety engineer assigned to this section will have been informed of the completion by following through on Forms GS-350 that are pending. Close contact will be kept at all times with the progress being made on jobs recommended by the safety department.

Coordination of Safety Improvements

One of the definite functions of the work order follow-up section is to apply worth-while suggestions regarding one particular unit to all of the other units. In this way considerable assistance can be given toward making the manufacturing methods and safety practices uniform throughout the plant.

[fol. 1222]

Date Issued	The United States Cartridge Co.	Bulletin
April 9, 1943	St. Louis, Missouri	Number 16-17
Date Effective	Manual of Procedure	Unit Work Order,
April 9, 1943	Departmental Procedure—Safety Department	Sanitation & Explosives
	Work Order Follow-Up	Page 2 of 2

Forms Mentioned

The following forms are mentioned in this procedure:

Form GS-350 (Rev. 7/42) "Request for Work Order"

Form GS-200 (Rev. 12/42) "Work Order"

Bulletin Referred To

The following bulletin is referred to in this procedure:

Bulletin Number 30-1 "Maintenance, Repairs and Alterations"

Departments Affected

The following departments are affected by this procedure:

Safety Department

Plant Maintenance Department

Personnel Service Department

* * * * *

[fol. 1223]

Date Issued 5/31/43	The United States Cartridge Co St. Louis, Missouri Manual of Procedure Departmental Procedure—Safety Department Sale of Safety Shoes	Bulletin Number 16-18 Unit General Page 1 of 2
Date Effective 5/31/43		

Purpose

The purpose of this bulletin is to outline the procedure to be followed in selling safety shoes under the regulations of the Office of Price Administration.

Sale of Shoes

Sale of Shoes—Regular Shoe Stamp

An employee purchasing safety shoes must turn in the designated war ration stamp as required by the Office of Price Administration when he has such a stamp available. At the time of purchase this stamp will be given to the clerk who will place the initials "W. S." (War Stamp) in the space "Special Remarks" on the "Employee's Sales Ticket". (Form IRS-1—Rev. 2/43) and then give the stamp to the general accounting department representative in the safety stores.

Sale of Shoes—Special Shoe Stamp

Since safety regulations require that employees in certain occupations wear safety shoes, provision has been made for permitting those employees to obtain shoes with a special shoe stamp in case their regular shoe stamp has been used. When the employee states at the time of purchase that he does not have a valid war ration shoe stamp, he will be given an "Application for a Special Shoe Stamp" (O. P. A. Form R-1703) to fill out. On this form he must state, in addition to other information, his war ration book number. If the employee is not able to f nish this number, he will be allowed to purchase the shoes but will be required to inform the safety stores of his number the

following day. After filling out Form R-1703 the employee will be allowed to purchase one pair of safety shoes as outlined in Bulletin Number 16-12. The shoe clerk will write the initials "S. S." (Special Stamp) in the space "Special Remarks" on the Form IRS-1.

Handling and Control of Shoe Ration Stamps

Special Shoe Stamps

Forms R-1703 filled out by employees will be sent to the Chairman of the Ration Committee who will review the applications, indicate his approval, and return them to the general accounting department representative in the safety stores. A general accounting department clerk assigned to safety stores then will use Forms R-1703 to prepare a "Document Register" O. P. A. Form R-181), listing the name and war ration book number of each employee purchasing shoes with a special shoe stamp. In addition, the clerk will obtain a supply of special shoe stamps from the general accounting department representative and for each name on the Form R-181 will fill in a stamp showing the war ration book number and the date. The Form R-181 and the Forms R-1703 listed thereon will be sent to the Office of Price Administration approximately every three months. The special shoe stamps properly filled out will be given to the cashier who then will deposit them in the special shoe ration stamp account in the Boatman's National Bank. This account will be under the control of the general accounting department and as shoes are purchased from manufacturers, checks may be written against the shoe stamp account to supply the manufacturer with the necessary stamps.

Regular Shoe Stamps

Regular shoe stamps turned in to the general accounting department representative by the safety stores clerks will be given to the cashier who will deposit them in the special shoe stamp account.

[fol. 1224]

Date Issued 5/31/43	The United States Cartridge Co.	Bulletin Number 16-18
Date Effective 5/31/43	St. Louis, Missouri	Unit General
	Manual of Procedure	Page 2 of 2
	Departmental Procedure—Safety Department	
	Sale of Safety Shoes	

Forms Mentioned

The following forms are mentioned in this procedure:

Form IRS-1 (Rev. 2/43) "Employee's Sales Ticket"

OPA Form R-1703 "Application for a Special Shoe Stamp"

OPA Form R-181 "Document Register"

Bulletin Referred To

The following bulletin is referred to in this procedure:

Bulletin Number 16-12 "Sale of Safety Equipment".

Departments Affected

All departments are affected by this procedure.

[fol. 1225]

Date Issued 2/3/44 Date Effective 2/3/44	The United States Cartridge Co. St. Louis, Missouri Departmental Instructions—Safety Engineering Department Authorization for Issue or Sale of Safety Equipment	Bulletin Number 16-21 Reference: Procedure No. 16-21 Page 1 of 2

Purpose

The purpose of this departmental instructions bulletin is to outline the procedure to be followed in authorizing the issue of safety equipment at company expense, or the direct sale of safety merchandise through payroll deduction.

Issues by Safety Stores

Except when replacing worn out or broken equipment which was issued originally at company expense, safety stores will issue safety equipment at company expense, and sell safety merchandise to employees through payroll deduction, only upon the presentation of an "Authorization for Issue or Sale of Safety Equipment" (Form IRS-59) properly signed by the employee who is to receive the merchandise, and approved by the employee's timekeeper. In addition, in all cases where safety equipment is to be issued to an employee at company expense, the employee also will present a "Loaned Safety Equipment" (Form IRS-38 —Rev. 6/43) prepared and approved by his foreman, supervisor or department head as outlined in Departmental Instructions Bulletin Number 16-13.

Authorizing Purchase of Safety Merchandise Through Payroll Deduction

An employee who desires to purchase merchandise from the safety stores through payroll deduction will secure a blank Form IRS-59 from his foreman, supervisor or superintendent's office, and will prepare the form in original only, listing the merchandise desired. Form IRS-59 will be signed by the employee and presented to the employee's timekeeper who will check the employee's time card. The employee must have worked at least two full shifts after induction, reinstatement or re-employment before the timekeeper will approve Form IRS-59, except when it is necessary for

merchandise such as safety shoes, etc., to be issued before the employee can start to work. In such cases, the Form IRS-59 will have a notation to this effect and be signed by the employee's foreman. Also, if the fourth copy of "Termination of Employment" (Form IRP-3—Rev. 5/43) for the employee has been received by the timekeeper, Form IRS-59 will not be approved. When these requirements have been met satisfactorily, the timekeeper will approve the Form IRS-59, enter his badge number, make the notation "Safety Stores Sale" on the employee's time card and return the Form IRS-59 to the employee. The employee will use the Form IRS-59 as his authorization to purchase safety merchandise from the safety stores.

Authorizing Issuance of Safety Equipment

When safety equipment is to be issued to an employee at company expense, a Form IRS-38 indicating the equipment required will be prepared in duplicate and approved by the employee's foreman, supervisor or department head. If it is necessary for the equipment, such as safety glasses, etc., to be issued before the employee can start to work, a notation to this effect will be made on Form IRS-38. Except when worn out or broken equipment is to be replaced, as outlined below, the Form IRS-38 and a Form IRS-59 then will be given to the employee who will prepare and sign the Form IRS-59, and take this form to his timekeeper for approval as outlined in the above paragraph. Upon approval of the Form IRS-59 in such cases, the timekeeper will enter the notation "Safety Stores Issue" on the employee's time card.

Disposition of Form IRS-59

The Form IRS-59, and Form IRS-38 (if any), then will be presented to the safety stores by the employee. After the issue or sale, the safety stores clerk will stamp the Form IRS-59 "Cancelled" and attach it to either the original copy of Form IRS-38 or the triplicate copy of "Employee's Sales Ticket" (Form IRS-1—Rev. 5/43), prepared for sales made through payroll deduction. Form IRS-59 then will be routed with

[fol. 1226]

Date Issued 2/3/44 Date Effective 2/3/44	The United States Cartridge Co. St. Louis, Missouri Departmental Instructions—Safety Engineering Department Authorization for Issue or Sale of Safety Equipment	Bulletin Number 16-21 Reference: Procedure No. 16-21 Page 2 of 2

triplicate copy of the Form IRS-1 to the general accounting department (see Departmental Instructions Bulletin Number 16-12), or with the original copy of Form IRS-38 to the factory accounting department (see Departmental Instructions Bulletin Number 16-13).

Replacing Worn Out or Broken Equipment

Worn out or broken safety equipment which was issued originally to an employee at company expense, will be replaced without charge to the employee when proof is presented that the original equipment is worn out or broken. In such cases, a Form IRS-59 will not be required to issue the new equipment and the employee will present to safety stores only Form IRS-38, properly approved by his foreman, supervisor or department head, along with the worn out or broken equipment, or its parts.

Clearance Upon Employee's Termination

If an employee who during the current work week has been issued safety equipment or has purchased safety stores merchandise through payroll deduction terminates, the payroll unit will not prepare the final pay check if the clock card bears the notation "Safety Stores Sale" or "Safety Stores Issue" until they receive their copy of Form IRP-3 showing the required clearance of loaned safety equipment, or the amount due for purchase of merchandise is deducted from the amount of the final pay check.

Forms Mentioned

The following forms are mentioned in these instructions:

Form IRS-59 "Authorization for Issue or Sale of Safety Equipment"

Form IRP-3 (Rev. 5/43) "Termination of Employment"

Form IRS-38 (Rev. 6/43) "Loaned Safety Equipment"

Form IRS-1 (Rev. 5/43) "Employee's Sales Ticket"

Bulletins Referred to

The following departmental instructions bulletins are referred to in these instructions:

Bulletin Number 16-13 "Issuing Safety Equipment at Company's Expense"

Bulletin Number 16-12 "Sale of Safety Equipment"

Departments Affected

All Departments are affected by these instructions.

* * * * *

[fol. 1227] Q. Mr. Miller, I will show you a paper consisting of 43 sheets which has been identified as Defendant's Exhibit 11, and ask you if that bundle of papers constitutes the Manual of Procedure for the safety engineering department? And I might ask you specifically, where changes were made does that show the first copy and then [fol. 1228] subsequent editions of the same document with the dates shown?

A. This is the Manual of Procedure as it applied to all the procedures covering the organization and functions of the safety department. The sheets here, however, are the latest corrected procedure in every case, and copies of the earlier procedure are not in here.

Q. The dates when those procedures were put into effect, are they indicated on the various documents?

A. They are indicated in the upper left-hand corner, and they are the effective date that each procedure became effective.

Q. And what was done with these documents? What use were they put to?

A. They were distributed to any supervisor of the company who would need the information shown in these sheets in carrying out the functions of his job. For instance, they would be given to the chief safety engineer and his assistants, and would also be given to any other supervisor in the company where any procedure is set forth which he would be required to follow.

Q. In other words, copies of these were not confined solely to the safety engineering department?

A. That is true.

Q. But were distributed to other departments where perhaps there might be some question of jurisdiction as between departments, or conflict?

[fol. 1229] A. Jurisdiction and also the cooperation.

Q. And the manner of cooperating, too?

A. Yes, sir. Coordinating.

Q. Who is responsible for those Manuals of Procedure? Who wrote them up?

A. They were written up by a number of people working together: myself, the chief safety engineer, his assistants, the controller's office, the production superintendent, general superintendent—they were written up, checked, and

revised, so that they wouldn't interfere with the proper operation of any department. So that they were written and revised by the people, first, in the department, and then in conjunction with other departments.

Q. Who gave final approval or disapproval to the issuance of these Manuals of Procedure?

A. The director of personnel.

Q. And that was true with all manuals of procedure that were written for the various departments?

A. No, sir, that was true of all the departments in the personnel division. And the controller would give the final approval on any procedures for his department, the general superintendent for any procedures in production, and so forth.

Q. But no one above those department heads passed on this. Did the general manager, for example, approve or disapprove them before they were finally released?

[fol. 1230] A. Only in certain cases.

Mr. McRoberts: We offer in evidence, if Your Honor please, Defendant's Exhibit 11.

Mr. Bond: Before stating my objection to that, may I ask this witness a few questions relating solely to the competency of the document?

The Court: Yes, sir.

Mr. Bond: As I understand you, this Manual of Procedure was prepared in the way you have described, and was given to the director, you call him chief safety engineer, and his assistants?

The Witness: Yes, sir.

Mr. Bond: Also to the supervisory personnel in the production and other departments?

The Witness: Only those portions of the manual which would influence those people were given to them.

Mr. Bond: This manual was not prepared for the information of the safety engineers and was not given to the safety engineers?

A. Yes, sir, any portion referring to work where they would need to know the information or the procedure to follow as set forth in the procedure, that procedure was given to them.

Mr. Bond: You don't mean to say that this group of papers was given to each of the plaintiffs in this case?

A. No, I do not. I say the papers in there were given to [fol. 1231] the interested man. If there was a procedure there on transportation, it was given to the safety engineer who worked for transportation. If it was a procedure on the—

Mr. Bond: Let's take transportation. A. Yes, sir.

Mr. Bond: This is a comprehensive manual of procedure? A. Yes, sir.

Mr. Bond: And if a certain part of it related to the department of transportation, it would be given to whom?

A. To the safety engineers working in transportation.

Mr. Bond: And not to the men on the shift? A. Yes, sir.

Mr. Bond: Anything that related to the men on the shift, that portion you say would be given to them?

A. Yes, sir.

Mr. Bond: But this manual as a whole was only for the information of the director's office and the supervisory personnel? A. That is true.

Mr. Bond: Now if Your Honor please, I object to it as not binding upon the plaintiffs in this case. If there were any particular portions which were given to any particular plaintiffs in this case to guide their conduct in the performance of their duties, I will have no objection to that portion being offered. But this comprehensive manual of [fol. 1232] procedure gotten up by the top management, I do not think that is binding on my clients, and I object to it.

Mr. McRoberts: It is not a question of being binding, I think it is the best evidence of what the safety depart-

ment did and how it functioned at the plant. It is sort of a constitution of the department.

The Court: Witness doesn't acknowledge the manual was given to the plaintiffs in this case?

Mr. McRoberts: Not as a whole, only parts of it. This is the detail story, this is the official record.

The Court: Why don't you produce the parts of what was given to them.

Mr. McRoberts: It is our contention when the director of the safety engineering department has given—

The Court: He is testifying what somebody else did, and you don't produce the document.

Mr. McRoberts: This is the document.

The Court: No, it isn't, he said a portion given to them, but he didn't do it, and there is no way in which he could say what part was given.

Mr McRoberts: I am offering this on the theory everyone of the plaintiffs has read everyone of these.

The Court: You are offering it on the theory to show who it was.

Mr. McRoberts: It shows the functions of the department primarily, and this definitely was related to the rest of the [fol. 1233] plant. It goes to show, I believe, what this witness has already testified to, that this department was operated as an advisory station organization, advising the productive departments how to operate properly.

Mr. Bond: That has no bearing on the classification.

Mr. McRoberts: I do not contend, if Your Honor please, that so far as any individual employee is concerned that he has seen all of this, or in particular any employee any particular part of it. I can't make that proof, but I do

elieve it is admissible for what it is worth to show the
nctions of this department in which these men were
orking.

The Court: It may be admitted subject to the objection.

ol. 1234] Q. (Mr. McRoberts) Now Mr. Miller, did you
ave occasion from time to time to write up descriptions,
a description of the duties which the safety engineer
erformed? A. I did, yes, sir.
Q. Did you have anything to do with that (passing a
aper to the witness)? A. The last page only, yes.

[fol. 1237] Q. Mr. Miller, I will show you a paper which has been identified as "Defendant's Exhibit 12," and ask you what that is?

A. This is a form headed "Administrative Exemption."

Q. I do not mean tell the contents, but what is the nature of the document?

A. The nature of the document, it was written up and describes the duties of the employee covered by this sheet and the requisites of the job. That is all.

Q. Did you have anything to do with the preparation of that document? A. Yes, sir.

Q. What did you have to do with it?

A. The chief safety engineer, the occupation [analyist] himself.

Q. Who is occupation analyst? Tell us about him. Describe him.

[fol. 1238] A. He was a man whom we hired to make a determination as to whether we should pay or should exempt from the payment of overtime various salaried employees.

Q. In cooperation with him?

A. In cooperation with him. And he came to us with about four years experience with the Wage and Hour Division doing the same type of work and was hired for the specific purpose of making a determination as to whether these employees should be classified as exempt from overtime under the provisions of the Fair Labor Standards Act, or should be paid overtime.

Q. In any event, in connection with him and with Mr. Strickland, you helped to prepare that particular document? A. Yes, sir.

Q. And what was the purpose of preparing that document?

A. The purpose was to furnish all of the information in regard to these jobs to this occupational analyst so that he could then make his determination on those employees.

Q. Well, did you attempt in that document to describe the job referred to in it? A. Yes.

Q. And what particular job is referred to in that document?

A. The job referred to is shown at the top of the sheet as Safety Inspector Code 984.

Q. And was this document prepared as part of a prep-
[fol. 1239] aration of a number of similar documents covering a lot of different jobs in the plant?

A. Yes, sir, it was.

Q. And does that document, or did that document describe the characteristics and qualifications of the job and set forth therein correctly to the best of your knowledge at the time? A. It does briefly.

Q. It is a very brief statement? A. Yes, sir.

Q. At the time that was prepared. When was it prepared? A. July 22, 1942.

Q. And would you say that is a correct summary description of the job of safety inspector?

A. It is a correct general description, omitting a great many very small details, yes, sir.

Mr. McRoberts: We offer in evidence "Defendant's Exhibit 12", Your Honor.

Mr. Bond: Your Honor please, I certainly object to that. It is a self-serving statement prepared by the management for the information of an occupational analyst whom they had hired to classify these men. There is no evidence that the duties of this job as set out herein were ever communicated to the plaintiffs or they were ever ordered to perform these duties or ever did perform them, but here in the management office they undertook to classify men. They hired a man to do it, and they say what the duties [fol. 1240] of the job are, or tell him in the document what the duties of the job are and ask him to classify such a job. I say that is purely self-serving and it isn't binding on my clients. And it is because it was erroneous and that it is an erroneous document and an erroneous classification that we bring this suit.

Mr. McRoberts: We submit this is a record made in the ordinary course of business, not for the purpose of this litigation at all. And the witness further testified it correctly states the duties.

The Court: Admitted subject to the objection.

(A paper is marked "Defendant's Exhibit 13")

Q. Mr. Miller, I show you a paper which has been identified as Defendant's Exhibit 13, consisting of some 7 or 8 pages, and ask you what that is?

A. This is a group of seven or eight pages which give a complete job description of the seven or eight job classifications shown on these pages.

Q. And this particular document covers other jobs than safety engineers, does it? A. Yes, sir, it does.

Mr. Bond: What is that document?

Mr. McRoberts: Job descriptions of various jobs.

Q. Let me direct your attention then, if you will, to the page covering safety engineers or safety inspectors. Is [fol. 1241] that the page? A. I have it.

Q. Did you have anything to do with the preparation of that document? A. Yes, sir.

Q. Tell us under [shat] circumstances and how that happened to be prepared?

A. It was prepared at the same time that we prepared job descriptions for every job classification at the plant. Those classifications were prepared for all hourly rates and all salary rated jobs. The original purpose in preparing them was two-fold. They were prepared for us in connection with the War Manpower Commission, they are made out on War Manpower Commission forms of job descriptions, and were used, first, for securing [deferrence] for these employees whom we needed to get deferred; and they were prepared second—

Q. That is, deferred from military service?

A. Yes, sir, Judge. And second, they were prepared and submitted for the purpose of securing approval of the War Labor Board and of the Treasury Department of our hourly rated and salary rated job ranges.

Q. And when were they prepared?

A. They were prepared in March and April, 1943.

Q. Did you assist in the preparation?

A. Yes, sir, I directed it.

Q. And this particular page of that particular document [fol. 1242] purports to contain a description of the job of safety engineer. Is that correct? A. That is right.

Q. And prepared for the purposes that you state?

A. Yes, sir.

Q. And was and is that a correct description of the job?

A. Yes, sir.

Mr. Bond: Object, Your Honor, that is not the way to prove what the duties of these men were, nor what these men were required to do. He gives him a self-serving document prepared for certain purposes other than the

guidance of these safety engineers. There is no evidence it was ever given to the safety engineers or that they were ever required to do those things. That is one of these things that conflicts with all the evidence. And I say it is incompetent because a self-serving statement not given to the men and which the men were not required to follow, and it isn't the way to prove these were the men's duties.

The Court: He may answer subject to the objection.

(Last preceding question was read)

A. The answer is, we were very particular to see that it was a correct description of the job because of the two purposes for which we were preparing it. The actual method of preparation was that I myself, the chief safety director and his assistants prepared it. In the preparation of it we [fol. 1243] actually conferred with and talked to some of these safety engineers and had them look over and read what we were writing as to the description of the job. Subsequent to that we also discussed all of these descriptions with various other supervisors throughout the organization, including production, controller's office, general manager's office, and so forth. They were checked carefully about three or four times in addition to checking them with the men.

Q. And was this job description actually used in obtaining deferments?

Mr. Bond: Object to that as incompetent, Your Honor. What they say to obtain deferments is not a criterion of the way the men should be classified under the Fair Labor Standards Act.

The Court: Objection sustained.

Mr. McRoberts: We offer in evidence Defendant's Exhibit 13. We are only interested in one sheet that relates to safety inspector, and we only offer that one sheet, unless you wish the rest of it.

Mr. Bond: Object to it as incompetent, irrelevant and immaterial, and self-serving statement of plaintiffs' duties, and there being no evidence it was ever communicated to plaintiffs, or that there were ever any requirement that the plaintiffs perform the duties.

The Court: It will be admitted subject to the objection.

Note

Blank Pages at this Point

[fol. 1253] Q. Now Mr. Miller, referring to this Plaintiffs' Exhibit F_D entitled "General Instructions," copies of which were given to each of the plaintiffs who have testified. Were those instructions ever revoked or modified?

A. They were not, no, sir.

Note

Blank Pages at this Point

[fol. 1256] Q. Mr. Miller, I will show you a paper which has been identified as "Defendants' Exhibit 14," and I will ask you what that is?

A. This is a list of duties of an inspector Senior Code 843.

Q. Did you have anything to do with the preparation of that document? A. Yes, sir.

Q. Will you tell us how and under what circumstances and for what purpose that was prepared?

A. This was prepared—it is a copy of the job description which I just talked about, and was prepared for two purposes; first, for the purpose of securing deferment, for the War Manpower Commission.

Mr. Bond: Object to that and ask that it be stricken out.

The Court: Sustained.

Q. You stated that this is a copy of the information that is set forth on Defendant's Exhibit 13? A. Yes, sir. [fol. 1257] Q. It is merely a separate sheet which was prepared preliminary to the making up of this Defendant's Exhibit 13? A. Yes, sir.

Q. Then I want to re-ask you the question about it. I would like to call your attention, Mr. Miller, to certain percentage figures which are shown here under the caption "per cent of time" opposite the description of different duties. What do those percentages represent?

A. The percentage figures represent our determination of the average per cent of time worked by the average safety engineer in carrying out these functions. They were arrived at after we had observed the carrying out of the job and after discussion with some of the safety engineers and the various supervisors.

Q. And are these the same percentage figures which appear on Defendant's Exhibit 13, and does the same explanation apply with respect to these figures?

A. Yes, sir, that is true.

Q. Mr. Miller, refreshing your recollection, if you care to, from Defendant's Exhibit 13, would you tell the Court in a general way how the employee, the safety engineer's time was allocated to his different duties? Approximately what percentage of his time has been in the different types of work, the average?

Mr. Bond: Object to that as calling for a conclusion and [fol. 1258] a self-serving statement, and for the further

reason that any division of duties on a percentage basis is wholly immaterial where the defense is that the exemption is on the ground of an administrative employee. That question of percentage of exempt and nonexempt only becomes material where the defense is that the exemption is on the ground of an executive. The decisions all differentiate that where a man is a part time executive and a part time worker and whether or not his time as worker exceeds 20 per cent is important, but where the defense is administrative, that he exercises judgment and discretion and is a real administrator, the question of the percentage is a wholly immaterial factor. And further, because this is just something gotten up by the management in which the plaintiffs were not a party, and it isn't binding on them.

Mr. McRoberts: The purpose of this is not to show that the employees spent less than 20 per cent of their time doing manual labor. Plaintiffs' own testimony is they did none of that, they did not undertake to do the work, but merely instructed, advised and reported. The purpose is to show, for example, they spent a substantial part of their time checking the manual movements of employees and pointing out unsafe practices to the supervisors, and a small part of the time submitting written reports or doing other things of the sort. It is to help describe the actual day by day work of these men.

(Last preceding question was read.)

[fol. 1259] Mr. Bond: I might add to my objection that there is no proof that the plaintiffs, or any engineers, were required to make any reports of percentage of time devoted to any duties, and that any opinion, any statement that the witness might make would be guesswork.

May I ask him a few questions on this?

Mr. Bond: Were the safety engineers required to make any report to the management of how the time was distributed between the various duties? A. They were not.

Mr. Bond: Have you in your files any records made at the time showing the daily duties were distributed on a percentage basis? A. This is the only record we have.

Mr. Bond: And that is an estimate?

A. It is an approximation gathered by watching the job.

Mr. Bond: But not based on any records or reports? No safety engineer was required to report how much of his time he spent in patrolling or writing a report or doing anything else, was he? A. No, sir, they were not.

The Court: Objection sustained.

Mr. McRoberts: Your Honor please, we offer to prove by this witness that if permitted to answer, that the employees would spend in the different duties indicated on [fol. 1260] Defendant's Exhibit 13 the percentages of time of the total time set forth opposite "description".

The Court: The Court will permit you to show the production time if it is based upon any record, but just to let the man guess at it, the Court isn't going to do.

Q. (Mr. McRoberts) Mr. Miller, will you explain a little more in detail as to how you arrived at these figures?

A. Yes, sir, the chief safety engineer in charge of the department, two of his assistants and myself, went out in the factory and checked and watched the jobs of some of these safety engineers.

The Court: For how long a period?

A. For three days. We talked to several of the safety engineers, and the four of us with the safety engineers we were talking to decided that these were the percentages that would apply in each case. Those were secured, as I said, by watching the men doing the work, by talking to the men and with the chief safety engineer and his two assistants, and myself.

The Court: Did you watch through all three shifts?

A. Yes, sir.

The Court: Just through that?

A. We watched through one shift and about three hours of another.

Judge Bond: May I ask another question?

[fol. 1261] Mr. Bond: Name all or some of the men you talked to.

A. Safety engineers?

Mr. Bond: Yes, sir.

A. I don't know who they were.

Mr. Bond: Of the fifty-nine men who are plaintiffs in this case, you can't name one?

Mr. McRoberts: There were a lot more safety engineers besides fifty-nine.

A. Yes, sir, there were. And I may have talked to some of those. I don't know.

Q. (Mr. McRoberts) In talking with them did you ask them questions about the time spent on different duties?

A. Yes, sir.

Q. And these figures are the result of your investigation and discussion which you have described?

A. Yes, sir.

Mr. McRoberts: Now if Your Honor please, we offer to show by this witness that the time spent in the different duties described in Defendant's Exhibit 13 is substantially the amount set forth, opposite the description, of each type of duty in that exhibit.

Mr. Bond: Object for the reasons heretofore stated.

The Court: Sustained.

Q. Mr. Miller, were those safety engineers required as part of their regular work to make a written report of an accident requiring first aid treatment, and make recom-[fol. 1262] mendations for correcting the conditions which were found to exist? A. Yes, sir.

Mr. Bond: Object as leading and suggestive. Let him tell what they were required to do.

The Court: Objection sustained and answer stricken.

The Court: Do not answer in the future until the Court has ruled.

Q. Mr. Miller, I will show you a file of papers without having them identified and ask you to tell me what they are?

A. These are safety inspection reports, accident record reports turned in by safety engineers.

Q. And what was the occasion for the safety engineers to make such a report? What were their duties with respect to making the reports?

A. Their duties were to investigate any accident resulting in the necessity for First Aid or hospital treatment. The employee was required—the safety engineer was required to get a record from the employee as to the cause of the accident, the nature of the injury, any record of witnesses that might be available. He was also re-

quired to handle it and discuss it with the employee's supervisor, to make recommendations as to corrective or preventive action, and then turn in a written report of the results of his action.

Q. And were those reports made from time to time?

A. Yes, sir, they were.

[fol. 1263] Q. And what was done with them?

A. These reports were turned in by him to his supervisor from his supervisor to the chief safety engineer, and from the chief safety engineer to me. And they are in my file.

Q. They are part of the records of the company?

A. Yes, sir.

Q. Could you give us some idea as to the number of reports of that character that are in the file?

A. Thousands.

Q. Thousands of them? A. Yes, sir.

Q. And out of those have you selected or caused to be selected some reports made up bearing names and purporting to have been made by some of the different plaintiffs in this case, other than the ones that have already testified? A. Yes, sir, I have.

Q. And indicating the kind and type of corrective action which they took? A. Yes, sir, they do.

Q. And without going through that whole file, which is rather voluminous, will you go through the different—or do you have that file divided into different types and kinds of action that was taken?

A. Yes, sir, into the kinds of action taken by the safety engineers.

[fol. 1264] Q. All right, give me the first type of action that you have there that was taken. I don't mean the specific report but the group, what does it show?

A. It says "condemned by the safety engineer."

Q. Does that mean where some of their machinery or appliances, or something, was condemned? A. Yes, sir.

Q. Will you read into the record, giving the dates, the name of the plaintiff and the particular action that was taken according to his report, from one or two of those where that type of action was taken?

Mr. Bond: Pick them out because I will want them on cross examination.

Mr. McRoberts: Any one you read from, just lay it aside.

A. "Report of safety engineer R. Baxter, dated May 4, 1943."

Q. I don't want to bother with the details of the accident. Skip on down to the correction, or what he did.

A. "The end of a platform nearest the ladder obstructed and I condemned it from further use pending reports, on advice of Mr. Case, foreman, and Mr. Woods, general foreman, not to let the men use the platform, although filters are normally changed twice a shift."

Q. Lay that aside and pick out another one or two of them.

[fol. 1265] A. Report signed by M. J. Burk, dated July 14, 1943. "condemned both skids and had moved to dock where metal leg one will be repaired and the wooden one scrapped. Instructed both Mr. Bowman, foreman, and Mr. Marsh, general foreman; not to use any damaged skids in the future."

Q. Will you take another type of report that you have there?

A. Reports of machinery or other items taken out of service.

Q. Will you read from one or two of those?

A. Report signed by J. C. Kavanaugh, dated June 16, 1942. "I will take this up with Mr. Linge of the Millwright Department, to have machinery repaired and baling wire taken off."

Report signed by R. Carbone July 26, 1943. "Correction: Had millwrights replace guard and make proper repairs."

Mr. Bond: Those are accident reports you are reading from?

Mr. McRoberts: All of them, yes, sir.

A. Report signed by F. M. Harris: "So I told him under the circumstances I wouldn't permit the welding job to progress, all of which met with the approval of Mr. Maher." Mr. Maher is also a complainant. "I tightened rivets to permit welding at elevator freight door openings in 10. Before I inspect for information get elevator openings cleaned." It is the same report signed by Mr. Harris.

Q. Mr. Miller, I call your attention particularly to the report, safety inspection report you have in your hand, [fol. 1266] dated 8/17/43 and bearing typewritten signa-

ture of F. N. Harris, and ask you if this is one of the reports in your files, some of the reports, and is part of the company records?

A. It is one of many reports bearing the typewritten signature of F. N. Harris which came to me from the head of the safety department.

Q. And is it that part of your records kept as you have already described? A. Yes, sir.

Q. Will you read the correction in that case?

A. Correction in this report: "I reported the machine out of order and locked electric switch leaving key with safety department. Cautioned employee to be more careful in the future and to refuse to operate unsafe machines."

Q. Do you have some others?

A. Yes, sir, I have some ordered corrections here.

Q. By that you mean where certain orders have been given to the safety engineer? A. Yes, sir.

Q. Will you read one or two of them giving the names and dates?

A. Report signed by Champion, dated 12/1/42. Corrections: "I have been finding quite a few trucks having as many as four in a cab. I have been stopping truck and having some of them get out." And Carbone dated July [fol. 1267] 1, 1943: "Cautioned patient that in the future while these boxes are stacked on skid in [in] such manner as to create a hazard he should fail to unload until fixed safely."

And one signed by Carbone, dated July 2nd. "Instructed foreman Wilson to instruct all inspectors to raise from their chairs when moving men would either place jackets into trays or remove full tote boxes."

And one signed by Mr. Bentine. "Correction: No metal for process has been ordered put there, and employee cautioned to be very careful in getting the job setup carefully."

Q. I think that is enough of that type. Are the reports that you have read typical of a number of similar reports which you selected from the files? A. Yes, sir, they are.

Q. Mr. Miller, there has been some testimony that this part of the original general instructions which I pointed out to you on page 2 was rescinded or modified. Is that true? A. No, sir, it is not.

Q. Have safety engineers always been subject to that instruction? A. Yes, sir, they have.

Q. How far back does that go, Mr. Miller?

A. It goes back to the beginning of operations.

Q. Do you have any memorandum that would show when that policy was first adopted? A. Yes, sir, I have.

[fol. 1268] Q. What is it?

A. I have a letter written by the director of personnel to the chief safety engineer with a copy to the general superintendent in charge of operating, which states that the safety engineer shall have the authority to shut down operations, shut down machines and to remove employees. Dated December 11, 1941.

Q. That was even before these general instructions were issued? A. Yes, sir.

Q. And that has never been rescinded?

A. That is right.

Q. And has that authority been exercised on occasions?

A. Yes, sir, it has.

Q. Mr. Miller, the testimony shows that originally safety engineers started to work a half hour ahead of the regular production shifts, and that that policy was changed. Do you have any record as to when that was changed? A. Yes, sir.

Q. When did the change occur?

A. It was changed on March 9, 1943.

Q. From that time on what hours did the safety engineers—were they compelled to report?

A. They were required to report and work the same hours as the production shifts with whom they were working.

[fol. 1269] Mr. Bond: I think he made a mistake. You didn't mean March, 1943, did you? A. Yes, sir.

Q. And you base that upon one of your records as to when that should be done? A. Yes, sir.

Q. And what is the record on which you base that?

A. The record is a letter of that date addressed to all safety engineers stating that effective Wednesday March 10th working hours will be from 8 A. M. to 4 P. M., from 4 P. M. to 12 midnight, and from 12 midnight to 8 A. M. Then this statement follows: "This will eliminate the additional half hour required of the safety engineers each day."

Q. Now Mr. Miller, there was some testimony by Mr. Harris about a notice having been put up and then rescinded the next day? A. Yes, sir.

Q. Is this the notice that was put up and rescinded, or is this the one that was carried out?

A. This was carried out.

Q. And then from March 9, 1943, working hours were from 8 A. M. to 4 P. M. on the day shift, 4 P. M. to 12 midnight on the second shift, and from midnight to 8 A. M. on the night shift?

A. That is for the following day, effective the 10th.

[fol. 1270] Q. Effective beyond that? A. Yes, sir.

Q. Now Mr. Miller, what lunch period were the safety engineers allowed?

A. Safety engineers were allowed a half hour lunch period.

Q. And that was true during the entire period both when they were reporting a half hour ahead of the production shifts, and when they were reporting at the same time the production shift reported?

A. I think in the very early days before we really got into production, they were allowed only 20 minutes; but that was in, you might say, our construction days and lasted only a very short time. And subsequent to that they were always allowed a half hour the same as all of the other employees.

Q. And is that true during the period covered by these complaints? A. Yes, sir.

Q. And during that half hour period were the safety engineers required to be on duty and subject to call, or were they free to use that period as they saw fit?

A. They were free to use that period as they wished either within or without the plant site.

Q. Were they permitted to leave the plant site during that half hour period, if they so desired? A. Yes, sir.

Q. And occasionally some employee did?

[fol. 1271] A. That is right.

Q. But the most of them stayed in the plant and ate in the company cafeterias? A. Yes, sir.

Q. Now Mr. Miller, when we examine the time-cards we see that on some of these cards employees punched in just a few minutes before the beginning of their shift, one or two, or three or five minutes before. Another employee during the same time may have punched in his card 30

or 40 or 50 minutes before. Now can you tell us why that discrepancy?

A. Yes, sir. At the beginning of any one of the three shifts employees in departments would start arriving at the plant anywhere from a half an hour or an hour before the beginning of the shift.

Q. Why?

A. They did that primarily on account of transportation. By coming in early on buses they were sure of getting bus seats. They came in connection with our car pool, and perhaps the driver or some other employee actually worked early. They came in early, and we had several thousands of those who did that every day. With the hourly rated employee they were not permitted to ring the time-card more than 15 minutes before they were required to start the shift. That wasn't true, however, with salaried employees who might ring their cards at any time they wished.

Q. Now, was there any requirement that any of these [fol. 1272] salaried, and particularly the plaintiffs in this case, should report to work before either the beginning of the 8-hour shift in the later period, or before 30 minutes prior to the beginning of an 8-hour shift in the early period? A. No, there was not.

Q. So that if an employee did report and ring in 10 or 20, or 30 or 40 minutes before, he did it of his own volition and not because of any requirement of the company?

A. That is right, yes, sir.

Q. Now Mr. Miller, I see that there is some variation in the time at which the employee punched out. An employee on one day, for example, may punch out at 4 o'clock, and next Monday 4:01, and next day 4:22. Why would there be that variation?

A. Well, after the end of the shift, an employee ringing out several minutes or longer after the end of the shift would do so only because he was finishing out some job that he had been doing. It would be in most cases voluntary on his part. There would be no requirement that he remain after that period.

Q. Although there might be occasions where an individual employee would be required to stay over for some special job? A. Very few, in very rare cases, yes, sir.

Q. Now Mr. Miller, calling your attention to some typical time-cards, I will show you first Defendant's Exhibit 15.

Note

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[fol. 1275] Q. Mr. Miller, I will show you a paper which has been identified as "Defendant's Exhibit 15", and ask you what that is?

A. This is a weekly time-card of one of the claimants, A. C. Kropp, for the period ending February 7, 1943.

Q. Is that one of the cards which was brought in pursuant to subpoena of Judge Bond? A. Yes, sir, it is.

Q. Calling your attention to that card and to Monday of the week in question, I believe that shows that that particular plaintiff punched in at 7:22 A. M.

Mr. Bond: Object to his leading the witness, Your Honor. Let the witness state.

Q. I direct your attention to Monday and ask you at what hour the card shows he punched in?

A. Punched in at 7:22 A. M.

Q. When did he punch out? A. 5:11 P. M.

Q. And at that time when did his shift start? A. 7:30.

Q. And when did it end? A. Four.

Q. And he had a half hour period off for lunch, I believe you testified to? A. Yes, sir.

Q. Now, how many hours are shown on that time-card in pencil, being the number of hours put in that day?

A. For that date 9-1/10.

[fol. 1276] Q. Can you tell me how that figure was arrived at?

A. Well, starting at 7:30, deducting the half hour allowed for lunch, figuring up to five o'clock would be nine hours. He rang out at 11 minutes after five. These minutes are computed on the nearest completed tenth of an hour, or every six minutes. So he is allowed time for the six minutes beyond five o'clock and the five additional minutes are disregarded as well as the eight minutes ringing in before the beginning of the shift, that is also disregarded, and the nine and one-tenth hours are shown being the time from 7:30 to 5:06, less the half hour lunch period.

Q. Now, let me call your attention to Defendant's Exhibit 16, and ask you what that is?

A. That is a weekly time-card of one of the complainants, B. J. Ludwig, for the period ending 2/7/43.

Q. I direct your attention to Wednesday of that week,

and will you tell us when the card says that claimant punched in? A. It says he punched in at 7:08 A. M.

Q. And when did he punch out?

A. He punched out at 4:31 P. M.

Q. Four thirty-one? A. Yes, sir.

Q. I show you 4:45. A. 4:45 was Tuesday.

[fol. 1277] Q. Well, let me direct your attention to Tuesday. My letter was wrong. Let me direct your attention to Tuesday of that week. He punched in at 7:08 A. M.? A. Yes, sir.

Q. When did he punch out? A. Punched out at 4:45.

Q. And that means he punched in 22 minutes before his shift started, and punched out 45 minutes after the shift ended?

A. I think his shift started at 7:15 during this entire week.

Mr. Bond: This shift started at 7:15? A. Yes, sir.

Q. Then can you tell me how you arrived at the pencil figure there for the number of hours?

A. Arrived at it by disregarding the minutes that he rang in between 7:08 and 7:15, if that was his regular starting time, which it appears to be. Figuring all of the time from 7:15 to 4:45, minus a half hour for lunch, would be 9 hours.

Q. He actually was given credit for nine and one-tenth hours?

A. The card shows nine and one-tenth hours, yes, sir.

Q. That would seem to indicate he was given credit for part of that time before his shift started? A. Yes, sir.

Q. And his shift actually started at 7:30?

A. Apparently his shift started at 7:15. That is the in-[fol. 1278] dication here. But he was given credit for time prior to that. He rang in at 7:08.

Q. What is the indication that his shift started at 7:15?

A. Well, the indication is that actually he rang in prior to 7:15 on every day except the first day. Also he rang out at 4:45. Rather on Tuesday and out Tuesday, and at 4:30 on the two following days. So it just appears he started at 7:15 during that week.

Q. If his shift started at 7:30 on that day and he was allowed the 22 minutes before his shift started, and the

45 minutes after the shift started, making a total of 67 minutes computed to the nearest one-tenth of an hour, you would get the total shown on the card nine and one-tenth hours for that day, wouldn't you?

A. Yes, sir, if you allow him every minute from the time he rang in until the time he left.

Q. And that is the figure that is shown, isn't it?

A. Yes, sir.

Q. Mr. Miller, can you testify; or should I ask this question of Mr. Kelley of the pay roll department? With reference to the method of computing the pencil figures shown on the two cards which you have in your hand, and all other time-cards, during the period on question?

A. I think Mr. Kelley would have to give you that testimony.

[fol. 1279] Mr. McRoberts: Well, I will ask him about this then instead of you.

Q. Mr. Miller, why did you keep these time-cards and compute the time as you did in pencil for salaried employees? For what purpose were those computations and records made?

A. Those computations were made for the reason that a policy was established that a salary, monthly salaried employees, might be permitted up to two weeks sick leave per year without special approval of the management. The policy further was that any sick leave in addition to that might receive special consideration only with the approval of the management. The purpose of making these pencil computations on the time-cards was not for the purpose of paying these employees but for the purpose of keeping a record of their absenteeism or loss of time in any one day or any one week.

Mr. Bond: Are not these pencil memorandums the time-keeper's memorandums?

A. They are the pay roll department's.

Mr. Bonds: They are not your memorandum?

A. No, sir.

Mr. Bond: I ask all this testimony be stricken. He didn't make them. The man who made them ought to tell why he made them.

Q. (Mr. McRoberts) Do you know what the policy of the company was in requiring these to be kept, and what [fol. 1280] they were kept for? A. Yes, sir.

The Court: How do you know it?

A. I helped set the policy.

The Court: Objection overruled.

Q. Now Mr. Miller, for what other purpose were those records kept and used?

A. Well, they were kept for this reason: Any employee working less than the regular time of 40 hours per week could do one of two things: with the approval of his supervisor he might be paid for any time lost due to illness or any other reason, which is approved, and that was set up by the use of a special form for that purpose. In other words, the employee could apply for pay during sickness or absence. Employees signed it and submitted it to their immediate superior who also signed it, if he so approved, and then forwarded it to the management for approval and payment by the pay roll department.

Q. Then do I understand that if an employee according to these records was shown to have put in less than 40 hours in any particular week, there would be a deduction from his salary for that week?

A. Unless the employee asked for payment, submitted the reason and had it approved by his superior and the management.

Q. Now Mr. Miller, I have during plaintiffs' case offered some little slips called "Applications for pay of a salaried employee." A. Yes, sir.

[fol. 1281] Q. Which at that time were offered for a different purpose and were rejected? A. Yes, sir.

Q. Are those papers to which you refer the applications to which you referred? A. That is right, yes, sir.

Q. So that if a man only worked 30 hours in a particular week but his employer, his supervisor approved his absence—

Mr. Bond: Object to his testifying, Your Honor. Let him ask the witness.

The Court: Sustained.

Q. If an employee according to his records was shown to have worked less than 40 hours per week, what was the option given to him? Will you state?

A. Yes, sir. The employee then had the privilege of requesting his supervisor to issue a slip authorizing the payment of salary for his absence. The form after being filled out required the signature of the employee stating the amount of time for which he was requesting pay and usually—always the reason for his absence. The employee signed it, and then it was turned over to his supervisor for his signature, with a statement by the supervisor that he recommended the payment for this time. It was then forwarded to the head of the department for his approval before they paid.

Q. And if he approved he got payment? A. Yes, sir.

[fol. 1282] Mr. Bond: You mean he would be docked for the number of hours worked if less than forty, and if he didn't request pay and submit a reason for his absence, if he didn't follow that procedure there would be a deduction made at the end of the pay period at his regular hourly rate for the number of hours he worked less than forty?

Mr. McRoberts: Object to that "at his regular hourly rate." It assumes facts not in evidence and calls for an opinion.

Mr. Bond: I am asking this witness.

Mr. McRoberts: May I suggest you do that on cross examination?

The Court: Sustained.

Q. Mr. Miller, if the employee did not make application for payment and get approval for the payment, there would be a deduction from his pay? A. Yes, sir.

Q. How would that deduction be computed?

A. I couldn't tell you that.

Q. Who can tell me that? Mr. Kelley's pay roll department? A. Mr. Kelley can tell you that.

Q. Now suppose an employee's time where he was regularly working an 8-hour shift, less a half an hour for lunch, would show at the end of the week only 42, 43 or 45 hours instead of a whole 48, what would happen?

[fol. 1283] A. Nothing. He would be paid in full.

Q. And the only time that any deduction would be made would be when the records kept and as shown by

these time-cards would indicate less than 40 hours. And there would be no approval given for that shortage?

A. That is right.

Q. Were those safety engineers subject to call for special service beyond the regular shifts?

A. They were subject to call 24 hours a day, seven days a week.

Q. And by that you mean in the event of emergency?

A. That is right.

Q. Or some special— A. Emergency or disaster.

Q. There was some testimony about special clothing and the requirement that that be changed and not worn home. Will you tell us what the facts are with respect to the uniforms or special clothing of safety engineers?

A. All of the safety engineers wore a uniform. They were required to wear a uniform. All of the safety engineers with the exception of a very few were permitted to wear those uniforms out of the plant and to wear them home, if they so desired. The only exception would apply to three or four men who would be doing the job of safety engineer in the major restricted areas.

[fol. 1284] Q. What do you mean by restricted areas?

A. I mean by that what we call our hazardous area where we manufactured the mixture that went into the primers, for instance. Those were called hazardous areas, and employees there had to wear a special uniform which they couldn't wear out of that area. They were required to change there.

Q. Did the other safety engineers, with the exception of those few, have the option of wearing their uniform home, or not? A. Yes, sir.

Q. Did any of them wear them home? A. Most of them.

Q. So that there was no requirement that they come in early to change uniforms? A. That is right.

Mr. McRoberts: Now, if Your Honor please, I want to go on and have this witness testify in some detail with respect to the duties of a number of these individual plaintiffs, who are of a special nature, other than the ones who have testified, certain supervisory employees, and things of that sort; but it may be rather lengthy and I am wondering if you want me to go ahead with this now?

Mr. Bond: It will be agreeable to me if you want to adjourn.

The Court: I haven't anything on the docket for tomorrow.

[fol. 1285] Mr. Bond: It is satisfactory to me.

The Court: Announce an adjournment until tomorrow morning at ten o'clock.

Thereupon, at 4:05 P. M., July 10, 1946, an adjournment was taken to 10 A. M., July 11, 1946. The proceedings were then resumed as follows:

The Court: You may proceed with the case on trial.

Q. (Mr. McRoberts) Mr. Miller, did you at my request since you left the witness stand yesterday afternoon make some further check with reference to the time when the safety engineers ceased to be required to report a half hour before the production shift, and changed over to report at the time of the production shift? A. Yes, sir.

Q. Have you checked back through some of the time-cards themselves and other records of the plant to find out when that took place? A. I have.

Q. Approximately when was that?

A. Approximately beginning the 4th of October, 1943, up to the end of October, 1943. It varied with different men.

Q. In other words, the change-over did not take place uniformly?

A. No; it took place with each man as that man was transferred over under the jurisdiction of the production supervision in the units.

[fol. 1286] The Court: That is when the safety engineers, after that time, were no longer required to report ahead of time? A. That is right.

Mr. Bond: But I do not quite understand from the beginning.

Mr. McRoberts: I will clarify for Judge Bond, if you don't mind.

Q. Now then, your testimony yesterday with respect to a date of sometime in March, 1943, is incorrect?

A. That is right.

Q. And they continued reporting one-half hour ahead of the production shift through the year 1943 from the beginning until the month of October, 1943?

A. That is right.

Q. Thereafter and up until the close of the plant, they reported on the even hour along with the production shifts?

A. That is right, along with the shift in which they worked.

Q. Mr. Miller, there has been some testimony with reference to recommendations made from time to time by safety engineers regarding disciplinary action, or regarding transfers to different types of work because of injuries and physical and mental characteristics of the individual, and that type of thing. Will you tell us what weight was usually accorded to recommendations of that character?

Mr. Bond: Object. It calls for an opinion and conclusion [fol. 1287] of the witness.

The Court: He may answer subject to the objection.

A. Every recommendation of the safety engineer was given full consideration, and in most cases, in a very great majority of cases, these recommendations were carried out. We had a placement department under my supervision in the personnel division for that specific purpose. Originally the safety engineer making the recommendations had to use his own discretion and his own judgment as to whether he would or would not recommend action. If he recommended action it came, that recommendation came directly to me in my department and was handled with the other interested department heads, and in most cases these changes were made.

The Court: He used his own discretion to make a recommendation? A. Yes, sir.

The Court: But he had no authority?

A. Yes, sir, he did, yes, sir.

Q. (Mr. McRoberts) He had no authority to make the change itself, it was nothing but a recommendation?

A. Yes, sir, that is correct.

Q. One other point of a general nature, Mr. Miller. To what extent were members of the armed forces of the United States and employees and agents of the War Department or other branches of the Government of [fol. 1288] the United States located in the St. Louis Ordnance plant either full time or part time?

Mr. Bond: Object as immaterial.

Q. Mr. Miller, were officers of the United States Army and other members of the United States Army forces and other employees and representatives of the United States Government stationed either full or part time in the St. Louis Ordnance Plant?

Mr. Bond: Object as immaterial.

Mr. McRoberts: I am offering it, Your Honor please, to show relationship of the United States Government to the operations here, and that the members of the United States Government were always present not only in the office but throughout the office. It bears upon the question whether these goods are being produced in interstate commerce, and bears upon the question of the definition of goods as excluding goods which did not come in there.

The Court: He may answer subject to the objection.

A. The Ordnance Department—

Q. The question calls for a Yes or No answer.

A. Yes, sir, they were.

Q. Will you tell us to what extent those representatives of the Government were in that plant?

Mr. Bond: Your Honor please, may the record show my objection to all this line of testimony as incompetent, irrelevant and immaterial to the points to which he said it was addressed.

[fol. 1289] The Court: Yes, sir.

A. The Ordnance Department had stationed at the St. Louis Ordnance Plant a commanding officer who was in complete charge of the St. Louis Ordnance Plant. Under him he had a group of ordnance employees totalling up to approximately two thousand. Those were production in-

spectors, safety inspectors, there was an officer of the Army who was in charge of Ordnance Safety and Security with whom I had direct contact, and many of our safety engineers had direct contact. In addition to that, other branches of the armed forces and Ordnance came into the plant constantly. The Safety and Security Division in Chicago issued many regulations and recommendations, and sent safety engineers, military forces, in to the plant to make safety audits and safety check-ups as to whether we were or were not complying with the regulations and recommendations. They also had safety engineers of their own stationed throughout all of the production buildings and other units of the plant.

Q. In addition to safety matters, Mr. Miller, did they have representatives of various branches of the Government, or more particularly of the Ordnance Department, out in the plant? For example, checking the receipt of goods? A. They did, yes, sir, always.

Q. Were all goods checked into the plant by a representative of the Government? A. Yes, sir.

[fol. 1290] Q. Then throughout the manufacturing operations representatives of the Government, were they present and watching and directing and inspecting what was being done?

Mr. Bond: Just a moment. That is calling for a conclusion.

Q. Tell us what they were doing?

The Court: He may answer subject to the objection.

A. They were present through every phase of the operation. They were checking, they were inspecting, and they were rejecting and they were advising us what material we could or could not use, and what it could be used for.

Q. And then after the manufacturing operations were completed did they have representatives of the Government in the plant telling you what should be done with the finished product? A. Yes, sir.

Q. Was there any part of this plant to which representatives of the United States Government didn't have access?

A. There was no part to which they didn't have access.

Q. Now Mr. Miller, referring to the plaintiff William

Francis O'Meara, will you tell us what his duties were as an employee of the defendant?

A. Mr. O'Meara was employed as a safety engineer and worked as a safety engineer from May 2, 1942, until June 19, 1943. His duties—

Q. I am not going to [——] into that for a moment. Let me direct your attention specifically on or about June 19, 1943, [fol. 1291] were his duties changed? A. Yes, sir, they were.

Q. And what did he become at that time?

A. He became one of the assistants to the chief safety engineer.

Q. And referring back to the organization chart, Defendant's Exhibit 10, where would his position be on that chart beginning as of that time?

A. He was in full and complete charge of the fourth section, shown here.

Q. And that is the section designated Education Statistics Record and Safety Stores?

A. Yes, sir, also the laundry, which I believe is shown in the next section.

Q. Now, in that capacity what were his duties in that capacity?

Mr. Bond: Just a moment. May I question the witness on the source of his knowledge?

The Court: Yes, sir.

Mr. Bond: Where did you get your information as to what his duties were?

A. Because I was in charge of what he did. I was in charge of the employment, productions, assignments, job classifications. I determined the salary that he was to be paid, the duties that he was to do, and his location in the plant.

Q. Were not his duties prescribed by the chief engineer? [fol. 1292] A. Under my jurisdiction, yes, sir.

Mr. Bond: And the chief engineer reported to you?

A. That is right.

Mr. Bond: You had no contact with the safety department except through the chief engineer?

A. No, sir, I had constant contact with the safety department.

Mr. Bond: Where did you get your knowledge of what he did? A. What he was told to do.

Q. (Mr. McRoberts) I will reframe my question. Will you tell us what he was supposed to do according to the authority that you gave to that job.

Mr. Bond: They speak for themselves, I object, a conclusion.

The Court: Overruled.

A. Mr. O'Meara was assigned as assistant staff supervisor being an immediate assistant to the chief safety engineer in charge of these two subsections of the safety department. When the form changed his classification was approved by me, his salary was approved by me; he was put on the job, made weekly reports as being in charge of these two sections, and all of his weekly reports came to me and are in my file.

Q. When you say being in charge of these departments, tell us more specifically what being in charge of these departments meant. A. Those are rather large departments. [fol. 1293] Q. Approximately how many employees would be under him?

A. Approximately 80 employees covering a three-shift operation.

Q. And what was his relationship to these employees under him? A. He was in direct charge of all of them.

Q. And did he give them orders and directions?

A. He gave them orders and directions as to the operation, the complete operation on a three-shift basis of these two sections.

Q. And with the change to that position was there an increase in his salary? A. Yes, sir.

Q. From what, to what?

A. His salary was increased at the time of the change from $250 a month to $275 a month.

Q. Did he retain that position and perform those duties up until the time he ceased to be an employee?

A. Yes, sir, he did.

Q. Was he thereafter given a further increase or continue to work in the same duties? A. Yes, sir.

Q. The subsequent increase was to $299 per month, October 11, 1943? A. Yes, sir.

Q. Do you have, Mr. Miller, a statement signed by Mr. [fol. 1294] O'Meara which contains a statement as to what his duties were? A. Yes, sir.

Mr. Bond: May I see it?

Mr. McRoberts: Let me identify it "Defendant's Exhibit 17".

(The paper was handed to Plaintiffs' Counsel.)

Q. While Judge Bond is examining that let me ask you another question: In directing the activities of these same 80 men under him, was Mr. O'Meara required to do the same type of work that these men under him were doing, or were his duties confined to supervision?

A. His duties were confined entirely to supervision.

Mr. Bond: Go ahead.

Q. Mr. Miller, is this Defendant's Exhibit 17 the statement to which you referred? A. It is.

Q. And what was the occasion for the making of that statement.

A. The occasion for the making of the statement was a fire which occurred in the safety engineer headquarters during the absence of both the chief safety engineer and his first assistant chief safety engineer.

Q. In connection with the investigation and reporting.

Mr. Bond: Let the witness answer, will you please?

A. In connection with the investigation in regard to this fire Mr. O'Meara wrote out and signed this statement [fol. 1295] and gave it to us.

Mr. McRoberts: I offer in evidence Defendant's Exhibit 17—Is that Mr. O'Meara's signature attached to that statement? A. It is.

Q. And that is a part of the company's files and records? A. That is right.

Mr. Bond: Does it bear a date?

Mr. McRoberts: Bears the date 1/19/43.

Q. I call your attention to the fact, Mr. Miller, were those dated prior to the time he was appointed assistant staff supervisor? A. Yes, sir.

Q. And then this would describe rather his duties as of the date of this statement? A. That is right.

Mr. McRoberts: I offer in evidence Defendant's Exhibit 17 and direct the Court's attention simply to this sentence: "This is to certify that I, William F. O'Meara, 41 years of age, am employed as a supervising safety engineer at the St. Louis Ordnance Plant by the United States Cartridge Company. In this capacity I have supervision over the safety engineers on duty throughout the plant on the 8 A. M. to 4 P. M. shift. I am working under the immediate supervision of Mr. Jack Sewell, general safety engi- [fol. 1296] neer. It is my duty to keep in constant contact with the safety engineers and pass judgment on any problems which come up." And thereafter it describes the particular incident in question.

[fol. 1297] (Defendant's Exhibit 17.)

Statement.

This is to certify that I, William F. O'Mara, 41 years of age, am employed as a Supervising Safety Engineer at the St. Louis Ordnance Plant, by the United States Cartridge Company. In this capacity, *I have supervision over the Safety Engineers on duty throughout the Plant on the 8:00 AM to 4:00 PM shift.* I am working under the immediate supervision of Mr. Jack Sewell, General Safety Engineer.

It is my duty to keep in constant contact with the Safety Engineers and pass judgment on any problems which come up. On Saturday, January 16, I was operating in this capacity and at about 11:45 AM, I had occasion to visit the Men's Wash Room in the basement of Building #222B for a few minutes before going to lunch. I passed the Fan Room where a fire broke out a short time later. I did not notice anything unusual, as it is my recollection that the door to said Fan Room was closed.

The first knowledge that I had of a fire was when advised by Mr. Jack Sewell when we were at lunch in Building #101. We left immediately to investigate the fire and in as much as Mr. Sewell was present, I assumed my regular duties.

/s/ W. F. O'MARA.

WFO'M:ws-fr

1/19/43

[fol. 1298] Q. Now Mr. Miller, does that so far as it goes correctly describe the duties of Mr. O'Meara in January, 1943? A. That is right, yes, sir.

Q. And did he continue to perform those same duties until he was promoted to assistant staff supervisor June 19, 1943? A. Yes, sir, he did.

Mr. Bond: On that date he was supervising safety engineer, was he not? A. That is right.

Mr. McRoberts: That is correct.

Q. Now Mr. Miller, directing your attention to Mr. Trimble, L. W. Trimble, one of the plaintiffs in this case, he was first employed I believe on March 25, 1942? A. Yes, sir.

Q. And in what capacity?

A. He was employed on that date as an instructor and always remained an instructor. He was never a safety engineer.

Q. He carried the pay and code number of a safety engineer, did he not? A. That is right.

Q. What duties did he perform?

A. He instructed the safety engineers and all other supervision that was employed at the plant.

Q. He instructed not only safety engineers but instructed [fol. 1299] supervision? A. Yes, sir.

Q. In what matters? A. In safety, particularly First aid.

Q. Mr. Elmer Clayton Maher is one of the plaintiffs in the case, I believe? Do you have in your files a statement signed by Mr. Maher in which some reference is made to the nature of his duties? A. I have, yes, sir.

(A paper is marked "Defendant's Exhibit 18")

Q. I will show you Defendant's 18 and ask you if that is a statement that you refer to? A. It is.

Q. And is that Mr. Maher's signature? A. Yes, sir.

Q. And what was the occasion of the making of that statement?

A. This was the same investigation of the same fire in which Mr. O'Meara gave his statement.

Q. And this is part of the official records of the company? A. Yes, sir.

Mr. Bond: May I see it, please?

(The paper is passed to Plaintiffs' Counsel)

Mr. Bond: Go ahead.

Q. And I direct your attention to the date on that report. Is that the same one, 1943?

[fol. 1300] A. Yes, sir, 1943.

Q. And does that document insofar as it goes correctly describe the duties of Mr. Maher at that time?

A. Yes, sir.

Mr. McRoberts: We offer in evidence Defendant's Exhibit 18, and I direct the Court's attention to these statements:

> "This is to certify that I, Elmer C. Maher, am employed at the St. Louis Ordnance Plant by the United States Cartridge Company in the capacity of supervising safety engineer. My duties consist of the immediate supervision of the safety engineers of this particular shift upon which I am working, and I report to Mr. Jack Sewell, General Safety Engineer."

[fol. 1301] (Defendant's Exhibit 18.)

Statement.

This is to certify that I, Elmer C. Maher, am employed at the St. Louis Ordnance Plant by the United States Cartridge Company *in the capacity of a Supervising Safety Engineer. My duties consist of the immediate supervision of the Safety Engineers of the particular shift upon which I am working, and I report to Mr. Jack Sewell, General Safety Engineer.*

From January 7, 1943, to January 18, inclusive, *I was working on a special assignment.* This assignment provided that I represent the Company during a safety audit, and that I accompany Mr. Jensen, Ordnance Safety Auditor, on a safety inspection tour of both Plants #1 and #2.

I was so engaged on January 15th and 16th. While I was on this assignment, I was available to Mr. Jack Sewell at all times and could easily be summoned by means of the Auto Call.

/s/ E. C. MAHER.

CEM:ws-fr

1/19/43

[fol. 1302] Q. At that time was Mr. Maher's duties the same as Mr. O'Meara's? A. Yes, sir.

Q. And did he continue to have those duties up until June 7, 1943? A. He did.

Q. And will you describe a little more specifically than is shown in either Defendant's Exhibits 17 or 18 the duties of a supervising safety engineer?

A. The supervising safety engineer has supervision and authority over all of the safety engineers, plantwide, on his shift. Safety engineers report to him. He is responsible for their assignments. He is also called upon and required to use his own judgment in handling any situation which may be referred to him by any safety engineer under his supervision.

Q. Mr. Miller, about how many men would be under a supervising safety engineer on a shift?

A. Oh, probably about thirty.

The Court: Would a supervising safety engineer have authority to correct any infraction and give orders?

A. No, sir. He would have authority to contact the supervisor of any other department.

The Court: And make recommendations?

A. And request corrections.

Q. (Mr. McRoberts) Mr. Miller, would a supervising [fol. 1303] safety engineer have authority to stop operations in the event of emergency or apparent extreme hazard, or immediate danger to life or limb?

A. Yes, sir.

Q. Other than that his duties would be solely to make recommendations and requests?

A. Well, excepting he was held responsible for seeing that his recommendations were followed to a conclusion either to a correction or a decision not to make the correction.

Q. But he had no authority to actually make the corrections himself, except in that one instance?

A. That is right.

Q. In that connection you say there were about how many on a shift? A. About thirty.

Q. And that would be approximately 90 in a 24-hour day? A. Yes, sir.

Q. How large was this safety department?

A. Approximately 100 safety engineers maximum working at any one time with a total number of employees in a safety department of about 380. There were a few more safety engineers working on the day shift than there were on either of the other two shifts.

Q. Now coming up to June 7, 1943, were the duties of Mr. Maher changed at that time? A. Yes, sir.

[fol. 1304] Q. Will you tell us what change was made?

A. Mr. Maher was promoted to assistant staff supervisor and reclassified and given an increase in his salary.

Q. From $250 to $275? A. Yes, sir.

Q. And when he became an assistant staff supervisor what were his duties?

A. His duties were to handle all special assignments and to make a check of the corrective action taken on safety practices, both our own and those of the safety office in Chicago, of the Ordnance Department.

Q. Was he assigned to be in immediate charge of any of those departments shown on the organization chart, as Mr. O'Meara was? A. No, sir.

Q. And in performing the duties which you have just described, did he have any men under him?

A. Only if or when he might need them. He didn't normally have any men under him.

Q. He had no group normally assigned to him as Mr. O'Meara did?

A. No, sir, his function was completely roving in nature. It covered the plant.

Q. I call your attention to John William Hirschberger, another of the plaintiffs in this case, and ask you whether [fol. 1305] or not on July 12th, 1943, his duties were changed? A. They were, yes, sir.

Q. And what change was made at that time?

A. At that time he was promoted to assistant staff supervisor.

Q. Let me go back before I forget it. In case of Mr. Maher, did he continue to be an assistant staff supervisor during the balance of his employment with the company?

A. Yes, sir.

Q. Now going back to Mr. Hirschberger, what change was made in his occupation?

A. On July 12, 1943, he was promoted to assistant staff supervisor being one of the assistants to the chief safety engineer.

Q. And the salary was $300 per month? A. Yes, sir.

Q. Did he continue to hold that position until the termination of his employment with the company?

A. He did.

Q. What were Mr. Hirschberger's duties as assistant staff supervisor?

A. His duties as assistant staff supervisor was to be in full charge under the chief safety engineer of the entire safety department. He only assumed full charge in the absence of the chief safety engineer. He did, however, carry the responsibility and function directly under the chief safety engineer.

[fol. 1306] Q. Where would he appear on this organization chart, Mr. Miller?

A. He would appear in the section box at the top as assistant chief safety engineer over all of the subsections of the safety department.

Q. And he preceded Mr. Bodeker in that position?

A. Yes, sir.

Q. I note from Defendant's Exhibit 10 opposite Mr. Bodeker's name, No. 7344 of 10/8/45. A. Yes, sir.

Q. Does that represent the time when Mr. Bodeker held that position? A. That is right.

Q. And Mr. Hirschberger ceased to be employed by the company in June 24, 1944? Is that correct? A. Yes, sir.

Q. And in performing those duties were they entirely supervisory over the safety department? A. Entirely so.

Q. And covered all of the employees in the safety department except, of course, his superior chief safety engineer? A. Yes, sir.

Q. I call your attention to the plaintiff Alfred Charles Kemp. Is there a change in his status and duties on January 11, 1943? A. Yes, sir.

[fol. 1307] Q. What was that change?

A. That change was a promotion to general supervising safety engineer.

Q. And his salary was increased from $250 to $275 a month at that time? A. Yes, sir.

Q. And what were his duties in that position?

A. His duties were roving in nature covering the entire safety department and having supervision over all safety engineers on any special assignments that he might cover.

Q. Can you give us a little more information about that, as to how he functioned and what he was supposed to do?

A. In that capacity he functioned directly under the assistant chief safety engineer of the department. He had no particular assignment in any building, but investigated or checked or handled with the safety engineers any special case or special occasion which might come up in any unit.

Q. Could you give us an example of that?

A. An example would be any complaint by a safety engineer anywhere in the plant that any supervisor was failing to take corrective action. It would be a complaint that we might receive from the safety and security division in Chicago that corrective action or the proper safeguards were not being taken anywhere in the plant. Anything of that nature where the safety engineer on the job needed some more weight to get the corrective action taken.

[fol. 1308] Q. And did he continue in that capacity receiving another increase to $300 a month on April 16, 1943?

A. Yes, sir.

Q. Until October 4, 1943? A. Yes, sir.

Q. And what change was made at that time?

A. October 4, 1943, he was made assistant staff supervisor.

Q. And what were his duties as assistant staff supervisor?

A. His duties at that time were special assignments inside of and outside of the plant.

Q. How did they differ from his duties under this previous title?

A. They didn't differ particularly except that on receiving the appointment his assistant staff supervisor gave him full authority directly under the chief safety engineer, and he had authority then over any of these subsections which are shown in the chart.

Q. That is, any of these subsections occurring the third line from the top? A. Yes, sir.

Q. Did he continue to hold that position and perform those duties until his employment was terminated?

A. He did, yes, sir.

Q. Mr. Miller, Mr. Kemp was first employed by the company on December 31, 1941, wasn't he?

[fol. 1309] A. That is right, yes, sir.

Q. Was that in the safety department? A. Yes, sir.

Q. I see the word "guard lieutenant." Is that title for some occupation in the safety department?

A. No, it isn't. He was hired as a safety engineer on that date.

Q. Now calling your attention to Mr. Yancey, another of the plaintiffs, when was he first employed by the company? A. July 3, 1942.

Q. In what capacity? A. As an adjuster trainee.

Q. And was he on a salary or an hourly basis?

A. An hourly rate.

Q. Of 62 cents per hour? A. Yes, sir.

Q. And adjuster trainee, an adjuster trainee is a man who adjusts machines out there to make them operate?

A. Yes, sir.

Q. That has nothing to do with the safety department, does it? A. No, sir.

Q. That is one of the production jobs?

A. Well, the trainee is in school for eight to twelve weeks.

Q. And then he was transferred to what?

[fol. 1310] A. He was transferred from there to an adjuster, and later in July he was transferred to a fireman.

Q. Still on an hourly basis? A. Yes, sir.

Q. Did he continue on an hourly basis until December 11, 1942? A. Yes, sir.

Q. And during all the time from July 3, 1942, to December 11, 1942, he was paid on an hourly basis?

A. That is right.

Q. And on an hourly basis would he be paid overtime for any work in excess of 40 hours per week? A. Yes, sir.

Q. And he first went on a salary basis on what date?

A. On December 11, 1942.

Q. Now coming down to October 10, 1943, was there a change in his duties at that time?

A. There was not any change in his duties, no, sir. He functioned as a fire inspector from December 11, 1942, to November 1, 1943; as a fire inspector he had special assignments throughout the entire plant.

Q. What do you mean by "special assignments"?

A. Investigating fires.

Q. And making reports on them?

A. Making reports and recommending and securing corrective action.

[fol. 1311] Q. Thereafter what change was made on November 1, 1943?

A. On November 1, 1943, he was promoted to a supervising safety engineer.

Q. And his salary was increased?

A. Yes, sir, from $225 to $279.

Q. And what were his duties in that capacity?

A. In that capacity he was assigned to two—one production unit and later transferred over to another production unit when the whole building with all of its employees was changed over, and he was the supervising safety engineer in charge of the whole building. In other words, he supervised the other two safety engineers who worked on other shifts. He reported directly to the superintendent and the two men under him, but he himself was particularly held accountable for the safety supervision of the production supervisors in the building.

Q. Do I understand that he would actually work one shift himself and be in charge of the other two men on the other two shifts?

A. He did on one shift and supervised the other two shifts.

Q. And while he was on duty would there be a safety engineer under him, or not? A. No, sir, not on that shift.

Q. Do you use the term safety engineer and safety inspector interchangeably? A. Yes, sir.

[fol. 1312] Q. There is no difference except in the name?

A. That is right.

Q. And did he continue to perform those duties until his employment was terminated? A. He did, yes, sir.

Q. I call your attention to Guy Herman Bentiné, one of the plaintiffs in this case. Was there a change in his duties on February 12, 1945?

A. There was a change in his duties prior to that, on October 4, 1943.

Q. What duties did he assume at that time?

A. He became at that time supervising safety engineer in the *Tale* and Gauge Building.

Q. And what were his duties as such?

A. His duties there as such were that he was in complete charge of the safety for the building and supervised the safety engineers on the other shifts.

Q. Was there a subsequent change in his duties?

A. Yes, sir.

Q. When did that occur?

A. On February 12, 1945, he was transferred from a supervising safety engineer to an hourly rated job.

Q. And continued on the hourly rated job until what time?

A. Continued on that hourly rated job, which was a Class C Tool Inspector, from February 12, 1945, to February 27, 1945.

[fol. 1313] Q. While he was on an hourly rated job he was paid for any overtime in excess of 40 hours per week?

A. Yes, sir.

Q. And what occurred on 2/27/45?

A. On February 27, 1945, he was transferred back to the safety department as an assistant supervisor, being secretary of the safety committees.

Q. What were his duties?

A. His duties were to hold meetings and interview all interested parties as to when meetings would be held, and the date and so forth. He acted as chairman of the meeting, wrote up minutes after the meeting and took the mat-

ters which were brought up at those safety committees and discussed them with the interested parties both in our own division and in the other divisions of the company.

Q. What were the meetings for? What occured at them?

A. The meetings were for the purpose of discussing the violations or infractions which may have caused accidents, and in also discussing any possible preventive or corrective action. And he also discussed and called to the attention of all those attending, various safety bulletins and safety matters. We received all safety material from the National Safety Council. We received all Ordnance regulations which were promulgated in regard to safety, and we received regulations and bulletins from the Safety & [fol. 1314] Security Division in Chicago. All of those which pertained to operations performed at the plant were discussed in those safety meetings.

Q. Did he continue to perform those duties until his employment was terminated? A. He did, yes, sir.

Q. Directing your attention to the plaintiff Benton Joseph Ludwig, he was employed by the company June 16, 1941? A. Yes, sir.

Q. And he was first employed in a different capacity that had nothing to do with the safety engineer department? Is that correct? A. That is correct.

Q. On March 2, 1942, was he transferred or were his duties changed?

A. On March 2, 1942, he was transferred at his request to a safety engineer.

Q. On October 25, 1943 was there a change in his duties?

A. Yes, sir.

Q. What was that change?

A. He was transferred at that time to a supervising safety engineer with miscellaneous assignments in buildings in two of our 50 calibre production buildings, checking and handling of safety and security and ordnance audits.

Q. What is a safety and security audit, Mr. Miller?

A. Safety and security audit is an audit that is made by [fol. 1315] an engineer from the Ordnance Safety and Security Division in Chicago, the audit being made by that engineer accompanied by one of our own safety engineers. And the purpose of the audit, of course, is to bring about safe conditions and safe practices in the plant. The Safety

and Security Division started a safety contest of all ordnance munition plants in 1943 and made these audits periodically in connection with that test.

Q. And he received a wage increase or salary increase in connection with the promotion? A. Yes, sir.

Q. Is there anything else you can tell us about his duties other than what you have already told us? A. No, sir.

Q. Did he continue to perform those duties until his employment was terminated? A. That is right.

Q. Calling your attention to plaintiff William Victor Stutz, he was first employed on June 7, 1943? A. Yes, sir.

Q. And what were his duties? What was his title and what were his duties?

A. He was employed as an assistant staff supervisor at that time. He was never a safety engineer. His duties were from that time until the time of his termination, special and supervisory assignments.

Q. Give us a little more specifically what they were? [fol. 1316] A. Well, in addition to that he also did some instructing and some teaching in our training functions.

Q. And on those supervisory assignments can you give us just a little bit more information about his duties?

A. Plantwide investigation and follow-ups of the recommendations and reports of the safety engineers.

Q. And would that be the same with the other man where you said he was to help get recommendations carried out?

A. Yes, sir. And he had authority and supervision over any safety engineers in the plant.

Q. I call your attention to Joseph Charles Reeves. Was there a change in his duties on November 1, 1943?

A. Yes, there was a change, prior to that time, of course.

Q. Give me that.

A. He was employed on January 30, 1942.

Q. Well, that is all right in his case, he doesn't claim any hourly time, so we don't have to go into that, Mr. Miller.

A. And there was a change in November, 1943, when he was promoted to a supervising safety engineer.

Q. What were his duties as such? A. He was assigned—

Q. He was to get a wage increase along with that to $279 a month? A. Yes, sir, that is right.

Q. What were his duties?

[fol. 1317] A. He was assigned to one of the 30 calibre production buildings, being in complete charge of safety in that building and having authority and responsibility over the other safety engineers in the building. And the major portion of his duties were to see that the production supervision and all other supervision carried forward the safety program of the company.

Q. Did he continue to perform those duties so long as he was employed?

A. No. He performed those duties until March 31, 1944, when that building was shut down and he was laid off.

Q. Then he was reinstated?

A. He was reinstated in the same building at the time when the operations of an ordnance repair depot were carried on in that building.

Q. And what were his duties then?

A. His duties were the same, supervisory safety engineer.

Q. Then did he continue to perform his duties until his employment was finally terminated? A. Yes, sir.

Q. I call your attention to Edwin Lewis Stockho. He was employed by the company March 31, 1942?

A. Yes, sir.

Q. In what capacity?

A. Capacity of an hourly rated inspector.

Q. And did he continue on an hourly paid basis until [fol. 1318] May 25, 1942? A. Yes, sir.

Q. And during the time he was on an hourly paid basis was he paid overtime for all time in excess of 40 hours?

A. Yes, sir.

Q. And was there a change in his duties then on October 25, 1943?

A. Well, there was a further change before that, when he was changed to a salary on May 25, 1942. He continued to receive overtime payments up to November 14, 1942.

Q. In other words, he continued to be paid for all overtime until November 14, 1942? A. Yes, sir.

Q. And then beginning on November 14, 1942, he went on a salary basis? A. That is right.

Q. Thereafter on October 25, 1943, was there a change made in his duties?

A. Yes, sir, he was promoted to a supervising safety engineer.

Q. And what were his duties as such?

A. His duties were roving in nature covering special assignments and safety audits plantwide, reporting directly to the chief safety engineer.

Q. And could you tell us a little more specifically what he did on these roving duties?

[fol. 1319] A. He would again check all recommendations and suggestions of the safety engineers, and as such had supervision over all safety engineers throughout the plant.

Q. And continued as such until his employment was terminated? A. Yes, sir.

Q. Edwin Fred Peters is the same as the plaintiff whose name is given in the petition as S. F. Peters? A. Yes, sir.

Mr. Bond: What did you say his correct name is?

A. Edwin F.

Q. He was first employed by the company on November 16, 1941? A. Yes, sir.

Q. Was that in the safety department? A. No, sir.

Q. What department was he in?

A. That was in the accounting department and Administration Building.

Q. And he continued in that department until November 30, 1942? A. Yes, sir.

Q. On June 21, 1943, was there a change made in his duties? A. Yes, sir.

Q. What was the change?

A. He was promoted to an assistant staff supervisor in [fol. 1320] the safety department with increase of salary to $275 per month.

Q. What were his duties as assistant staff supervisor?

A. He was in charge of safety engineers in there, sanitation, scrap disposal and burning grounds section of the safety department.

Q. Which of those departments on the third line on the chart was he in charge of?

A. The second and third sanitation, powder disposal.

Q. And approximately how many men did he have under him? A. Approximately 200.

Q. And what was the nature of his duties over them, or with reference to these men? A. He was in charge.

Q. Supervisory duties?

A. Supervisory completely, three shifts.

Q. And how long did he continue in that capacity?

A. Until August 16, 1943.

Q. Then what change was made?

A. Then he was transferred to the Public Relations and Advertising Department.

Q. What were his duties in that department, if you know?

A. He was still an assistant staff supervisor, assisted in gathering and publishing of various information including the printing one newspaper, the "United States Cartridge News."

Q. Was he still connected with the safety department or [fol. 1321] was he specializing in safety news in any way?

A. No, sir.

Q. And how long did he continue in that capacity?

A. Until November 15, 1943.

Q. What happened then?

A. Then he was transferred to the Employment Department.

Q. And what were his duties there?

A. He was an artist, drawing of pictures, window dressing, and so forth, and all other publicity in connection with the employment of additional people.

Q. Did he continue in that capacity until his employment was terminated?

A. No. He was transferred on January 31, 1944, to the personnel service department.

Q. And what were his duties there?

A. His duties there were to handle any complaints, grievances or disorders of any employee.

Q. Did he continue in that capacity until his employment was terminated? A. Yes, sir.

Q. I call your attention to the plaintiff W. B. Niedringhaus. Was there a change made in his duties on October 25, 1943? A. Yes, sir.

Q. And what was the change?

A. He was promoted to supervising safety engineer.

[fol. 1322] Q. With a wage increase to $279 a month?

A. Yes, sir.

Q. And what were his duties?

A. Report directly to the chief safety engineer, handling roving assignments in all of the production buildings at the plant. He didn't get into the restricted areas.

During that same time he was sent by the company and attended a special safety course in Chicago of six or seven weeks' duration, accompanied by three other men.

Q. And on those roving assignments, what were his duties, a little more specifically?

A. Again his duties—all of these roving assignments on supervising personnel was to pick up where the safety engineer left off and safety engineer's reports. They made recommendations. They couldn't carry them out, they could only recommend for consideration. Supervising engineer then had authority to come in and find out why those recommendations were not carried out and to get some weight behind them to see that it was done.

Q. Were the safety engineers under these roving men?

A. They were not under them in the normal assignments, no, sir; but the roving safety engineer had authority over any safety engineer.

Q. Whenever any specific matter came up involving one safety engineer, he would have authority over that one? [fol. 1323] A. That is right.

Q. But not over the ordinary every-day activity?

A. That is right.

Q. Did he continue in that capacity until the termination of his employment?

A. Yes, sir—well, he was terminated for military service and then came back.

Q. But when he came back he was working in the same capacity?

A. When he came back he came back in the same capacity. And at that time from May 15, 1944, until September 17, 1945, he was also secretary of the safety committees.

Q. And did he have the same duties as secretary of this safety committee that you described before with reference to one of the other employees? A. That is right.

Q. Were there more than one of the committees?

A. Yes, sir, there were about four of them.

Q. And this termination of the military service was on May 3, 1944? A. Yes, sir.

Q. He was reinstated May 15, 1944? A. Yes, sir.

Q. That was pretty short service?

A. Well, he didn't actually enter service. He had ex- [fol. 1324] pected to and didn't.

The Court: Go back, what date? A. May 15, 1944.

Q. Mr. Miller, I have the name here of Andrew W. Lockhart but do not have information about him. Is he one of the plaintiffs here? A. Yes, sir.

Q. Mr. Miller, referring to Andrew W. Lockhart, one of the plaintiffs in this case, was there a change made in his duties on September 14, 1942? A. Yes, sir.

Q. What was that change?

A. He was transferred from the plant to the Tyson Powder Storage area as supervising safety engineer in charge at the powder farm.

Q. And that powder farm is some thirty or forty miles from St. Louis Ordnance Plant, on Goodfellow Avenue in St. Louis? A. About 28 miles.

Q. Was he in charge of other safety engineers?

A. Yes, sir.

Q. Is he in full charge of all other safety engineers at the Tyson Farm?

A. Yes, sir. Well, there were not more than three safety engineers at Tyson. He was also in charge of the [fol. 1325] fire department there, in the absence of other supervision.

Q. And then what other changes were made in his duties?

A. He was brought back to the plant on 6/7/43 and promoted to assistant staff supervisor.

Q. And what were his duties as such?

A. Again assistant to the chief safety engineer, over all subsections and all employees of the safety department.

Q. Would his position correspond to the position of S. F. Bodeker on this organization chart?

A. No, it would not. You see we had an assistant staff safety engineer in charge of each of these subsections.

Q. And he was then underneath Bodeker but above the third line departments on the chart? A. That is right.

Q. And was he over all of those at the departments or just over some of them?

A. No, sir, he was over all of them except, of course, the two top men.

Q. And had the same duties that you have described with reference to other employees having the same type of position? A. That is right, yes, sir.

Q. And how long did he continue in that capacity?

A. He continued in that capacity until October 4, 1943.

Q. Then what happened to him?

A. Then he was transferred still in the same capacity as assistant staff supervisor to the production control, [fol. 1326] department of production in charge of all the safety.

Q. And very briefly, what were his duties there?

A. His duties there were to make the supervision carry out and abide by the safety regulations and requirements.

Q. And how long did he continue in that position?

A. Until he terminated on March 31, 1945. Then he was reinstated on April 10, 1945, in the safety department.

Q. In what capacity? A. As supervising safety engineer.

Q. With what duties?

A. With special assignments and special investigation throughout the plant.

Q. Similar to those which you have already described for other employees? A. That is right.

Q. And continued in that capacity until terminated?

A. Yes, sir.

Q. I call your attention to Russell Robert Barnett. Was there a change made in his duties on October 25, 1943?

A. Yes, sir.

Q. What was that change?

A. He was promoted to a supervising safety engineer with salary increase to $279 a month.

Q. With what duties?

A. He was assigned to one thirty caliber building, being [fol. 1327] in charge of building and supervising other safety engineers.

Q. When you speak of a Thirty Calibre Building, will you state for the record about how many employees would it take in one of those productions?

A. Normally in the Thirty Calibre Building about twenty-eight or twenty-nine hundred employees. In 50 Calibre Building normally from thirty-three to thirty-eight hundred employees.

Q. What other changes were made in Mr. Barnett's duties, if any?

A. February 7, 1944, he was transferred from a supervising safety engineer to a safety engineer.

Q. That is a demotion? A. And his salary increased.

Q. Then on February 19, 1945, was there a change?

A. Yes, sir, on February 19, 1945, he was transferred out of the department.

Q. To what duties?

A. To the duties of Plant Coordinator in the maintenance department.

Q. And briefly what were his duties in that capacity?

A. His duties there were to coordinate the need for and request for urgent tools to maintain and prevent production stoppages.

Q. And he continued in that capacity up to the end of his employment? A. Yes, sir.

[fol. 1328] Q. I call your attention to plaintiff Frank Marion Kirshville.

The Court: Announce a five-minute recess.

Thereupon, at 11:25 A. M., July 11, 1946, a brief recess was taken. The proceedings were then resumed as follows:

Q. Mr. Miller, in the case of Mr. Kirshville, was there a change made in his duties on October 4, 1943, or was that not until October 20, 1943?

A. Well, on October 4, 1943, he was transferred from the safety to the production department, still on the same job, however. And October 20, 1943, he was promoted to supervising safety engineer with an increase to $279 a month.

Q. And what were his duties as supervising safety engineer?

A. Special assignments and special reports and survey of various locations throughout the plant.

Q. The same general character as that of other employees about whom you testified? A. Yes, sir.

Q. And was there any subsequent change in his duties?

A. There was not, no.

Q. Until the termination of his employment?

A. He received another salary increase on April 9th, but no change in duties.

Q. I call your attention to plaintiff Mr. Bateman, Dane Franklin Bateman. Was there any change in his duties [fol. 1329] or did he perform the same duties throughout?

A. He performed the same duties as instructor throughout his employment.

Q. And in what did he instruct?

A. He instructed in safety training in our class-room training.

Q. He was a teacher and instructor of safety engineers?

A. No, sir, not safety engineers.

Q. Of what? A. Of production employees.

Q. Now will you just tell us a little bit more about that work?

A. Well, that was instructor of new employees in safety instruction, and instruction of women at the time they were being promoted, and instruction of gaugers and all various types of instruction of that kind.

Q. Were new production employees given instruction in safety of different kinds and degrees?

A. No, sir, not by the safety department. Only certain classifications were given instruction prior to going to work. They were instructed by their own supervision, and by the safety engineers after going to work.

Q. As a matter of fact, you had a situation where practically all of your employees had had no previous experience in the manufacture of ammunition or handling of [fol. 1330] explosives. Is that the situation?

A. We started with about forty employees who had no experience whatever in making ammunition or in the handling of explosives, and from that forty our employment increased to a maximum of 36,490 people, all of whom had to be trained. And with our turn over there were approximately 93,000 people who received training in safety and in safe handling of explosives during the operation.

Q. I call your attention to Mr. Brace, Clarence Brace. What were his duties?

A. From April 5, 1943, until October 8, 1943, he was a safety engineer with roving assignments all over the plant.

Q. After that, what were his duties?

A. After that he was assigned to the traffic and transportation department as safety engineer.

Q. What were the duties of the safety engineer in the traffic department?

A. His duties there were similar to what they were in the production. That is, to investigate all accidents, conduct our whole powder movements between the farm and the plant. These safety engineers accompanied the drivers or group of drivers. They checked the equipment, and so forth.

Q. I call you attention to Clifford Joe Champion. Was there a change in his duties on September 11, 1943?

[fol. 1331] A. Yes, sir.

Q. And what was that change?

A. That change was from a safety engineer in the traffic and transportation to assistant staff supervisor in charge of all safety in the production and control department.

Q. And where would that be on the organization chart?

A. That is not on the organization chart, that is outside of the safety department. It has to do with the movement of material into and out of the plant, and within the plant.

Q. And he was in charge of all safety engineers working on that type of—

Mr. Bond: Don't lead the witness.

Q. What was he in charge of?

A. He was in charge of all safety engineers who had any supervision over the handling or movement of material and the employees doing that work.

Q. How many safety engineers would that be, approximately? A. About ten.

Q. And did he continue in that capacity until the termination of his employment? A. Yes, sir.

Q. I call you attention to plaintiff, Burckhardt Herbert Hargate. Was there a change in his duties on March 12, 1945?

A. Yes. On March 12, 1945, he was transferred to a supervising safety engineer in the traffic and transportation department.

[fol. 1332] Q. And what were his duties in that capacity?

A. Supervising all of the safety engineers who worked with the traffic department and the transferring of mate-

rial by truck. There was a change prior to that on October 1, 1943, he was transferred from the plant to the Tyson Powder Storage area as safety engineer at Tyson.

Q. Mr. Miller, [your] were referring to Mr. Hargate. He was first employed on January 13, 1942, was he not?

A. Yes, sir.

Q. And he was employed on an hourly rated job as a warehouseman? A. Yes, sir.

Q. And continued on an hourly rated job until what time? A. Until May 18, 1942.

Q. And during that period was he paid overtime for all hours worked in excess of 40 hours per week?

A. Yes, sir, he was. He was also paid overtime from May 18, 1942, to June 15, 1942.

Q. Now Mr. Miller, were there other changes in the duties of various plaintiffs where they were promoted to the position of—what would you call it? Supervising?

A. Supervising safety engineer.

Q. Supervising safety engineer? A. Yes, sir.

Q. And with the duties of supervising safety engineer, [fol. 1333] which you have already described, will you state into the record the names and the dates upon which any of these plaintiffs about whom I have not already asked you specifically, were promoted to the position of supervising safety engineer, and how long they continued to perform those duties?

[Q.] First, I have D. M. Burke. There was no change in his function except that he did serve as an instructor from time to time, although he was classified as and worked as a safety engineer. J. O. Cavanaugh was promoted on October 20, 1943, to a supervising safety engineer and increased to $279 a month.

Q. Now in each case tell us how long he continued to perform the duties as supervising safety engineer?

A. He continued until his termination. He was then in the production building in charge of safety engineer in that unit.

Q. In that connection, let me ask you: This supervising engineer, did his duties call for him to attend these meetings?

A. His duties called for him to attend all safety meetings held in that building.

Q. Before we go on with these names, tell us how often

those meetings were held, what the supervising safety engineer did at those meetings, and what purpose he served?

A. They were usually held once a week. There was a [fol. 1334] short period when no meetings were held at all of about two and a half or three months. At those meetings he attended the meetings and was there to give his recommendations or his advice, or his best judgment on any matter that might come up for discussion particularly where any changes, or the use of any new type of material or equipment or guards were suggested or recommended.

Q. Now, of the three safety men on each shift in these production buildings, the one who was designated as the supervising safety engineer was the one who attended the meetings? Is that correct? A. That is true, yes, sir.

Q. The other two men may or may not attend?

A. That is right.

Q. Now will you go ahead and state when the different plaintiffs were promoted, when certain of the plaintiffs became supervising safety engineers, and what increase they received, and how long they performed those duties?

A. S. P. Coley was promoted to supervising safety engineer on October 9, 1944, and increased from $240 to $277. He was assigned to a 50 caliber production building and had charge of supervision over the other safety engineers.

Q. And continued how long?

A. And continued until his termination. Sterling Cook was promoted supervising safety engineer on October 25, 1943, and increased from $260 to $279. He was supervising safety engineer in the tool and gauge building with two [fol. 1335] other safety engineers under his supervision.

Q. Continued to?

A. And continued until his termination. Mr. Darby was promoted to supervising safety engineer on October 4, 1943, and had complete charge of all safety in the proof house.

Q. What is the proof house?

A. The proof house was the building with gun ranges where they actually shot and tested various samples of ammunition after production was completed. It did require considerable attention for safety, and it was usually of a different kind from that in the other units. It was where they had the machine guns, and we gave various tests and fired various types of cartridges to determine the effectiveness.

Q. And continued?

A. And continued until his termination. George Gillen was safety engineer in sanitation from May 1, 1942, until October 4, 1943. At that time he was transferred to safety engineer in the maintenance and continued to function in that department until his termination. W. E. Gorg, Jr., was safety engineer at the burning grounds and power disposal from February 15, 1943, until October 4, 1943, when he was transferred to the tool and gauge building as safety engineer, and continued until termination.

Q. I think if you will start with the date of promotion to supervising safety engineer it will shorten it.

[fol. 1336] A. F. N. Harris was promoted to supervising safety engineer October 25, 1943, and continued, with salary increase, and continued in that capacity until he was terminated. E. H. Hoskins was promoted to supervising safety engineer on October 25, 1943, had an increase from $260 to $279 per month, and continued until his termination. He was assigned, he had miscellaneous assignments throughout the plant. He was not assigned in this specific building. F. F. Knight was promoted to supervising safety engineer on May 4, 1943, and continued until October 11, 1943, when he left the department and became a coordinator in the plant maintenance department. A. C. Kropp was promoted to a supervising safety engineer on February 14, 1944, at an increase from $260 to $280, remaining on this until March 12, 1945, when he became a coordinator in the plant maintenance. R. J. Peterson was promoted supervising safety engineer November 1, 1943, at an increase from $240 to $279 and increased again on May 1, 1944, to $300, again on November 20, 1944, to $320, and remained on that until termination. He was assigned to electrical areas in both Plant one and Plant two. J. S. Schneider was promoted to supervising safety engineer on February 26, 1945 and increased from $236 to $277 and remained until his termination. R. M. Stewart was promoted on May 4, 1943, to assistant supervisor of safety engineer department, and was promoted again on November 1, 1943, to supervising safety engineer, and remained until his termination. C. L. Valci [fol. 1337] was promoted on 10-21-43 to supervising safety engineer, increased from $240 to $279 per month, and remained until his termination. That is all I have.

Q. Mr. Miller, do you have ready at hand any information about any other instances where any of these plaintiffs were working on an hourly pay during a part of the time described in the complaint? Or have you finished your cross checking of that?

Mr. Bond: I will say, Mr. McRoberts, in computing our overtime claimed both in the complaint and in Exhibit B-1 to B-59, that we filed herein, we have not included any time when the employees worked on hourly rate during which time presumably they received overtime compensation. Isn't that correct, Mr. Harris?

Mr. McRoberts: I don't know about the computation, but in a number of instances the complaint alleges they were employed as a safety engineer on a salary basis from such a date to such and such a date, when as a matter of fact during part of the time they were on an hourly rate job, a different job.

Mr. Bond: We disregard in our computations all the time they worked on an hourly rate. The reason the complaint gives the date including that service, I took them from your summaries Exhibit A where you stated when the employment began and terminated, so we used the dates in the petition; but when he made the computation which we filed we did not include the time the employee worked on an hourly rate.

Mr. McRoberts: I think that is all.

[fol. 1338] (Counsel and Court confer at Court's Bench.)

Cross Examination by Mr. Bond:

Q. Mr. Miller, before getting into the general features of this case, I want to clear up these time-cards. You were shown, I believe your Counsel in response to my request has brought down some illustrative time-cards for each of these plaintiffs for a week in February, 1943, and a week in November, 1943. And from these time cards he picked out two: one relating to A. C. Kropp, and one to B. J. Ludwig, concerning which you were questioned yesterday. A. Yes, sir.

Q. I will ask you to look at the two time-cards again and tell me first what are the stamped figures?

Mr. McRoberts: Your Honor please, may I suggest you recall Mr. Miller said there were some questions he couldn't answer about these. I have present in the court-room and expect to put on the stand Mr. Kelley, who was in the Pay Roll Department and under whose direct supervision these cards were kept and computations made. He may be able to answer better than Mr. Miller.

Mr. Bond: You got a good deal of information from Mr. Miller yesterday. I think Mr. Miller will be able to tell me what I want.

Q. Those stamp figures, what are they?

A. The stamp figures in the lower portion of the card [fol. 1339] are figures printed by the time clock, at the time the time-card was punched.

Q. They show the time that the employee punched in and the time that he punched out? Isn't that correct?

A. That is correct.

Q. For that employee for each day of that week?

A. This is the morning range showing the time employee punched the card and this is the quitting punch.

Q. For example, he clocked in the first day at 7:22 A. M. and clocked out at 5:11. Now then, what are the pencil figures next to that?

A. The pencil figure immediately following that is the figure put in by the time-keeper for allowed time that he allowed this employee for that day.

Q. But am I correct in stating that that includes the total time between these two stamped figures, less a deduction which you made of odd minutes due to your method of computation and less a half hour each day for lunch?

A. It does—well, I can't answer you that. Mr. Kelley will have to.

Q. That is what you said yesterday?

A. No, sir; for one period it does include and for one period it doesn't.

Q. Those two cards that you have there before you, the time-keeper in putting in those pencil figures left off a half hour of the time shown by the time-clock for lunch?

[fol. 1340] A. That is right.

Q. On each date in each case for the whole week? Isn't that so? A. That is right.

Q. Now then, in your summaries which you gave me, giving the pay roll information as to the plaintiff's involved in this case—

Mr. McRoberts: There is no showing Mr. Miller gave them to him.

Mr. Bond: When I say "you" I mean the defendant.

Mr. McRoberts: Or that Mr. Miller has anything to do with these documents.

A. The time omits one-half hour in total elapsed time.

Q. In reporting to the plaintiffs the total actual hours of that employee for that week, your company reported the total of the pencil figures, did they not?

A. I didn't prepare that computation.

Q. I will ask you to look at the plaintiffs' Exhibit A-2 for that pay period 2/7/43 and state in the record what is reported there under the column "total actual hours"?

A. 51.7.

Q. And what is the total actual hours stated in pencil on that card?

Mr. McRoberts: Nothing on the card that says anything about total actual hours, Judge Bond.

[fol. 1341] Q. What is the total of the pencil figures on that card? A. There is a total on the card of 51.7.

Q. Which corresponds with the figure given in the column "total actual hours" in Plaintiffs' Exhibit A-2? Isn't that correct? A. That is right.

Q. So that it is correct to state, then, that for that week the total actual hours reported in Plaintiffs' Exhibit 2-A was three hours short of the total actual hours shown on the time-card? Isn't that correct? A. No, sir.

Q. Why not?

A. Well, it isn't correct, the same figure is shown in both places.

Q. But that figure is arrived at by eliminating a half hour each day for lunch, isn't it? A. Yes, sir.

Q. So that had lunch been included—well, that is right.

Now then, is that typical of all the cards I had produced here? A. I don't know.

Q. You were able to state yesterday in answer to Mr. McRoberts that your testimony about the cards was typical of the others, were you not?

Mr. McRoberts: I think the record will show what he stated. I don't believe it will show that.

[fol. 1342] The Court: This is cross examination.

Q. Did you not state in answer to your Counsel yesterday that that was typical of the whole bunch that he showed you?

A. No, sir, Mr. McRoberts didn't ask me whether these cards would be typical of all of the cards for the periods shown on these computations.

Q. He did ask you, though, if they were not typical of all the cards brought here in answer to subpoena duces tecum? A. I don't think so.

Q. Now then, I call your attention to Plaintiffs' Exhibit B-2, which contains computation of the overtime claim of Arthur C. Kropp, and ask you to state into the record the figures that are shown for that week, 2/7/43, under columns 2-A and 2-B.

Mr. McRoberts: That exhibit speaks for itself. I don't think we ought to ask him to state what appears on the face of the exhibit.

(Last preceding question was read.)

The Court: He may answer.

A. I have never seen this report before or these figures. The figure shown in column 2a is 51.7. The figure shown under column 2b for the same is 54.7, and each have a check mark following the figures.

Q. 51.7 is the figure shown on the time-card in pencil, isn't it? A. That is the same.

[fol. 1343] Q. And 54.7 is that figure plus three hours?

A. I don't know what it is plus, it is three more than that figure.

Q. And you are not willing to state that that difference which we have just pointed out between the time shown

on the time-card and the pencil computation—you are not prepared to state that what I point out is typical of the whole period of these [platintiffs'] employment?

A. I am sure that it is not.

Q. Mr. Kelley will know that? A. Yes, sir.

Q. And he will be a witness in this case? A. Yes, sir.

Q. Now then, Mr. Miller, taking up this chart Exhibit 10. Well, I have a copy of it. It is exactly the same as the organization chart attached to your answers to my interrogatories herein. Isn't it Mr. McRoberts?

Mr. McRoberts: I think one is typewritten and one is printed. I think they correspond.

Q. Will you use your Exhibit 10 and I will use this typewritten copy. I notice that you have at the head of the safety department an officer entitled chief safety engineer. and he is named for a period as being Mr. Strickland, and for another period as being Mr. McKitrick. Was that the office and those the officials that the previous witnesses have referred to as safety directors?

[fol. 1344] A. Yes, sir.

Q. Which is the correct title?

A. We print the correct title on this exhibit, Chief Safety Engineer.

Q. The fact is, they were generally spoken of in the plant as safety directors, were they not?

A. Not by us, no, sir.

Q. Your official title for these two men was Chief Safetys Engineer? A. Yes, sir.

Q. What the previous witnesses have referred to as assistant directors you would place in a block as assistant chief engineer? A. That is correct.

Q. Now going below this top personnel, you have blocked all of the various operating units of the plant, haven't you? A. No.

Q. What are those?

A. Those are various subsections of the safety department.

Q. Subsections of the safety department? A. Yes, sir.

Q. That operated in these particular units of the plant isn't it?

A. Not necessarily. Those are the subsections being a

breakdown of the safety engineering department. This chart doesn't say anything whatever about production.

[fol. 1345] Q. It doesn't show the particular buildings or units they were in? A. No, sir.

Q. It is just a breakdown of the department into different sub—what do you call it? Different sub-groups?

A. Subsections.

Q. Subsections, yes, sir. Now in several of these groups you have an official whom you describe as staff safety engineer? A. Yes, sir.

Q. And over whom did he exercise supervision?

A. Over this whole section or group.

Q. That means the safety engineers under him? Is that it?

A. It means the safety engineers underneath him and various other people including approximately 270 or 280 hourly paid employees.

Q. Not in the safety department?

A. In the safety department.

Q. And at the bottom of your chart you have safety engineers, three shifts? A. Yes, sir.

Q. That would be the men whom you speak of interchangeably as safety inspectors or safety engineers, and would include the plaintiffs in this case except for such period of their employment as they had different titles? Isn't that it?

[fol. 1346] Mr. McRoberts: Just a minute. There is no testimony about the plaintiffs in this case except certain ones who have testified.

Mr. Bond: I am asking him if it wouldn't include the plaintiffs in this case.

The Court: He may answer.

A. With the exception that I have just testified to, it would include all of the safety engineers functioning as such at the plant.

Q. It would include the plaintiffs in this case, wouldn't it? A. Some of them.

Q. Didn't all of them work there as safety engineers?

A. No, sir.

Q. Who didn't? A. I just testified.

Q. That is for part of the time?

A. No, sir, some of them full time. Some of them never worked as safety engineers.

Q. You are referring to those instances you have just enumerated. You would give the date in each instance where his title changed? A. That is right.

Q. And prior to that date he was a safety engineer, was he not?

A. No, sir. I told you two of those men were instruc-
[fol. 1347] tors, for instance.

Q. Name the two that were not.

A. Stutz was never a safety engineer.

Q. And who else?

A. Trimble was an instructor during the entire employment.

Q. With those two exceptions, according to your records, all the plaintiffs in this case worked in the safety department at sometime or another as safety inspectors or safety engineers? Is that right?

A. I think I have another exception.

Mr. McRoberts: Is that Mr. Bateman.

A. Mr. Bateman was always an instructor. And there could be another one.

The Court: Mr. Burke you testified to as an instructor at one time.

Mr. Bond: But not the whole time.

The Court: He said he served as instructor from time to time, was his language if I recall it.

A. I have in mind one other man who was hired as an assistant staff supervisor before his employment, and who had never been a safety engineer.

Mr. McRoberts: That was one of the men about whom I asked you directly. The record will show which one it was. A. I don't locate it at the present time.

[fol. 1348] Mr. McRoberts: I think I can get it for in just a moment, Mr. Miller. Mr. Stutz was employed with the title of Assistant Staff Supervisor, wasn't he? A. Yes, sir.

The Court: Mr. Stutz he already mentioned.

The Witness: That may be the one I had in mind.

Q. (Mr. Bond) With the exception, then, of those three, am I not correct? With the exception of Stutz, Trimble and Bateman, it is correct to state that all of these plaintiffs were at some period of their employment employed in your safety department in the capacity of safety inspectors or safety engineers? Isn't that correct?

Mr. McRoberts: May I direct your attention to Edwin F. Peters. See what your record shows on him.

A. The record on Edwin F. Peters shows that he was never classified as a safety engineer.

Mr. McRoberts: Or a safety inspector?

A. Or a safety inspector.

Q. (Mr. Bond) I will ask you, Mr. Miller, whether or not all of the plaintiffs in this case, with the exception of Messrs. Stutz, Trimble, Bateman and Peters, were employed in your safety department of the United States Cartridge Company during at least a portion of their time as safety engineers or safety inspectors?

A. That is right, yes, sir, at one time or another.

[fol. 1349] Q. Now, Plaintiffs' Exhibit A contains a column entitled "Occupational Code". What is that?

A. I haven't seen the exhibit.

Q. Don't you know, or don't you have an occupational code out there? A. Yes, sir.

Q. What was that occupational code?

A. Are you asking me?

Q. No, sir, I will ask you what your occupational code was.

A. Occupational code is a classification of the type of job on which the man is classified.

Q. Will you look at Plaintiffs' Exhibit *27*, at the bottom of the page, and tell us what classification is there given Mr. Bateman by your occupational code?

A. Well, the classification that is written on here, eight forty-three, safety engineer.

Q. I will ask you to look at Plaintiffs' Exhibit A-16, at the bottom of page 2, and ask you to state what code of classification is there given to Mr. L. W. Trimble, during the period covered by that asterisk?

A. On page 2 there is an asterisk followed by 843, senior safety engineer.

Q. And I will show you Plaintiffs' Exhibit A-14 relating to Mr. W. Stutz and ask you what code classification appears there with reference to him?

[fol. 1350] A. Eight eighty-six, assistant staff supervisor.

Q. Which is a position in the safety department, is it not?

A. That classification is plantwide safety department, as well as all other departments.

Q. Now Mr. Miller, in the operation of this safety department, from whose office did the directives come?

A. They came from my office.

Q. Did you ever send a single directive down to the safety engineers? A. Daily, yes, sir.

Q. Over your signature? A. Yes, sir.

Q. Wouldn't it be sent to the chief engineer?

A. That is right, of the department; that is right.

Q. But from whom would the safety engineers or inspectors get their directives?

A. They would usually get them from these supervising safety engineers. And prior to the time that there were supervising safety engineers, they would get them from these assistant staff engineers of the department.

The Court: This is the usual time for recess. Announce a recess until 2 o'clock.

Thereupon, at 12:30 P. M., July 11, 1946, a recess was taken to 2 P. M. The proceedings were then resumed as follows:

The Court: Proceed.

[fol. 1351] Q. (Mr. Bond) Mr. Miller, I believe in Exhibit No. 10 is what purports to be the organization set up of the safety department. You make no differentiation below the grade of staff safety engineers. Isn't that correct?

A. No, I don't think so.

Q. Well, I will show you. Look down there at staff safety engineers, below that, all that appears is "safety engineers three shifts"? A. That is right.

Q. So there is no differentiation on the chart between ordinary safety engineers and the foremen and supervisors, is there? A. No, that is right.

Q. And in fact, as a practice, the foremen and supervisors work the shift just like other inspectors, don't they?

A. That is right, sure.

Q. And while on that shift did the same work of the safety inspector or a safety engineer? Isn't that correct?

A. No, sir.

Q. You mean they didn't patrol and inspect and report like the others did?

A. Some of them did and some of them didn't.

Q. Well, if they didn't, who did that work on their shift then?

A. Some of them didn't have a shift, some of them didn't have an assignment.

[fol. 1352] Q. I am not talking about them, I am talking about all foremen or supervisors that worked the shift did the same work on that shift as a safety inspector who was not a foreman or supervisor?

A. That was part of the work and part of the responsibility, yes, sir.

Q. But I asked you if they didn't do that, if they did that work? A. That is right, certainly.

Q. Now in these buildings or units in which these inspectors operated the authority was in a personnel, is that right? What you call the supervisory personnel?

A. What authority?

Q. Authority over the employees or operations in the unit? A. No.

Q. Including safety? A. No, sir.

Q. Included duty to reprimand employees for infractions of safety rules? A. Yes.

Q. Included the taking of corrective action in case of infraction? A. Yes, except in emergencies.

Q. Now then, in view of these notes that you gave me I call your attention to next to the last page—by the way, [fol. 1353] when I say supervisory personnel in these units or the building, that is meant the building superintendent and his foreman, isn't it? Well, tell me what it means.

A. I don't know. Let's tie it up with that question.

Q. It is a question in itself. I have been asking you about where the authority was in the various buildings or units in which the safety inspectors operated, and you told

me in some instances at least it was in the supervisory personnel in that building or unit. Is that right?

A. The authority so far as the safety department was concerned, rested with the supervising safety engineers. The authority so far as any of these staff supervisors was concerned in the safety department, rested with them. The authority with respect to production, to machines, to production personnel, rested with the supervision of production. The authority with respect to safety, pertaining to these production employees, rested with the production personnel supervision.

Q. When you say Personnel Supervision, you mean building superintendent and his foremen, don't you?

A. Yes, sir.

Q. I believe your Counsel exhibited Plaintiffs' Exhibit F to you yesterday, being the general instructions, forms, data and so forth, that was distributed to all safety engineers? Is that right? A. I think it is.

[fol. 1354] Q. In fact, it went to everyone in the safety department, didn't it?

A. May I see it. (A document is passed to witness.)

A. No, it didn't. It went to every safety engineer and every supervisor in the safety department.

Q. Now who was Mr. D. C. Storms?

A. He was general superintendent.

Q. And who was Mr. Gilbertson?

A. Mr. Gilbertson was production superintendent.

Q. Who was Mr. Hurley?

A. Mr. Hurley was chief inspector.

Q. Who was Mr. Stewart?

A. Mr. Stewart was plant engineer.

Q. Who was Mr. Allen?

A. Mr. Allen was head of the production control.

Q. I call your attention to the following from a communication from Mr. D. C. Storms, one of the gentlemen whose names I have just stated in the record, dated October 16, 1942, contained in Plaintiffs' Exhibit F, as follows:

> "It is the responsibility of the supervisory personnel to enforce all safety rules of this Company whether they apply to flywheels, mechanical guards, goggles,

hair nets, uniforms, safety shoes, conductive shoes, and so forth. I ask that you so instruct all general foremen and foremen accordingly."

[fol. 1355] Were those instructions correct? A. Yes, sir.

Q. Do you say that supervisory personnel did not have authority—

Mr. McRoberts: Witness did not state that, he stated—

Q. Having heard what I have read from Plaintiffs' Exhibit E (F-1), being the communication from Mr. Storms to these gentlemen, do you still say that supervisory personnel didn't have the authority over safety in their units?

Mr. McRoberts: Object to that as a misstatement of witness' prior testimony. He asked him if he still stated that. The witness didn't at any time make such a statement.

The Court: Objection sustained.

Q. Have the supervisory personnel authority over safety in their units?

A. You are asking whether the production supervisory—

(Last preceding question was read.)

Mr. McRoberts: He asked you to clarify what supervisory personnel you are talking about. Object to the question because it doesn't indicate which supervisory personnel he is referring to.

Q. Have you any doubt about what I am referring to?

A. No, I haven't any doubt at all about what you are referring to.

Q. Then answer the question, please.

[fol. 1356] Mr. McRoberts: Do you know which supervisory personnel he is referring to? A. No, sir.

Q. Will you look at that communication from Mr. Storms and Mr. Gilbertson and tell us what supervisory personnel he was referring to therein?

A. The letter of Mr. Storms is addressed to the gentle-

men whose names you read. Each of those gentlemen were in charge of a separate department of the company.

Q. Yes, sir?

A. Mr. Storms in his letter is talking about the supervisory personnel in each department operating under the men listed at the top of the letter. That supervisory personnel had complete authority over the safety measures with respect to their employees, machinery, working conditions, and any other conditions within their departments.

Q. And no safety engineer held any authority over any subject in the unit at all? Is that right?

A. That is not right, no, sir.

Q. What were the four departments that those men had in charge?

A. Mr. Gilbertson had complete charge of the production department.

Q. Let's stop right there a minute: That directive of [fol. 1357] Mr. Storms then means that in the production department the supervisory personnel therein under Mr. Gilbertson had complete authority over safety? Isn't that so?

A. With respect to its application to his employees, to his machinery and all his working conditions.

Q. And which was Mr. Hurley's Department?

A. Mr. Hurley was production inspector.

Q. And the directive had the same meaning as to his employees?. A. That is right.

Q. And which was Mr. Stewart?

A. Mr. Stewart was plant maintenance.

Q. And the directive had the same effect as to his employees? A. That is right.

Q. Which was Mr. Allen's?

A. Mr. Allen's was production control.

Q. And it had the same meaning as to his?

A. That is right.

Q. Now the responsibility mentioned in that letter was the responsibility of the supervisory personnel to enforce all safety rules? That directive applied in all units in which the safety men operated, didn't it? A. Yes, sir.

Q. And in reference to safety engineers, I will call [fol. 1358] your attention to Item 6. I would like to have

this page on which that letter of Mr. Storms appears marked for identification "Plaintiffs' Exhibit F-1." (The page is marked as requested.)

Mr. McRoberts: The whole book is an exhibit in evidence.

Mr. Bond: I believe the way the record is now, I offered the general instructions from it. In that [coloquy] with us the Court stated that either party might refer to any other part of it. I think that is the way the record is now.

Mr. McRoberts: May I interrupt to say we would like to offer the whole document, if and to the extent it hasn't already been offered and received in evidence.

Mr. Bond: But I would like this page to be part of my offer, Plaintiffs' Exhibit F-1.

Q. Now then, I call your attention to Item 6 of the general instructions, page 2:

> "The safety engineer will not attempt any correction of these violations by contacting the individuals who are guilty of these violations. In all cases he will contact the supervisors of the individual concerned, and will leave corrective action to the supervisor."

I will ask you if that instruction applied to all units in which the safety inspectors operated?

A. That instruction applied and we insisted upon it.

[fol. 1359] Q. The fact is, it has been stated that violation of it would warrant dismissal. Is that correct?

A. I don't know that it has been stated.

Q. Now then, appended to these general instructions in which you set out duties of safety engineers, which I have read in evidence, there are certain forms in this exhibit. One, a form for the report of infractions of the safety rules. You will find that about six or seven pages beyond the page I just read from. This document does not seem to be numbered. I don't know why. Do you see that form?

A. I don't know. I don't have that form here.

Q. I ask you to look at that form and also the two forms following, upon each of which I have turned down a page.

A. Yes.

Q. Were those forms put there as illustrative examples to be followed by the safety men in making their reports?

A. I think so.

Q. The first one is a form upon which to report infractions, and the next two relate to accidents. Isn't that so? The first one is headed: "Report of violations of safety regulations," and the second one "Safety inspection report," isn't it? A. Yes, sir.

Q. And that, I believe, is the form that was to be used [fol. 1360] in hospital cases. Isn't that so?

A. In cases requiring first aid or hospitalization.

Q. Will you look at the next one? My information is the next one was to be used for first aid or hospital, and the first ones for hospital. If I am wrong, state what is correct.

A. I understand the first one was used for first aid and hospital.

Q. And the second one?

A. Second one was to be used on the same thing. The [sec] one you will notice is very complete, and it is made up so that the safety engineer is merely required to put a check mark, whereas, the first report he is required to write out in full all the results.

Q. And as an example to him those forms in that book are filled out in writing just so far as the real accident or transaction occurred? A. That is right.

Q. Now it is a fact is it not that nowhere in any of these reports which the company gave its safety engineers as samples to be followed, is there anything indicating any corrective action on the part of the safety inspector?

A. No, that is not true.

Q. Point out any action that the safety inspector took.

A. The safety inspector report has one complete subdivision for the corrective action.

[fol. 1361] Q. Yes, sir, and under "Correction" in that sample of that accident report is stated the following:

> "It is a human [train] to try to retrieve something that dropped. This known hazard has been recognized and a suitable guard has been designed. A sample guard has been installed in gauge and weigh machine #1 for the past week. Guards for the balance

of the machines are now being fabricated in the sheet metal shop and will be installed as soon as received."

But is there anything in there to indicate that the safety inspector either installed or directed the installation of that guard? A. I think so, certainly.

Q. As a matter of fact, it would be done by the supervisory personnel, wouldn't it?

A. In some cases it would and in some cases it would be done by the safety engineer, just as reports I read where the safety engineer said, "I had a guard installed," or "I designed a guard."

Q. When he said "I had a guard installed", that means he directed the supervisory personnel to do that, or asked them to do it? A. That is right, yes, sir.

Q. Now in the form headed "Report of violations of safety regulations," in each instance the remarks indicate action to be taken by the foreman, do they not?

[fol. 1362] A. Yes, sir.

Q. Now I call your attention to Defendant's Exhibit No. 12, about which you testified yesterday, which purports to be a page of data and information relating to safety engineers, that you prepared, among other reasons, to submit to—I believe it was your occupational analyst? Do you have that there? A. I have, yes, sir.

Q. He was an employee of the United States Cartridge Company, wasn't he? A. Yes, sir.

Q. Whom you employed to handle the classification of these employees, didn't you?

A. That is right, to make his recommendations.

Q. And you prepared the information on this Exhibit 12 for his use in classifying these parties, didn't you?

A. Well, as I stated yesterday, that was one.

Q. That is the one I am interested in. A. That is right.

Q. Now have you got that before you?

A. I have the one I have before me.

Mr. Bond: I would like to use this, if you have that.

A. No, sir, I don't have that.

Q. I will ask you to look that over and tell me if it is not a fact that there are matters stated in that exhibit which do not exist in the safety department?

[fol. 1363] A. No, I couldn't say that.

Q. All right then, I will call your attention to this top sentence, "Explain briefly but adequately the work done by this type of employee." And all this is part of the information contained on that exhibit: "In complete charge of safety for an entire unit building or more during one shift." A. Yes, sir.

Q. You don't mean to tell me that a safety inspector was in complete charge of safety for an entire unit building during the shift, do you? A. Yes, sir.

Q. Haven't you just told me that was under the authority of the building supervisory personnel?

A. No, sir. What we have tried to tell you is that the safety engineer in that building is responsible and is in charge of seeing that all of the supervision in the building is carried out, carried forward, the safety program. This is his job, he has that responsibility, he has that authority.

Q. Isn't that responsibility limited to noting and reporting and recommending? A. No, sir.

Q. You just told me he couldn't take any corrective action in ordinary cases.

A. That is right, he is not supposed to. He is supposed [fol. 1364] to see the other supervision takes it.

Q. In view of the testimony you have just given, do you think it was an accurate statement to your occupation analyst to tell him that safety inspectors were in charge of safety for an entire unit building or more during one shift?

A. That is absolutely correct.

Q. Now I call your attention to this answer to Question 2 in this information you gave your analyst: "Does the job require special training, experience or knowledge along specialized or technical lines?" You answered, "Yes." and explain: "It is desirable that the inspector have five years' safety experience in explosives, or a college degree in science." A. Yes, sir.

Q. Were any such requirements or qualifications of that ever insisted upon in the safety department? A. Yes, sir.

Q. Can you name a single inspector who had a college degree in science, or any college degree?

A. No, I can't without examining the applications.

Q. Can you name any that had experience in explosives?

A. No, I couldn't. Of course, all of them had experience in explosives before they were given an assignment in production.

Q. The experience they got there on the job?

[fol. 1365] A. That is right, and in our training.

Q. But you are not undertaking to tell the Court that before giving them a job it was a requirement that they meet the requirements of this sentence that I have read?

A. No, I am not. I am saying that was the specification setup for a safety engineer.

Q. But you informed your occupational analyst that those were the requirements, did you not? A. No, sir.

Q. Now then, in the matter of performing his duty, I will ask you—we had some testimony in reference to first safety rules. Were they prescribed safety rules in existence in the plant? A. Yes, they were.

Q. Were they in writing?

A. They were put into writing, yes, sir. They were not in writing at the time, all of them were not in writing at the time we started operations.

Q. Did you gradually get them all in written form?

A. And revised and added to them from time to time.

Q. And the safety inspectors were informed of these safety rules? A. Yes, sir.

Q. And the management also prescribed the safety equipment that was to be on the machines, didn't they?

[fol. 1366] A. Well, the management prescribed it, yes, sir. Those prescriptions of the management were in many cases based upon the recommendations of the safety engineers.

Q. But I am correct that the management formed the policy, didn't they? A. Oh, yes, sir.

Q. And also laid down standards of housekeeping to be observed in these buildings, didn't they?

A. No; there were general provisions for housekeeping. One of the functions of the safety engineer was to use his judgment in determining whether adequate housekeeping was being observed.

Q. That is with a view of meeting certain requirements, such as safe floors?

A. Yes, sir; in connection with that he had to take into consideration working conditions, type of operations, and

anything else that might have a bearing on the housekeeping.

Q. The judgment the safety engineer had to exercise in the matter of violation of safety rules, was to observe whether or not the rules were violated, wasn't it?

A. To observe whether or not the rules were violated, to observe whether or not the rules were adequate, or whether additional rules were needed. And the same thing applied to machinery and equipment.

Q. Now you in answer to questions of your counsel yes-
[fol. 1367] terday in reference to the lunch period of employees, I will ask you whether or not those employees were permitted to leave the plant during the lunch hour?

A. All employees were permitted to leave the plant during the lunch hour.

Q. Well, didn't they have to have a pass to get out of the gate? A. For a part of the time they did.

Q. And this safety inspector didn't have any such pass, did he?

A. Some of them did. As a matter of fact, I think all of them had permanent passes to get in and out of the gate.

Q. My information is to the contrary. Do you know that? A. Yes, sir.

Q. To let them in and out at all times?

A. They not only had a permanent pass to get in and out of the gate, they had a permanent pass that would let them through police lines at all times.

Q. During the working hours?

A. Twenty-four hours, seven days a week, those passes would permit them to get in and out.

Q. I am informed that there were two passes in effect out there, and that the one you are talking about was one to come and go to and from work; but it wasn't one they could use at the lunch hour.

[fol. 1368] A. No, sir, I mentioned both of them.

Q. They were subject to call during the lunch hour, were they not?

A. They were subject to call twenty-four hours a day, seven days a week, in case of emergency.

Q. And every employee of the plant who was paid at hourly rate was paid for that half hour devoted to his lunch, wasn't he? A. No, sir.

Q. Are you familiar with the pamphlet that I introduced in evidence called "Your Job at the St. Louis Ordnance Plant?" A. Yes, sir.

Q. You heard me read the statement from the book which was given to every employee, either at the time or shortly after his employment, that a lunch period will be allowed on each shift and will be paid for by the company? That is, that no deduction will be made for the lunch period? A. Yes, sir, I heard that.

Q. And you still say, even though he is working there at an hourly rate, he is not paid for the lunch time?

Mr. McRoberts: That wasn't your question before, you said "to all employees" before.

Mr. Bond: Oh, well, I didn't say all employees, I said all employees who worked at an hourly rate.

[fol. 1369] Mr. McRoberts: That is correct.

Q. Were paid for the lunch period?

A. No, sir, they were not.

Q. Which ones were not?

A. All employees who worked at an hourly rate on a production job on a three-shift basis, were paid for the lunch period. All hourly rated employees who work in any office or away from production, or not on a three-shift operation, were not paid for the lunch period.

Q. These safety inspectors were on a three-shift operation, were they not? A. Most of them, yes, sir.

Q. And they are asking in this case to be paid at an hourly rate, are they not? A. I don't know.

Mr. Bond: I want to pass now, Your Honor, to some questions about those particular plaintiffs that he picked out this morning as having at times during their employment had titles different than safety engineer or inspector, and I would like to get the summaries relating to each, out. I can't go quite as fast as I would like. I had rather go on with it tomorrow morning, if you can use the rest of the afternoon.

Mr. McRoberts: If I may withdraw Mr. Miller temporarily and put on some other witnesses who are anxious to get away.

Mr. Bond: That will be satisfactory to me.

[fol. 1370] The Court: We will have to see what the situation is tomorrow.

Mr. McRoberts: I had hoped to finish today.

Mr. Bond: I will not have much rebuttal. This witness is temporarily withdrawn, and I reserve the right to cross examine him further.

[fol. 1371] JAMES L. KELLEY,
of lawful age, produced, sworn and examined, testified on behalf of defendant as follows:

Direct Examination by Mr. McRoberts:

Q. State your name. A. James L. Kelley.

Q. Where do you live? A. St. Louis, 5882 Cabanne.

Q. Where are you employed?

A. Unemployed at the present time.

Q. You were formerly with the United States Cartridge Company? A. Yes, sir.

Q. In what capacity? A. Pay roll timekeeper.

Q. And as such, Mr. Kelley, was it part of your duties to either do or have done under your supervision the making of certain computations in pencil on the time-cards of [fol. 1372] the safety engineers employed at the plant?

A. It was my duty to have it done.

Q. It was done under your supervision, direction and control? A. Yes, sir.

Q. You didn't do the actual computations yourself?

A. No, sir.

Q. Are you familiar with the principles or the formula that was used in making those computations? A. I am, sir.

Q. I believe there was a change in that formula during this period of operation? A. That is right.

Q. Were there just two general principles that were followed there during the first period and then during the second period, or more than two? A. Two is all I know.

Q. And the first applied to the period up until approximately October 11, 1943?

Mr. Bond: I would like the witness to state the facts, and not counsel state them.

Q. And your first applied during what time?

A. From the beginning of the organization to approximately October 11, 1943.

Q. And the second during what time?

[fol. 1373] A. From October 11, 1943, until the termination.

Q. Now during the first period will you state what principle was followed in making those pencil computations on the time-cards?

A. Well, during the original period, or this initial period, I had a tolerance period, or time to ring in before starting the shift, and a time to ring in at the close of the shift. If they rang in within that period either at the beginning or the end, they were paid straight.

Q. We are talking computations. When you talk will you talk about computations rather than payments?

A. All right.

Q. Simply the method of arriving at these pencil figures.

A. If he rang in within the tolerance period and rang out within the tolerance period, in the initial period, he had credited eight hours for an eight and a half hour day, 15 minutes before the beginning of the shift or 15 minutes after the close of the shift. He had 15 minutes to ring in and 15 minutes to ring out at the close of the shift, and they got no credit for that time, in case he rang out within that tolerance period—

The Court: Fifteen minutes before the shift started and 15 minutes after it closed?

A. Yes, sir; if they rang in in excess of that tolerance period, that was included in the extension of their time.

[fol. 1374] Mr. Bond: Then the tolerance period was included? A. Yes, sir.

Mr. Bond: But not the excess?

(No reply)

Q. (Mr. McRoberts) To use a specific example: if a card was punched ten minutes before the employee's shift began, you ignored that ten minutes in making these extensions? A. That is correct.

Mr. Bond: No, sir, he said fifteen.

Mr. McRoberts: I am using an example of ten minutes.

Q. And if he punched out ten minutes after the end of the shift, you also ignored that? A. That is correct.

Q. If the employee punched in 20 minutes before or 20 minutes after the shift ended, then the full 20 minutes, including the 15 minutes tolerance period, was used in making these pencil computations? A. That is correct.

Mr. Bond: That is not what he said.

Mr. McRoberts: He has just said it.

Mr. Bond: The tolerance period was 15 minutes after an employee came in the morning, and 14 minutes before a shift began he didn't get credit?

A. No, sir; but if he clocked in 16 minutes he got credit for sixteen.

[fol. 1375] The Court: He got credit for nothing under the 15 minutes? A. No, sir.

The Court: Over the fifteen, after the fifteen, and excess time.

Mr. Bond: And the same thing is true in the evening, if he timed out at 4:14 he gets no extra time, but 4:16 he gets 16 minutes? A. Yes, sir.

Q. Are those figures of minutes before and minutes after, was there a qualification on that, that you gave them for the exact number of minutes before or after? or did you figure that differently?

A. It was figured to the nearest completed tenth of an hour.

Q. And by that you figured in six minute units?

A. That is correct.

The Court: Is it correct that if an employee punched in, let's say 20 minutes before, he wouldn't be given credit for the full 20 minutes but only for 18 minutes?

A. That is correct, being a completed three-tenths of an hour.

Q. And it wasn't figured, was it Mr. Kelley, to the nearest one-tenth of an hour, but it was figured to a completed one-tenth of an hour. So that if an employee punched out, we will say, to use Judge Bond's example, [fol. 1376] at 16 minutes after the end of the shift, it was figured two-tenths of an hour? A. That is correct.

Q. Not sixteen-sixtieths (16/60) of an hour? A. No, sir.

Q. Let me put it this way: if he punched out 18 minutes after the hour, he was allowed in these computations three-tenths of an hour? A. Yes, sir.

Q. If he punched out 19 minutes after, he was still allowed three-tenths? (No audible reply.)

Judge Bond: How about seventeen?

The Court: Two tenths.

Judge Bond: We have got it now, Your Honor.

Q. Is this a correct statement of that rule, and I think we went over it the other day? If an employee's card was punched within 15 minutes of the beginning or ending of his shift, no time was allowed or deductions for such extra minutes? That is correct? A. Yes, sir.

Q. If this card was punched in and out more than fifteen minutes before his shift started or more than fifteen minutes after his shift ended, then in computing the time represented by the pencil figures on the time-cards, the employee was allowed credit for the entire time from the time the card was so punched to the beginning or ending of the shift, as the case may be, computed to the [fol. 1377] nearest completed tenth of an hour. Is that a correct statement of your principle that was followed?

A. Yes, sir, if he rang in more than fifteen before and more than fifteen after the end, then it was computed from ring to ring. But if he rang in less than 15 minutes before the beginning and more than 15 minutes after the close of the shift, he would only get credit for the excess, not the *10* minutes at the beginning.

Q. During this initial period in computing those pencil figures, was there also a deduction made for one-half hour lunch period? A. In the initial period, there was.

Mr. Bond: By "initial period" you mean to October 11, 1943? A. Yes, sir.

Q. So that all of the timecards including the ones you have in your hand, are they a fair example?

A. I would say they are.

Q. And the ones you have in your hand for the purpose of the record have been identified as "Defendant's Exhibits 15 and 16," those are typical cards during the first period, are they not? A. That is correct.

Q. And the pencil computations on those cards and all other time-cards during that period, of the plaintiffs in this case, the pencil figures, both the extensions and totals, were computed in the method which you have described, according to those principles?

[fol. 1378] A. That is correct.

Q. Then after approximately October 13, 1945, what method was following in making these pencil computations?

A. The method used at that time was, they were given credit for the total elapsed time from the time they rang in in the morning, or the time they rang in at the beginning of the shift until the time they rang out after the close of the shift, with no deductions made for lunch period.

Q. Are these also figures to the nearest completed one-tenth of an hour? A. That is correct.

Q. In other words, if an employee rang in during this second period five minutes before the beginning of his shift, and 20 minutes after the expiration of the shift, you would add together both the 5 minutes before and the 20 minutes after, making a total of 25 minutes?

A. That is correct.

Q. You would compute that to the nearest completed one-tenth of an hour, which would be 24 minutes, or four-tenths of an hour? A. That is correct.

Q. And you wouldn't make any deduction for the one-half hour lunch period? A. No, sir.

Q. Or to state the principle in slightly different language, during this second period the entire elapsed time [fol. 1379] shown on the time-cards from the time he punched in to the time he punched out, with no deduction for the one-half hour lunch period, was computed to the nearest completed one-tenth of an hour minutes before the shift began and after the shift ended, added together, to arrive at the nearest completed one-tenth of an hour?

A. That is correct.

Q. And there was no deduction in these pencil computations for the one-half hour lunch period?

A. No, there was not.

Q. And those two methods were followed uniformly during their respective periods for all of these salaried employees. Is that correct? Or did it apply also to hourly rated employees? A. Just for salaried employees.

Q. And would include the plaintiffs in this case for whatever period of time they were on a salary basis?

Mr. Bond: That is going into a legal conclusion here as to whether that did.

The Court: That is for this Court.

Mr. McRoberts: That is the method of computation followed in making the pencil figures for the time-cards of all salaried employees, while they were salaried employees?

Mr. Bond: I think the cards are the best evidence.

Mr. McRoberts: Maybe I had better reframe it.

Q. Were those two methods which you have described [fol. 1380] on the witness stand, in making the computations on these time-cards, used with respect to all salaried employees?

A. To my interpretation, they had two types of salaried employees: those that received overtime and those that did not.

Q. My question is too broad. Now was this method used with respect to all salaried employees who were not paid overtime for over 40 hours a week? A. That is correct.

Q. And I am referring to both of these methods during the respective periods? A. That is right.

Q. Mr. Kelley, did you have anything to do, or employees under your jurisdiction have anything to do with preparing certain computations which have been identified as "Plaintiffs' Exhibit A?" Or was that done under Mr. Schulte? A. That was done under me.

Mr. Bond: When you submitted interrogatories, I asked you to prepare them, and I think you named these men.

Q. This was prepared under your supervision and direction? A. Yes, sir.

Q. Look at the column "total actual hours" on the one which you have in your hand. Do the figures in that column represent the pencil figures shown on the time-cards of that employee, and prepared and computed in the way in which you have just described?

A. That is correct.

[fol. 1381] Q. So that each of the items under that caption on Exhibit A corresponds to the pencil total of the hours computed for each day of the week in the method which you have described? A. That is right.

Q. And is that true with respect to all of these computations for the different plaintiffs which together form Plaintiffs' Exhibit A? A. That is true.

Mr. McRoberts: I think that is all.

Cross Examination by Mr. Bond:

Mr. Bond: I have just a few questions just to be sure I have this clear.

Q. As I understand you, in computing the time on these time-cards in the pencil figure which you have entered, up to October 11, 1943, you deducted from the actual hours shown on the card, after considering your tolerance period, a one-tenth computation, one-half hour each day?

A. From the beginning of the plant until approximately October 11th, we used that system.

Q. That means within a week, one way or the other?

A. I would say so.

Q. And those pencil figures you entered under the column "total actual hours" in the summaries which you prepared and your Counsel gave to me. And it is marked "Plaintiffs' Exhibit A". Is that right?

[fol. 1382] A. That is right.

Q. And whereas the time-cards themselves, the stamped figures, would show an additional half hour each day, wouldn't they? A. The pencil figures would not.

Q. No, sir, I pointed that way. In making the pencil figures you deducted a half hour? A. That is correct.

Q. So I am trying to get it clear that the figures shown on the time-card—what do you call those printed figures?

A. Clock rings.

Q. The clock-ring printed figures during all this period from the beginning of the plant until about October 11, 1943, show an additional half hour each day?

A. The pencil figure doesn't show the half-hour lunch period.

Q. That is taken in a different way, isn't it? A. Yes, sir.

Q. And if you would add a half hour each day to the pencil figures, you would get the clock rings, wouldn't you? A. I presume so.

Q. Well, wouldn't you? A. Sure you would.

Q. Now we have made some computations on your summaries, your summaries being marked Exhibit A and our computations Exhibit B, in which in computing our claim for overtime we took the figures shown under your column [fol. 1383] "total actual hours," which you now say is your pencil figure, and we added up to October 11, 1943, one-half hour each day. That would be, of course, three hours a week, wouldn't it? A. If you worked the full week.

Q. And assuming our column showing the figure that was arrived at to be correct, it would be a correct statement of the actual hours as clocked in, wouldn't it?

A. I am only responsible for our method of keeping time at that time.

Mr. Bond: I see. I think the figures speak for themselves.

Q. Now you say that men who worked on an hourly rate in your plant, and who were paid at an hourly rate, there was no deduction made over at any time for their lunch period? A. I didn't say that.

Q. Didn't you? A. No, sir.

Q. Well, is it a fact?

A. If they worked on a three-shift basis.

Q. That is to say, working on a three-shift basis, a man who is paid an hourly rate, working on a three-shift basis, the lunch hour is paid for by the company? That was your policy?

A. Yes, sir, to the best of my knowledge it was.

Q. Well, you are in charge of pay roll and time-keeping, are you not?

[fol. 1384] A. That was the policy of the company on the three-shift operation, they paid for the lunch.

Q. And you also had two groups of salaried employees, and in the case of one of those groups you paid them for their lunch hour, didn't you?

A. Very rarely, the majority of those people worked eight and a half hours and were paid for eight hours.

Q. You told your Counsel you had two groups, some paid for lunch and some were not.

Mr. McRoberts: He didn't say that.

Q. I will ask you then, myself: were there two groups of salaried workers, one of which was paid for their lunch period and one of which was not?

A. No, sir, I couldn't say that.

Q. What would you say?

A. I would say the hourly rate of salary rated employees, nonexempt employees, worked eight and a half hours, and were paid for eight.

Mr. McRoberts: The distinction between the two classes is what [your] consider exempt employees and the ones that were not?

A. With a few isolated cases, which was very few, they were very much in the minority, they were paid; but the majority of your salary rated employees, non-exempt employees, worked one and two shifts and were not paid for the lunch.

[fol. 1385] The Court: What is nonexempt?

A. Paid overtime.

Q. Let's see if this is right, then: As I understand you, wherever you had a salaried worker, that is a man working on a salary but who wasn't classified as exempt, his lunch hour was paid for? A. No.

Q. Well, what was the fact about it? A man working on a salary on a three-shift basis, who was not classified by the company as exempt, what was the policy of the company in reference to his lunch?

A. If his job was on a three-shift operation, he was paid for his lunch period.

Q. Well, that is what I asked you, these inspectors were on a three-shift basis, were they not?

A. I guess some of them were. They didn't come under my jurisdiction.

Q. And if the Court holds that they are not exempt from the Fair Labor Standards Act, then under your policy they would be entitled to the lunch period?

Mr. McRoberts: Just a moment. Object to that.

The Court: Sustained.

Q. In a lot of cases here on these summaries, you say these were prepared under your direction?

A. That is correct.

[fol. 1386] Q. In a lot of cases I note deductions from the employee's pay when he didn't work 40 hours in a week. How were those deductions computed?

A. Well, that more or less was left up to the discretion of the supervision.

Q. How did you compute that in your department?

A. If his supervisor approved his time he was paid for it; if it wasn't approved, he wasn't.

Q. Assuming that he didn't ask to have his absenteeism approved and his supervisor didn't approve it and it was a case where you were going to dock him, how did you figure deduction? That is what I want to know.

A. It depended on the shift and his work week. If he was working on a 48-hour week, he was deducted on the basis of 48 hours; if he was working on a 40-hour week, it was deducted on that basis.

Q. You can take my word for it that this is a correct carbon copy. We can't seem to locate the original exhibit; but I call your attention to—oh, you have the original. I will show the original then: I can't seem to locate right at this moment instances in which you have made deductions from the pay period, at the end of a pay period, for payments due these plaintiffs, but there are a great many in the summaries you prepared. You remember that, don't you? A. I don't know how many there were, no, sir.

[fol. 1387] Q. There were some, were there not?

A. There could have been.

Q. Aren't you willing to admit there were some?

A. Well, there were some deductions that were made and late approved.

Q. In all cases where you did deduct in the cases of my

clients, in these summaries you computed the hourly rate on the basis of a 40-hour week, did you not?

A. It depends on whatever his work week was at the time he was working.

Q. I am asking the method followed.

A. If a man was working a 48-hour week, his deduction was made accordingly.

Q. If you computed it on a 40 hour week, that was because his work week was 40 hours? (No audible reply)

Mr. McRoberts: I ask the answer be stricken out. This witness knows nothing about what the work week of the employee was. It would be speculative and hearsay. He was in the bookkeeping department. What his work week was would depend on what happened out in the place where he worked.

Mr. Bond: He can tell the method that was used in preparing this thing.

The Court: That is what he is finding out.

Mr. McRoberts: These computations will show the hours. One shows 39.5, and over here it shows you had less pay [fol. 1388] that week, and it is a matter of arithmetic to show how much was deducted for the one-half hour. And witness was asked what the principle was they followed.

The Court: He is the man that made the computation, and the method used.

Mr. McRoberts: Then he wants to go beyond that and say, If you used a certain method this employee's work week must as a matter of fact have been according to the method he followed. Now whether he followed the right method or not, I don't know; but you can't use this employee to testify as to what the work week of that employee was. The point Judge Bond is trying to make is this: These computations according to one of the earlier witnesses, a deduction was made and when you figure it out mathematically the deduction for one hour was one [forty] of a total weekly pay, from which the conclusion is drawn that was computed on the basis of a 40-hour week. Now that evidence speaks for itself. The record is there, and I have no objection to showing that method

was used for making that computation. The figures themselves speak for that, but he wants to go beyond and ask this witness if he used that formula and if you figure it that way, then the facts about this employee's terms of employment must have been thus and so. And I say when you ask him that question you are asking this witness to either testify as to things about which he has no knowledge, and pure hearsay, or you ask him to form an opinion [fol. 1389] and conclusion based upon some formula that was used.

Mr. Bond: Would Your Honor ask him to read the question?

Mr. McRoberts: Well, the employment was on a 40-hour week. That is the question to which we object.

Mr. Bond: I think the question has been answered, Your Honor.

(Last preceding question was read)

Mr. McRoberts: If he is asking about the method, I have no objection. I don't want this testimony to be admitted as proof of the work week of any individual.

Mr. Bond: I said if his work week was forty hours, this would be your method.

Mr. McRoberts: That wasn't what he said.

(Last preceding question was reread)

Mr. McRoberts: I renew my objection for the reasons stated; he didn't answer.

The Court: He may answer subject to the objection.

Mr. McRoberts: May I question him subject to my objection?

The Court: Yes, sir, you may do that.

Mr. McRoberts: Mr. Kelley, do you know anything about the actual work weeks which any of these plaintiffs actually worked except what you might have been told by some other employees of the company? A. By the supervision.

Q. But you know nothing except what you have been [fol. 1390] told by someone?

A. The supervision of these various departments lay down the work week, and we are committed to that accordingly.

Mr. McRoberts: Your entire answer as to what any man actually worked was based upon what you were told in that respect? Is that correct?

Mr. Bond: That is leading and suggestive.

The Court: Objection sustained.

Mr. McRoberts: Do you have any other source of information as to what hours the men actually worked except what you have just told?

A. Only the policy is that done by the company by their procedures. They tell us what the hours are to be, and they are subject to change from time to time. We do not establish a work week in our department, if that is what you mean.

Mr. McRoberts: The point I am trying to make is the source of your information as to the hours which these people actually worked.

A. It is established by the company policy.

Mr. McRoberts: I appreciate the company determines what hours they work, but this was a department that you had nothing to do with directly, is that correct? Were you in the safety engineering department? A. No, sir.

Mr. McRoberts: And do you know of your own personal [fol. 1391] knowledge except what you have been told?

A. By the safety department, the hours worked.

Mr. McRoberts: Is that the sole source of your information? Were you present or do you know anything beyond that about it? A. No, sir.

Mr. Bond: Object. All of this is immaterial and [irrelevant]. Here is a man whose job it is to make the computations and deductions, and his own testimony is he does it on information given to him by the departments of defendant's concern. I am asking him for his methods and

procedure in making these deductions according to the information that he had in his department.

Mr. McRoberts: I have no objection to asking the method that was used in making those computations.

The Court: Objection sustained.

Q. (Mr. Bond) What is your job out there? I want to be sure. A. At the present time?

Q. Yes, sir. A. I am not working now.

Q. What were you doing the four years?

A. When I left there I was in charge of the pay roll, timekeeping and supervising.

Q. And you had charge of all matters of computing what [fol. 1392] was due an employee, did you not?

A. As the week work schedule was established by the company.

Q. And you didn't establish the work schedule? A. No.

Q. But you took it as it was given to your department?

A. That is correct.

Q. And you made the computations and deductions on that data? A. That is correct.

Q. And so you made the computations and deductions charged in Plaintiffs' Exhibit A here?

A. That is correct.

Q. Now then, in taking an employee where he didn't work 40 hours a week, in cases where you did make the deduction, what method did you follow in computing the deduction to pay him on the basis of his work week?

A. If he was working a 40-hour week we deducted on the basis of 40 hours; or if he was working a 48-hour or a 44-hour week.

Q. And you only deducted on the basis of a 40-hour work week where the employee was working on 40 hours?

A. Where he was scheduled to.

Q. I show you a deduction you made here for the pay period indicated June 13, 1943, where according to your summary here R. M. Powell put in 39.9 hours. His gross wages and salary were $51.79—No, sir, $51.92, and you [fol. 1393] paid him $51.79. Tell us how you computed that deduction of 13 cents?

A. I would have to see the records, is the only way I could tell.

Q. How much time was he short of forty? A. One-tenth.
Q. How much was he deducted? A. Thirteen cents.
Q. And that is one-tenth of how much? Well, you can take my word that is one-tenth of one thirty. A. I think so.
Q. So you used 1.30 as the regular hourly rate?
A. I would have to see the record.
Q. Could you have made the deduction on any other basis?
A. I would have to see the records before I make a statement as to how a deduction was made. I can't tell from that.
Q. The fact that the deduction was only made for one-tenth of an hour shows the man was on a 40-hour basis, doesn't it?

Mr. McRoberts: Object to that as argumentative.

The Court: Objection sustained.

Q. Do you have the procedures of the company which set out the work week for these employees on whom these computations? A. Do I?
Q. Yes, sir. A. No, sir.
[fol. 1394] Q. Where are they? A. The company.
Q. You don't work there now? A. No, sir.
Q. Who is your successor there now?

Mr. McRoberts: The company is about out of business, Judge Bond. We are closing up and we are no longer operating.

Mr. Bond: You have an organization out there, though.

Q. What I am getting at is out there among the records of the department that you were in when you made these computations are to be found the procedures on which you acted in making these deductions, are they not?
A. That is correct.

Mr. Bond: That is all.

Mr. McRoberts: That is all, Mr. Kelley.

WALTER L. SCHULTE,

previously sworn on behalf of plaintiffs, being called on behalf of defendants, testified as follows:

Direct Examination by Mr. McRoberts:

Q. Mr. Schulte, state your name, please.

A. Walter L. Schulte.

Q. You have already been sworn and testified as a witness for the plaintiffs in this case, have you not?

A. Yes, sir.

[fol. 1395] (A paper is marked "Defendant's Exhibit 19.")

(Brief discussion off the record.)

Q. Mr. Schulte, as a witness for the plaintiffs, when you were called by the plaintiffs you identified and there were offered in evidence copies of certain purchase orders, one of which was identified as "Plaintiffs' Exhibit N," wasn't it? A. Yes, sir.

Q. Was the copy which you identified there the second or third copy, or is that the original copy?

A. It is the third copy.

Q. Those purchase orders are made out in how many copies? A. Thirteen copies.

Q. And the original goes to the Vendor and the other copies go to different agencies and departments?

A. Yes, sir.

Q. Now the copy that has already been introduced in evidence, does it have in print on the reverse side of it in the caption "Terms and Conditions"? A. It doesn't.

Q. Does the original purchase order which goes to vendor have certain terms and conditions printed on the reverse side of it? A. Yes, sir.

Q. I will show you a blank form, Defendant's Exhibit 19, and ask you if that is a copy of the original of pur-[fol. 1396] chase order form which was used by the plaintiffs and is the same form that was used for all of the purchase orders about which you have testified as a witness called by the plaintiffs?

A. Yes, sir, with this one exception: there might have

been some slight changes in the conditions from time to time. It would be in general the same.

Q. The particular paragraph to which I want to direct your attention is Condition No. 2 on the reverse side. Was that condition in that language or substantially that language on all of them? A. Yes, sir.

Mr. Bond: Paragraph 2?

Mr. McRoberts: No. 2.

Mr. McRoberts: I offer in evidence, Your Honor, "Defendant's Exhibit No. 19."

Defendant's Exhibit 19.

Df Ex 19 7/11/46 - AP

1 ORIGINAL

VENDOR'S COPY

THE UNITED STATES CARTRIDGE COMPANY
ST. LOUIS ORDNANCE PLANT
ST. LOUIS, MISSOURI

PURCHASE ORDER

PURCHASE ORDER NO. ST. L. B

DATE

TO .

ADDRESS .

ENTER THIS ORDER IN ACCORDANCE WITH THE TERMS OF YOUR BID DATED _____ SUBJECT TO THE TERMS AND CONDITIONS ON THE REVERSE SIDE HEREOF. BY ACCEPTANCE OF THIS ORDER, SELLER CERTIFIES THAT TO THE BEST OF HIS KNOWLEDGE, INFORMATION AND BELIEF THE PRICE OR PRICES CHARGED DO NOT EXCEED THE MAXIMUM PRICE OR PRICES FOR THE ARTICLES OR MATERIALS COVERED HEREBY, ESTABLISHED BY THE OFFICE OF PRICE ADMINISTRATION OR ANY SUCCESSOR THERETO OR ANY EQUIVALENT GOVERNMENTAL AGENCY. IN THE EVENT IT IS SUBSEQUENTLY DETERMINED THAT THE PRICE OR PRICES CHARGED HEREIN ARE IN EXCESS OF THE PRICE OR PRICES SO ESTABLISHED, SELLER AGREES TO REFUND SUCH EXCESS TO BUYER.

END USE CLASSIFICATION - U. S. A. - PURCHASER, THE ARMY - 5.20 - AMMUNITION. SMALL ARMS BELOW 20 MM

ITEM	QUANTITY	DESCRIPTION	PRICE	AMOUNT

SHIP TO: ST. LOUIS ORDNANCE PLANT

FOR ACCOUNT OF: THE UNITED STATES CARTRIDGE COMPANY

SHIP BY _____ VIA _____ F. O. B. _____

TERMS: NET _____ DAYS - LESS _____ % _____ DAYS, AS DEFINED ON REVERSE SIDE.

REQUIRED DELIVERY _____

MARK PACKAGES, CASES, ETC. WITH ABOVE PURCHASE ORDER NUMBER, SPECIAL NUMBER OF EACH PACKAGE, WEIGHT OF EACH PACKAGE, VENDOR'S NAME, AND THE FOLLOWING SPECIAL MARKINGS → DELIVERY POINT

ACCOUNT NUMBER

INSTRUCTIONS

ACKNOWLEDGE RECEIPT OF THIS PURCHASE ORDER IMMEDIATELY BY SIGNING AND RETURNING THE ATTACHED ACCEPTANCE COPY. ENCLOSE A COPY OF SHIPPING TICKET OR PACKING SLIP IN EACH PACKAGE OR TACK INSIDE EACH CAR DOOR. MARK ALL PACKAGES, INVOICES, BILLS OF LADING, SHIPPING TICKETS, AND ALL PACKING SLIPS WITH THE SHIPPER'S NAME, VENDOR'S NAME, THIS PURCHASE ORDER NUMBER, DELIVERY POINT, AND ACCOUNT NUMBER. MAIL SEPARATE INVOICES FOR EACH SHIPMENT AND EACH PURCHASE ORDER IN ORIGINAL AND 2 COPIES TO THE UNITED STATES CARTRIDGE COMPANY, ST. LOUIS ORDNANCE PLANT, 4300 GOODFELLOW BLVD., ST. LOUIS, MISSOURI. DESCRIPTION OF MATERIALS ON INVOICES SHOULD CONFORM TO DESCRIPTIONS HEREON.

THE UNDERSIGNED PURCHASER CERTIFIES, SUBJECT TO THE PENALTIES OF SECTION 35(A) OF THE UNITED STATES CRIMINAL CODE, TO THE SELLER AND TO THE WAR PRODUCTION BOARD, THAT, TO THE BEST OF HIS KNOWLEDGE AND BELIEF THE UNDERSIGNED IS AUTHORIZED UNDER APPLICABLE WAR PRODUCTION BOARD REGULATIONS OR ORDERS TO PLACE THIS DELIVERY ORDER, TO RECEIVE THE ITEM(S) ORDERED FOR THE PURPOSE FOR WHICH ORDERED, AND TO USE ANY PREFERENCE RATING OR ALLOTMENT NUMBER OR SYMBOL WHICH THE UNDERSIGNED HAS PLACED ON ORDER.

THE UNITED STATES CARTRIDGE COMPANY

_____

PURCHASING AGENT

FORM P-11F REV. 2-45

Defendant's Exhibit 19.

TERMS AND CONDITIONS

1. No agreement or other understanding in any way modifying the conditions of this purchase order shall be binding upon Buyer unless made in writing and signed by Buyer's authorized representative. Any waiver of strict compliance with the terms of this order shall not be a waiver of the right to insist upon strict compliance with the terms hereof thereafter.

2. This order, issued under the provisions of Contract No. W-ORD. 491 made between Buyer and the United States Government, may be assigned by Buyer to the Government; and if so assigned Buyer's liability hereunder shall cease and Seller shall look to the Government for payment.

3. The Government contract referred to above provides that the Government's contracting officer may at any time make changes in the drawings or specifications as to any articles, material or work covered hereby. If such changes cause an increase or decrease in the amount due under this order, an equitable adjustment shall be made and this order shall be modified in writing accordingly.

4. The Seller shall place all subcontracts and purchase orders for materials and components (including "B" products as defined in the controlled materials plan and other items normally taken direct from suppliers' stocks) required for the performance of this purchase order as promptly as possible and shall schedule deliveries thereof so as to enable it to adhere to, but not unreasonably anticipate, the schedule of deliveries set forth in this purchase order. Each such subcontract or purchase order shall expressly provide that the subcontractor or vendor shall place all its subcontracts and purchase orders as promptly as possible, that the subcontractor or vendor shall adhere to and shall not unreasonably anticipate the schedule of deliveries set forth therein, and that all subcontracts and purchase orders placed by its immediate and mediate subcontractors and vendors shall contain like provisions.

5. If this order is for articles or materials other than standard or commercial articles or raw material, the Seller, in performing the work required hereunder, shall not discriminate against any worker because of race, creed, color or national origin.

6. Seller agrees to be responsible in matters within its control for the safeguarding of all secret, confidential or restricted matters that may be disclosed or that may be developed in connection with the work under this order.

7. No member of or delegate to the Congress, or Resident Commissioner, shall be admitted to any share or part of this contract or to any benefit arising therefrom, but this provision shall not be construed to extend to this contract if made with a corporation for its general benefit.

8. Seller agrees to comply with all applicable Federal, State or local laws, rules and regulations, including the Walsh-Healey Public Contracts Act (Act of June 30, 1936 - 49 Stat. 2036, as amended), and the Emergency Price Control Act of 1942, as amended; (Act of January 30, 1942 - Public Law 421 - 77th Congress).

9. (A) The Buyer may terminate work under this order in whole or in part at any time by written or telegraphic notice, whenever (1) the Government requests the termination of this order or (2) a contract between the Buyer and a third person, including the Government, requiring for its performance articles or services of the kind or type covered by this order is terminated, in whole or in part, or amended, so as to eliminate or reduce such requirements. Such notice shall state the extent and effective date of such termination; and, upon the receipt thereof, the Seller will, as and to the extent directed by the Buyer, stop work under this order and the placement of further orders or subcontracts hereunder, terminate work under orders and subcontracts outstanding hereunder, and take any necessary action to protect property in the Seller's possession in which the Buyer has or may acquire an interest.

(B) If the parties cannot by negotiation agree within a reasonable time upon the amount of fair compensation to the Seller for such termination, the Buyer in addition to making prompt payment of amounts due for articles delivered or services rendered prior to the effective date of termination, will pay to the Seller the following amounts without duplication:

(1) The contract price for all articles or services which have been completed in accordance with this order and not previously paid for.

(2) (I) The actual costs incurred by the Seller which are properly allocable or apportionable under recognized commercial accounting practices to the terminated portion of this order, including the cost of discharging liabilities which are so allocable or apportionable, and (II) a sum equal to 2% of the part of such costs representing the costs of articles or materials not processed by the Seller, plus a sum equal to 8% of the remainder of such costs; but the aggregate of such sums shall not exceed 6% of the whole of such costs. For the purpose of Subdivision (II) such costs shall exclude any charge for interest on borrowings and shall exclude the cost of discharging liabilities for parts, materials and services not received by the Seller before the effective date of termination.

(3) The reasonable costs of the Seller in making settlement hereunder and in protecting property in which the Buyer has or may acquire an interest. Payments made under this Subparagraph (B), exclusive of payments under Subdivision (3), shall not exceed the aggregate price specified in this order, less payments otherwise made or to be made.

(C) With the consent of the Buyer, the Seller may retain at an agreed price or sell at an approved price any completed articles, or any articles, materials, work in process or other things the cost of which is allocable or apportionable to this order under Subparagraph (B) (2) above, and will credit or pay the amounts so agreed or received as the Buyer directs. As directed by the Buyer, the Seller will transfer title to, and make delivery of, any such articles, materials, work in process or other things not so retained or sold. Appropriate adjustment will be made for delivery costs or savings therein.

(D) The provisions of this Paragraph 9 shall not limit or affect the right of the Buyer to terminate this order for the default of the Seller.

shall state the extent and effective date of such termination; and, upon the receipt thereof, the Seller will, as and to the extent directed by the Buyer, stop work under this order and the placement of further orders or subcontracts hereunder, terminate work under orders and subcontracts outstanding hereunder, and take any necessary action to protect property in the Seller's possession in which the Buyer has or may acquire an interest.

(B) If the parties cannot by negotiation agree within a reasonable time upon the amount of fair compensation to the Seller for such termination, the Buyer in addition to making prompt payment of amounts due for articles delivered or services rendered prior to the effective date of termination, will pay to the Seller the following amounts without duplication:

(1) The contract price for all articles or services which have been completed in accordance with this order and not previously paid for.

(2) (I) The actual costs incurred by the Seller which are properly allocable or apportionable under recognized commercial accounting practices to the terminated portion of this order, including the cost of discharging liabilities which are so allocable or apportionable, and (II) a sum equal to 2% of the part of such costs representing the costs of articles or materials not processed by the Seller, plus a sum equal to 8% of the remainder of such costs, but the aggregate of such sums shall not exceed 6% of the whole of such costs. For the purpose of Subdivision (II) such costs shall exclude any charge for interest on borrowings and shall exclude the cost of discharging liabilities for parts, materials and services not received by the Seller before the effective date of termination.

(3) The reasonable costs of the Seller in making settlement hereunder and in protecting property in which the Buyer has or may acquire an interest. Payments made under this Subparagraph (B), exclusive of payments under Subdivision (3), shall not exceed the aggregate price specified in this order, less payments otherwise made or to be made.

(C) With the consent of the Buyer, the Seller may retain at an agreed price or sell at an approved price any completed articles, or any articles, materials, work in process or other things the cost of which is allocable or apportionable to this order under Subparagraph (B) (2) above, and will credit or pay the amounts so agreed or received as the Buyer directs. As directed by the Buyer, the Seller will transfer title to, and make delivery of, any such articles, materials, work in process or other things not so retained or sold. Appropriate adjustment will be made for delivery costs or savings therein.

(D) The provisions of this Paragraph 9 shall not limit or affect the right of the Buyer to terminate this order for the default of the Seller.

10. This order shall be deemed to contain all the provisions required by Subsection (B) of the Renegotiation Act as amended by Section 701 of the Revenue Act of 1943 (Public Law No. 235, 78th Congress, enacted February 25, 1944). In compliance with said Subsection (B) of the Renegotiation Act, Seller shall insert in the suborders specified in said Subsection (B) and made by the Seller after the date of this order either provisions similar to this Paragraph 10 or the provisions prescribed by said Subsection (B) of the Renegotiation Act.

11. When terms of delivery or conditions of this order are F. O. B. our Plant, all transportation charges (including switching charges) shall be paid by Seller.

12. No allowance shall be made for packing, cartage, crating or storage unless stated herein.

13. The United States Government has the right to inspect the goods covered by this order either at the place of manufacture or origin, or at the place of delivery, and acceptance of said goods by Buyer shall be dependent upon the final inspection and acceptance thereof by the authorized representative of the Government. At Buyer's option defective goods may be returned at Seller's expense for full credit or replacement.

14. Seller warrants that the use or sale of the goods, as such, purchased hereunder by Buyer shall not infringe any patent, and agrees to defend any suit brought against Buyer for such infringement and to reimburse Buyer for any loss or recoveries incurred by Buyer because of such suit, including all court costs and attorney's fees. Buyer shall promptly notify Seller of such suit and shall deliver to Seller all papers relating thereto.

15. Seller expressly warrants that all articles, material and work covered by this order shall conform to the specifications, drawings, samples or other description furnished or adopted by Buyer and shall be fit and sufficient for the purpose intended, merchantable, of good material and workmanship and free from defect.

16. In the event of any proceedings by or against either party, voluntary or involuntary, in bankruptcy or insolvency, or for the appointment of a receiver or trustee, or an assignment for the benefit of creditors of the property of either party, or in the event of breach of any of the terms hereof including the warranties of the Seller, the other party shall be entitled to cancel this order.

17. If this order covers the performance of labor at Buyer's Plant, Seller agrees to indemnify and protect Buyer against all liabilities, claims, or demands for injuries or damages to any person or property growing out of the performance of this order. Seller further agrees to furnish a certificate from its insurance carriers showing that it carries adequate Workmen's Compensation, Public Liability, and Property Damage insurance. Said certificate must show the amount of coverage, number of policy and date of expiration. If Seller is a self insurer, he must have the Department of Labor for Industry in the State in which said labor is to be performed furnish a certificate of same to Buyer.

18. Buyer reserves the right to cancel any portion of this order if not filled as specified, and to postpone time of shipment.

19. Seller agrees to furnish a statement of account to Buyer's Accounting Department as soon as possible after the first of each month.

20. The payment and discount periods, referred to on the face side of this purchase order, are understood to begin only after (1) the arrival of goods at destination and the final inspection and acceptance thereof by Buyer and Government, (2) the receipt by Buyer of properly executed bill of lading (or shipping paper) and (3) the receipt in triplicate of invoices. Any overshipment or substitution of goods made by Seller shall entitle Buyer to withhold payment for entire shipment pending its approval of such overshipment or substitution without loss of discount privileges. Delay in receiving invoices, also errors, omissions or price discrepancies appearing thereon causing delay in determination of amount due, shall likewise entitle Buyer to withhold payment without loss of discount privileges. Where variance appears between purchase order and invoice in respect of price or payment terms, Buyer shall be entitled to most favorable of such terms.

[fol. 1398] Mr. Bond: There was no evidence, Your Honor, and there is no evidence now that that paragraph was on the order which he produced here in court yesterday. I object to it being received in evidence.

Mr. McRoberts: If the evidence is not here I failed to clarify.

Q. Was the printed matter to which I have directed your attention on the reverse side of the original order of which Plaintiffs' Exhibit M-1 is one of the numerous copies?

Mr. Bond: Let me ask you: This purchase order which is [fol. 1399] marked Plaintiffs' Exhibit M-1, is it a purchase order and company papers which you produced out of your file? A. Yes, sir.

Mr. Bond: Where is the original that you say this is a copy of? A. The vendor has the original.

Mr. Bond: Consequently the original was not produced here in court? A. That is correct.

Mr. Bond: You never saw the original?

A. I can't say of that particular order.

Mr. Bond: And this form which you gave me you say was changed from time to time? A. That is correct.

Mr. Bond: I object, Your Honor, to it being received in evidence in this case, I don't think it has been established.

Mr. McRoberts: Witness testified this particular language was there in this language, or in substance, on all of them, and it is nothing more than a statement order was issued under provision of contract ORD 491 made between the buyer and the United States Government. And I am going to offer the contract in evidence and I am just tieing up the operations of the plaintiffs with the contract.

Mr. Bond: If this original purchase order was sent to the purchaser of this material, you have no recollection of [fol. 1400] seeing it, have you?

A. The original of that particular order?

Mr. Bond: Yes, sir. A. No, sir.

Mr. Bond: As far as you know you never saw it and have no idea what is on it? A. No, sir.

[fol. 1407] Q. Now Mr. Schulte, were you in charge of the books and records and accounts of the United States Cartridge Company, particularly their accounts with respect to the property ownership? A. Yes, sir.

Q. Did the St. Louis Ordnance Plant itself belong to the United States Cartridge Company? A. No, sir.

Q. That belonged to the United States Government?

A. That is correct.

Q. And how about the machinery and equipment in that plant?

A. Belonged to the United States Government, the tools and appliances.

Mr. Bond: Object to that.

Q. Do you know? A. Yes, sir.

Mr. Bond: How does he know? I object to that, and if it is a matter of record I demand the record. I know the Government built the plant and I know the defendant operated the plant, but where the title was to all the equipment—

The Court: Objection sustained.

Q. Mr. Schulte, are you familiar with the facts with respect to the records that were kept of materials and supplies as they came in the plant, and the finished prod-[fol. 1408] ucts as they went out. A. Yes, sir.

Q. Will you tell the Court what records were kept, first, of the property and assets of the United States Cartridge Company, and what records of the goods and products?

A. Well, the records of the United States Cartridge Company were the general ledger and auxiliary records pertaining thereto.

Q. Those records, of course, are voluminous? A. Yes, sir.

Q. Was any part of the raw materials or the working process of the finished product at any time carried on these records as an asset of the United States Cartridge Company?

Mr. Bond: Object. The records are the best evidence.

Mr. McRoberts: If you want them down here, we will bring them in.

Mr. Bond: I don't see how there would be any question about some of these being the property of the United States Cartridge Company. I have introduced orders and checks drawn by them on a special account on purchase orders issued by them. They certainly had title to it. They might have been under certain obligations, but they had title to the money they used to pay for the title to the goods when they came.

Mr. McRoberts: I think on this, Judge Bond, this is purely the negative, for I am going to show what the record actually did show there.

[fol. 1409] (Conference off the record at Court's Bench between Court and Counsel.)

The Court: All right, you may proceed.

Q. (Mr. McRoberts) Now Mr. Schulte, I was asking you about the records of the United States Cartridge Company.

A. Yes, sir.

Q. On the records of the United State's Cartridge Company do you have any assets consisting of either the St. Louis Ordnance plant or the machinery and equipment in it, or any of the tools and appliances used in the process out there? A. No, sir.

Mr. Bond: Object.

The Court: Your objection may run to all this testimony.

Mr. Bond: And Your Honor, the ground of my objection is not only to the manner in which the proof is offered but to its immateriality and irrelevancy to the issues in this case.

The Court: Yes, sir.

Q. Now, what about the raw materials used in producing the goods out there? Did the United States Cartridge Company carry, at any time during the operation of that plant, any of these raw materials on its books as an asset of that company? A. No, sir.

Q. Did the company ever claim any title in it or ownership or right to it? A. No, sir.

[fol. 1410] Q. What about working processes? A. No, sir.

Q. And necessary products? A. The same is true.

Mr. Bond: And this that he shows you is a form taken from the files of that company? A. Yes, sir.

Mr. Bond: I object.

The Court: Sustained.

Mr. McRoberts: May I inquire if it is on the ground there is not sufficient connection between these being the form?

The Court: Yes, sir.

Mr. McRoberts: May I inquire further, Mr. Schulte?

Q. These forms were revised from time to time, were they not? A. That is correct.

Q. Do you have out there in your plant copies of the forms as they were used and as they were in effect at different periods? A. Yes, sir.

Q. Will it be possible for you to produce copies of each purchase order as it was in use over the different periods [fol. 1401] of the plant? A. Yes, sir.

Mr. McRoberts: I will withdraw the witness and produce the various forms, so there will be no question.

Mr. Bond: Still object. There is no proof that the matter was on the form set out by the purchaser.

Mr. Bond: Can you give us an estimate how much ammunition was produced during the fours years of the operation of this plant?

Mr. McRoberts: I can give you the exact figure if you want it, Judge.

Mr. Bond: Yes, I would like to know.

Mr. McRoberts: As of August 31, 1945, I believe the correct figure is 6,748,745,110 rounds of cartridges produced.

Mr. Bond: At the St. Louis Ordnance plant?

Mr. McRoberts: That is correct.

Mr. Bond: I will accept that figure.

The Court: What is the figure?

Mr. McRoberts: Six billions.

Mr. Bond: That is all, Mr. Schulte.

RUSSELL ROLAND CASTEEL

previously sworn on behalf of plaintiffs, testified on behalf of defendants, as follows:

Direct Examination by Mr. McRoberts:

Q. State your name, please.

[fol. 1402] A. Russell R. Casteel.

Q. Where do you live, Mr. Casteel? A. Alton, Illinois.

Q. And where are you employed?

A. Olin Industries, Incorporated.

Q. Mr. Casteel, what is your connection with the United States Cartridge Company, the defendant in this case?

A. I am now secretary of the company.

Q. And were you an officer of that company from the time it was incorporated?

A. Yes, sir, I was assistant secretary at the time it was incorporated.

Q. Was that a wholly owned subsidiary corporation of the Western Cartridge Company? A. It was.

Q. And now is a wholly owned subsidiary of the Olin Industries, Incorporated? A. That is right.

Q. Olin Industries, Incorporated, being the same corporation as Western Cartridge Company, its name having been changed to Olin Industries, Inc., as a merger? Is that correct? A. That is correct.

Q. Are you familiar with the contract pursuant to which the St. Louis Ordnance plant was operated? A. I am.

[fol. 1403] (A paper is marked "Defendant's Exhibit 29.")

Mr. Bond: I would like to proceed to the point where you mark that for identification, but I understood that we had an understanding the other day, Mr. McRoberts, that before that was offered in evidence I would be shown a copy and be allowed to examine it so that I might state what if any objections I had to it. And I have never had an opportunity to read it.

Mr. McRoberts: Judge Bond did ask me.

Mr. Bond: You took it up with me, you said, "I am going to see you get a copy of this before I offer it in evidence." And I said, "I would like it very much."

Q. What about all of the furniture and supplies which you used in the operation of that plant?

A. Not on the United States Cartridge Company books, we didn't own.

Q. And you never at any time claimed any title to them, or right or interest in them? A. No, sir.

Q. The United States Cartridge Company doesn't have and has never had any fixed assets of any kind?

A. No, sir, never did have.

Q. Or never has of any kind? A. No, sir.

Q. Now, were any books or records kept out there with reference to the machinery, equipment, tools and appliances? A. Yes, sir.

Q. Will you state to the Court what kind of records they were?

A. Well, they were voluminous to begin with, but they were broken down as generally they are, in any kind of an office.

Q. Were they property accountability records?

A. They were what we term property accountability records, and we had our cross records and inventory records.

[fol. 1411] Q. There were records, then, kept of all tools and machinery and personal property on hand at the plant at any time? A. That is correct.

Q. What did those records show as to the ownership of these tools and equipment and appliances?

Mr. Boisd: I have to object to that, Your Honor, the records are the best evidence.

The Court: Objection will be sustained.

Mr. McRoberts: I am afraid I am going to have to produce them, and that will be a task.

The Court: Have you plenty of trucks?

Mr. McRoberts: I think the Government has. We can get them. I might state this, Your Honor: we have another contract here under which the Government purchased all of the machinery and equipment in the plant, and it was done with the assistance and direction and advice of the United States Cartridge Company.

Q. Mr. Schulte, can you tell from your records who paid for all of the machinery and tools and appliances? Do you know?

Mr. Bond: Object to that, too, as calling for a conclusion.

The Court: Objection sustained.

Mr. McRoberts: I think, if Your Honor please, I will withdraw it and we will make the type of proof which Judge Bond wants to have in this record. I will withdraw the witness, if I may.

[fol. 1412] Mr. Bond: Since he is on the stand I was going to ask him a few questions.

Cross Examination by Mr. Bond:

Q. I believe one of the previous witnesses testified that the United States Cartridge Company was a wholly owned subsidiary of the Western Cartridge Company, now called Olin Industries, Incorporated. Is that correct?

A. To the best of my knowledge.

Q. And do the accounts of the Olin Industries Company contain any records of the property of the United States Cartridge Company? A. That I wouldn't know.

Q. You would not know that?

A. I haven't seen the records of the Olin Industries.

Q. Who would know that? I am not asking you for the contents, I am asking you if they have any records of the property of the United States Cartridge Company?

A. I wouldn't know.

Mr. McRoberts: Mr. Casteel can answer that question, Judge.

Mr. Bond: You had him on the stand.

Mr. McRoberts: You can ask him that question now.

Mr. Bond: I would like to ask you that question, Mr. Casteel.

Mr. McRoberts: Mr. Schulte is withdrawn.

Mr. McRoberts: I don't recall making that statement to Judge Bond, but so that there is no question about the matter I will furnish you with a copy of this contract, which you may examine over night, and permit you to examine it at your leisure.

Mr. McRoberts: It looks as if I will have to withdraw this witness, Your Honor.

(Witness temporarily withdrawn.)

WALTER L. SCHULTE

previously sworn on behalf of plaintiffs and now called [a] a witness on behalf of defendants, testified as follows:

Direct Examination by Mr. McRoberts:

Q. Mr. Schulte, have you just called to my attention certain papers attached to Plaintiffs' Exhibit M-1?

[fol. 1404] A. I have.

Q. And these are part of the files of the company, being part of that particular transaction? A. Yes, sir.

Q. Do you happen to have in your file one of the copies of Plaintiffs' Exhibit M-1, which has the printed matter on the back of it?

A. The eighth copy of acceptance of the order is contained in this file of the original orders.

Q. That is the copy which the vendor accepted and returned to the company? A. That is correct.

Q. And that has the printed terms and conditions on the reverse side of it? A. It does.

Mr. McRoberts: Your Honor please, I believe that the one offer that was made here was that top sheet of Plaintiffs' Exhibit 1. I wish to now offer as Defendant's Exhibit 21 the eighth copy of the same purchase order "Plaintiffs' Exhibit M-1," including the reverse side of it.

Mr. Bond: Except the general objection that the matter contained in that paragraph is irrelevant, immaterial and incompetent, I have no other objection.

The Court: It will be admitted subject to the objection.

[fol. 1413] RUSSELL R. CASTEEL,
previously sworn, recalled by plaintiffs for further cross examination, testified as follows:

Cross Examination by Mr. Bond:

Q. The United States Cartridge Company, you told us a few minutes ago, is a wholly owned subsidiary of the Olin Industries, Incorporated? A. Yes, sir.

Q. The fact is, it is operated as a department of the Olin Industries? A. It is a separate corporation.

Q. Separate corporation but operated—

A. It is a subsidiary corporation.

Q. Now then, are you familiar with the records of Olin Industries, Incorporated?

A. Yes, sir, I am a member of the Board of Directors.

Q. Have they any records of property and assets of the United States Cartridge Company? A. Yes.

Q. And have they records of all the property and assets of the United States Cartridge Company? A. They have.

Mr. Bond: That is all.

Redirect Examination by Mr. McRoberts:

Q. Now the records about which you speak are the [fol. 1414] records as to the assets of the United States Cartridge Company? A. Yes, sir.

Q. Assets, liabilities, balance sheets and all of that company? A. Yes, sir.

Q. Are all properties belonging to the United States Cartridge Company shown on the books and records of the Olin Industries, Inc., other than the stock of the corporation or any liabilities due from one to the other?

A. We make up a consolidated balance sheet showing Olin Industries and all of the subsidiary companies in which all of the assets are put together into one balance sheet; but the assets of the United States Cartridge Company do not include any real estate or property in the sense of machinery or equipment of any kind.

Q. Let me ask you this question. I think that is what Judge Bond was after; Mr. Casteel, do the books of the Olin Industries, Incorporated, show as an asset of that

Defendant's Exhibit 21.

D/ Ex 21 7/11/46 AD

8 | 8TH COPY | ACCEPTANCE

THE UNITED STATES CARTRIDGE COMPANY
ST. LOUIS ORDNANCE PLANT
ST. LOUIS, MISSOURI

PURCHASE ORDER

PURCHASE ORDER NO. ST. LB 52625
DATE 9/23/44

TO: WESTERN CARTRIDGE COMPANY

ADDRESS: EAST ALTON,
ILLINOIS

ENTER THIS ORDER IN ACCORDANCE WITH THE TERMS OF YOUR BID DATED _____ SUBJECT TO THE TERMS AND CONDITIONS ON THE REVERSE SIDE HEREOF. BY ACCEPTANCE OF THIS ORDER, SELLER CERTIFIES THAT TO THE BEST OF HIS KNOWLEDGE, INFORMATION AND BELIEF THE PRICE OR PRICES CHARGED DO NOT EXCEED THE MAXIMUM PRICE OR PRICES FOR THE ARTICLES OR MATERIALS COVERED HEREBY, ESTABLISHED BY THE OFFICE OF PRICE ADMINISTRATION OR ANY SUCCESSOR THERETO OR ANY EQUIVALENT GOVERNMENTAL AGENCY. IN THE EVENT IT IS SUBSEQUENTLY DETERMINED THAT THE PRICE OR PRICES CHARGED HEREIN ARE IN EXCESS OF THE PRICE OR PRICES SO ESTABLISHED, SELLER AGREES TO REFUND SUCH EXCESS TO BUYER.

END USE CLASSIFICATION - U. S. A. - PURCHASER, THE ARMY - 5.20 - AMMUNITION, SMALL ARMS BELOW 20 MM

ITEM	QUANTITY	DESCRIPTION	PRICE	AMOUNT
1.	14,370,000 LBS.	CARTRIDGE BRASS FOR CAL. .50 CASE SHELL STRIP IN ACCORDANCE WITH U.S.C.C. SPEC. #1101-1, ISSUE 6 DATED DECEMBER 24, 1942 SIZE .254" TO .259" X 5-1/16" (WT 15.75		2,263,275 00
				2,263,275 00

DC/ SHIP TO: ST. LOUIS ORDNANCE PLANT FOR ACCOUNT OF THE UNITED STATES CARTRIDGE COMPANY

4300 GOODFELLOW (BLVD) ST. LOUIS, MISSOURI

SHIP BY _____ VIA _____ F O B _____

TERMS NET 30 DAYS - LESS _____ % _____ DAYS AS DEFINED ON REVERSE SIDE

REQUIRED DELIVERY STARTING 10TH AND ENDING OCTOBER AS SCHEDULED

MARK PACKAGES, CASES AND WITH ABOVE PURCHASE ORDER NUMBER AND SPECIAL ACCOUNT NUMBER AND GROSS WEIGHT OF EACH PACKAGE, VENDOR'S NAME AND THE FOLLOWING SPECIAL MARKINGS → DELIVERY POINT BUILDING 1064

RAW MATERIAL

ACCEPTANCE OF ORDER

IMPORTANT — PLEASE RETURN THIS SHEET PROMPTLY COMPLETELY FILLED OUT

THIS ORDER RECEIVED AND ACCEPTED — (DATE) _____ 6

SHIPMENT WILL BE MADE ON (DATE) _____ FROM _____

VIA _____

SIGNED _____ ALLOCATION

SEE REVERSE SIDE OF THIS SHEET

CERTIFICATE

THE UNDERSIGNED PURCHASER CERTIFIES SUBJECT TO THE PENALTIES OF SECTION 35 A OF THE UNITED STATES CRIMINAL CODE, TO THE SELLER AND TO THE WAR PRODUCTION BOARD THAT TO THE BEST OF HIS KNOWLEDGE AND BELIEF, THE UNDERSIGNED IS AUTHORIZED UNDER APPLICABLE WAR PRODUCTION BOARD REGULATIONS OR ORDERS TO PLACE THIS DELIVERY ORDER, TO RECEIVE THE ITEMS ORDERED FOR THE PURPOSE FOR WHICH ORDERED, AND TO USE ANY PREFERENCE RATING OR ALLOTMENT NUMBER OR SYMBOL WHICH THE UNDERSIGNED HAS PLACED ON ORDER

THE UNITED STATES CARTRIDGE COMPANY

_____
PURCHASING AGENT

FORM P-138 REV. 7-44

Defendant's Exhibit 21.

TERMS AND CONDITIONS

1. This order is tendered under the provisions of Contract No. W-ORD-491 made with the United States Government on the basis of reimbursement by the United States Government and if accepted shall be with the understanding that any contract resulting therefrom shall be assignable to the United States Government and if so assigned the liability of The United States Cartridge Company thereunder shall thereupon terminate and the vendor shall look to the United States Government for payment.
2. No agreement or other understanding in any way modifying the conditions of this purchase order will be binding upon Buyer unless made in writing and signed by Buyer's authorized representative. Any waiver of strict compliance with the terms of this order shall not be a waiver of the right to insist upon strict compliance with the terms hereof thereafter.
3. When terms of delivery or conditions of this order are F.O.B. our plant, all transportation charges (including switching charges) shall be paid by Seller.
4. No allowance will be made for packing, cartage, crating or storage unless stated herein.
5. The United States Government has the right to inspect the material or goods covered by this order either at the place of manufacture or origin, or at the place of delivery, and acceptance of said goods or material by Buyer shall be dependent upon the final inspection and approval thereof by the authorized representative or representatives of the government. At Buyer's option defective material may be returned at Seller's expense for full credit or replacement.
6. Buyer reserves the right to cancel any portion of this order if not filled as specified, and to postpone time of shipments.
7. Seller warrants that the use or sale of the material so sold purchased hereunder by Buyer will not infringe any patent and agrees to defend any suit brought against Buyer for such infringement and to reimburse Buyer for any loss or recoveries incurred by Buyer because of such suit, including all court costs and attorney's fees. Buyer will promptly notify Seller of such suit and will deliver to Seller all papers relating thereto.
8. Seller agrees to furnish a statement of account to Buyer's Accounting Department as soon as possible after the first of each month.
9. Seller expressly warrants that all articles, material and work covered by this order will conform to the specifications, drawings, samples or other description furnished or adopted by Buyer and will be fit and sufficient for the purpose intended, merchantable, of good material and workmanship and free from defect.
10. In the event of any proceedings by or against either party, voluntary or involuntary, in bankruptcy or insolvency, or for the appointment of a receiver or trustee or an assignment for the benefit of creditors, of the property of either party, or in the event of breach of any of the terms hereof including the warranties of the Seller, the other party will be entitled to cancel this order.
11. If this order covers the performance of labor at Buyer's plant, Seller agrees to indemnify and protect Buyer against all liabilities, claims, or demands for injuries or damages to any person or property growing out of the performance of this order. Seller further agrees to furnish a certificate from his insurance carriers showing that it carries adequate Workmen's Compensation, public liability, and property damage insurance. Said certificate must show the amount of coverage, number of policy and date of expiration. If Seller is a self insurer, he must have the Department of Labor for Industry in the state in which said labor is to be performed furnish a certificate of same to Buyer.
12. The Government Contract provides that the Contracting Officer may at any time make changes in the drawings or specifications as to any articles, material or work covered hereby. If such changes cause an increase or decrease in the amount due under this order, an equitable adjustment shall be made and this order shall be modified in writing accordingly.
13. If this order is for articles or materials other than standard or commercial articles or raw material, the Seller, in performing the work required hereunder, shall not discriminate against any worker because of race, creed, color or national origin.
14. Seller agrees to be responsible in matters within its control for the safeguarding of all Secret, Confidential or Restricted matters that may be disclosed or that may be developed in connection with the work under this order.
15. No member of or Delegate to the Congress of the United States of America shall be admitted to any share or part of this agreement or to any benefit arising therefrom.
16. Seller agrees to comply with all applicable Federal, state or local laws, rules and regulations, including the Walsh-Healey Public Contracts Act (Act of June 30, 1936 - 49 Stat. 2036 - 2039, as amended); Emergency Price Control Act of 1942, as amended; (Act of January 30, 1942 - Public Law 421 - 77th Congress).
17. Buyer's contract, as amended and supplemented from time to time, under which this purchase order is issued, authorizes the Government to terminate such contract, or to reduce the amount of finished products required thereby, without fault on the part of Buyer. In the event that the Government does terminate said contract or reduces its requirements thereunder, Buyer shall have the right to terminate this purchase order or to reduce the quantity of goods or materials specified herein, and in either of such events settlement shall be made in accordance with the provisions of the uniform termination articles adopted or recommended by the Joint Contract Termination Board and approved by the Director of War Mobilization.

In the state in which said labor is to be performed furnish a certificate of same to Buyer.
12. The Government Contract provides that the Contracting Officer may at any time make changes in the drawings or specifications as to any articles, material or work covered hereby. If such changes cause an increase or decrease in the amount due under this order, an equitable adjustment shall be made and this order shall be modified in writing accordingly.
13. If this order is for articles or materials other than standard or commercial articles or raw material, the Seller, in performing the work required hereunder, shall not discriminate against any worker because of race, creed, color or national origin.
14. Seller agrees to be responsible in matters within its control for the safeguarding of all Secret, Confidential or Restricted matters that may be disclosed or that may be developed in connection with the work under this order.
15. No member of or Delegate to the Congress of the United States of America shall be admitted to any share or part of this agreement or to any benefit arising therefrom.
16. Seller agrees to comply with all applicable Federal, state or local laws, rules and regulations, including the Walsh-Healey Public Contracts Act (Act of June 30, 1936 - 49 Stat. 2036 - 2039, as amended); Emergency Price Control Act of 1942, as amended; (Act of January 30, 1942 - Public Law 421 - 77th Congress).
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18. Terms of payment as stated on obverse side of this purchase order are understood to be effective and the discount period to begin (1) after arrival of material at destination, final inspection and approval as set out above, and (2) receipt of properly executed bill of lading (or shipping papers) and (3) copies of invoice. Delay in receiving invoices, also errors or omissions appearing thereon, causing delay in determination of amount due will entitle Buyer to withhold settlement without losing discount privileges.
19. If this purchase order is for an amount in excess of $100,000, or if by virtue of this purchase order, or any change therein, Seller has a subcontract with Buyer for an amount in excess of $100,000 within the meaning of Section 403 of Public Law No. 528, 77th Congress, as amended by the Revenue Act of 1942, Seller agrees as follows:
(1) Upon the written demand of the Secretary, at such period or periods when, in the judgment of the Secretary, the profits accruing to Seller under this contract can be determined with reasonable certainty, the Secretary and Seller will renegotiate the contract price to eliminate therefrom any amount found as a result of such renegotiation to represent excessive profits. The demand of the Secretary shall fix a place for renegotiation and a time for the commencement thereof not later than one year after the close of the fiscal year of the subcontract within which completion or termination of the contract, as determined by the Secretary, occurs.
(2) Seller will furnish to the Secretary such statements of actual cost of production and such other financial statements, at such times and in such form and detail, as the Secretary may prescribe, and will permit such audits and inspections of its books and records as the Secretary may request.
(3) Any amount of the contract price found as a result of such renegotiation to represent excessive profits shall, as directed by the Secretary —
(A) Be deducted by Buyer from payments otherwise due to Seller under this contract; or
(B) Be paid by Seller directly to the Government, if paid to him; or
(C) Be eliminated through reductions in the contract price or otherwise.
(4) Seller agrees that Buyer shall not be liable to Seller for or on account of any amount paid to the Government by Seller or deducted by Buyer from payments otherwise due under this contract, pursuant to directions from the Secretary in accordance with the provisions of this Paragraph. Under its contract with the Government, Buyer is obligated to pay or credit to the Government all amounts withheld by it from Seller hereunder.
(5) Seller agrees (a) upon direction of the Secretary, to include in any subcontract hereunder sections (1) to (6) inclusive of this paragraph 19, and (b) to make no subdivisions of any contract or subcontract for the purpose of evading the provisions of this section (5), and (c) to repay to the Government the amount of any reduction in the contract price of any such subcontract which results from renegotiation thereof by the Secretary and which the Secretary directs Seller to withhold from payments otherwise due under such subcontract and actually unpaid at the time Seller receives such direction.
(6) As used in this Paragraph—
(a) The term "Secretary" means the Secretary of War or any duly authorized representative of the Secretary, including the contracting officer.
(b) The term "subcontract" means any purchase order or agreement to perform all or any part of the work, or to make or furnish any material, part, assembly, machinery, equipment or other personal property, required for the performance of this contract, unless exempted pursuant to Section 403 (i) of the Sixth Supplemental National Defense Appropriation Act of 1942 as amended by Section 801 of the Revenue Act of 1942.
(c) The terms "renegotiate" and "renegotiation" have the same meaning as in section 403 (i) of the Sixth Supplemental National Defense Appropriation Act, 1942, as amended.
(d) The term "this contract" means this contract as modified from time to time.

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company any of the property of the St. Louis Ordnance Plant, or any of its machinery and equipment, and tools and appliances, or any raw materials that are now or ever were, or any working process, or any finished product?

A. They do not.

Q. We are speaking now of the books of the Olin Industries. A. Well, they do not.

[fol. 1415] Q. I am going to ask you that specifically, if it does appear on the books of the Olin Industries?

A. No, sir.

Q. Referring to the books of the United States Cartridge Company, do any of the properties of that kind, have they ever appeared on any records of the United States Cartridge Company as an asset? A. They have not.

Mr. Bond: To that I object to.

The Court: Objection sustained.

Mr. McRoberts: That is all.

Mr. McRoberts: Your Honor, until I can produce some records, I suggest we adjourn.

The Court: Announce an adjournment until tomorrow morning at ten o'clock.

Thereupon, at 4:30 P. M., July 11, 1946, an adjournment was taken to 10 A. M., July 12, [1947]. The proceedings were then resumed as follows:

(Witness Russell Casteel resumes the witness stand.)

Q. (Mr. McRoberts) Mr. Casteel, I will ask you whether or not the Western Cartridge Company performed any service in connection with the supervision, direction and control of the production aspects of the layout engineering and construction of the St. Louis Ordnance Plant?

Mr. Bond: Objected to as irrelevant, incompetent and immaterial. The Western Cartridge Company is not a [fol. 1416] party to this case.

(Last preceding question read.)

Mr. McRoberts: I propose to show the fact by this witness and by the contract pursuant to which these services were rendered, the facts with reference to acquisition of all of the machinery and equipment and tools and appliances.

The Court: You will connect this up?

Mr. McRoberts: Yes, sir.

The Court: Well, he may answer subject to the objection.

A. They did.

Q. Did they render this service pursuant to a contract with the United States of America? A. They did.

(A contract is marked "Defendant's Exhibit 22.")

Mr. Bond: It won't be necessary for me to continue to object, the record may show my objection to all of this line of testimony of the Cartridge Company.

Q. Mr. Casteel, I show you a document which has been identified as Defendant's Exhibit 22 and ask you if that is an original, signed copy of the contract pursuant to which these services were rendered? A. It is.

Mr. McRoberts: I offer in evidence, if Your Honor please, Defendant's Exhibit No. 22 in its entirety, and I direct Your Honor's attention particularly to this portion: The con- [fol. 1417] tract is dated December 5, 1940, and contains these recitals:

> "Whereas, the Government contemplates entering into contracts, hereinafter referred to as collateral contracts, with other parties for the construction, including the designing, engineering, installation and manufacturing facilities incident thereto or a plant hereinafter described in Title One.
>
> "And Whereas, the Government desires to have the contractor as an independent contractor on a fixed price, lump sum, basis, furnish management service covering supervision, direction and control of the production aspects of the layout, engineering and construction, including plant and equipment layouts for such plant, and the training of the key personnel

and as an independent contractor on a cost-plus and fixed-fee basis, procure and supervise the layout and installation of equipment."

And then summarized in Title One, there is a description of the plant which I believe we will all admit is the St. Louis Ordnance Plant. Then under Article 1-b, The character and extent of the service: "It is provided that the contractor shall determine"—the contractor being the Western Cartridge Company—"shall determine the requirements for a plant of the type and capacity described in Article One hereof, the layout, engineering and construction and the installation of equipment which would be provided under the collateral contracts, and shall manage, supervise, direct and control the production aspects of [fol. 1418] layout engineering and construction, including plant and equipment layouts of said plant."

Mr. Bond: Provides for the payment to the contractor of a fixed fee for the service.

Mr. McRoberts: And Title 2 there is a detail description of the service in connection with the training of key personnel. Then in Title 3, under the caption "Procurement of Equipment and Supervision and Design and Plans of Installation," it is provided in Article 3a, paragraph 1:

> "The contractor shall as an independent contractor, and not as an agent of the Government, purchase or procure and supervise the engineering and layout of all machinery, jigs, fixtures, tools, gauges, testing equipment and miscellaneous manufacturing and production equipment, except utilities necessary for the plant of the type and capacity described in Article 1. All of the above being sometimes hereinafter referred to as 'equipment.'"

And later there is a provision that that equipment shall be listed and schedules attached thereto.

> "It is provided that the Government reserves the right to furnish any of this equipment itself instead of having it acquired under this contract. It is provided that in the performance of the work provided for in Title 3, the contractor shall at all times advise

and consult with the Contracting Officer, he being the Government representative."

[fol. 1419] And finally, "that the extent and character of the work to be done by the contractor under this Title Three shall be subject to the approval of the contracting Officer to whom the contractor shall report and be responsible."

It is then provided that "the Government shall bear all cost and expense of every character and description incurred by the contractor under this Title Three."

There is a definition of what shall be considered cost and expense. There is a provision whereby the Government may advance the money with which to make these purchases, and how that money shall be handled and the restricted use. I am on page 8 now. And finally, it is provided with reference to all this equipment, being the material acquired under Title Three:

> "The title to all work under this Title Three shall be in the Government. Likewise, upon delivery at the site of the work or at an approved storage site, to all purchased materials, tools, machinery, equipment and supplies for which the contractor shall be entitled to be reimbursed under Title Four hereof, shall vest in the government. The Government shall bear all risks incident to such ownership. These provisions as to title being vested in the Government shall not operate, however, to relieve the contractor from any duties imposed upon it under the terms of this contract."

Mr. Bond: Your Honor please, I desire to object to the introduction in evidence of this contract generally because [fol. 1420] the contract itself as described by Counsel is irrelevant, immaterial and incompetent to any issues raised by the pleadings in this case; and further, because it is obvious under construction of the Fair Labor Standards Act that no private agreement between these contracting parties can either affect the character of these goods as commerce, nor can it affect the classification to which these people are entitled, nor the overtime compen-

sation to which they may be entitled under the Act. And I think that this private arrangement between the Government and a corporation not a party to this suit in reference to management, service and training of key personnel is wholly incompetent, irrelevant and immaterial, and [his] no place in this case.

The Court: It will be admitted subject to the objection.

[fol. 1421] (Defendant's Exhibit 22.)

Contract W-ORD-481

Fixed-Price (Lump Sum)

Management Service and Training of [Ket] Personnel
and
Cost-Plus-A-Fixed-Fee Procurement of
Equipment Contract

War Department

Contractor: Western Cartridge Company, East Alton, Illinois

Fixed-Price (Lump-Sum) for Management Service: $313,000.00 under Title I.

Fixed-Price (Lump-Sum) for Training Key Personnel: $1,300,000.00 under Title II.

Fixed-Fee for Procuring Equipment: $495,000.00 under Title III.

Contract for: Management service covering supervision, direction and control of the production aspects of the layout, engineering and construction (including plant and equipment layouts) of a plant for the manufacture of Caliber .30 and Caliber .50, Small Arms Ammunition of certain types; training of key personnel; and procurement, supervision of layout, and supervision of installation (including supervision of plans therefor) of manufacturing facilities.

Place: St. Louis, Missouri

Estimated Cost of Procurement of Equipment: $16,500,000.00 under Title II.

Payment [ot] be made by the Finance Officer, U. S. Army, at: St. Louis, Missouri

The supplies, equipment and services to be obtained by this instrument are authorized by, are for the purpose set forth in, and are chargeable to the following Procurement Authorities, the available balances of which are sufficient to cover the cost of the same.

ORD 7669 P99 A 0141-01
ORD 7670 P06 A 0141-01
ORD 8025 (11-0270 A 1005-01

L. H. CAMPBELL, JR.,
Brig. Gen., U. S. Army.

This contract is authorized by the following laws:

Act of July 2, 1940 (Public No. 703, 76th Cong.)

[fol. 1422] Fixed-Price (Lump-Sum)

Management Service and Training of Key Personnel
and
Cost-Plus-A-Fixed-Fee Procurement of
Equipment Contract

This Contract, entered into this 5th day of December, 1940, by the United States of America, hereinafter called the Government, represented by the Contracting Officer executing this contract, and Western Cartridge Company, East Alton, Illinois, a corporation organized and existing under the laws of the State of Delaware, with its principal office in East Alton, Illinois, hereinafter called the Contractor, witnesseth that:

Whereas, The Government contemplates entering into contracts (Hereinafter referred to as the "Collateral Contracts") with other parties for the construction, including designs and engineering, and installation of manufacturing facilities incident thereto, of a plant hereinafter described in Title I; and

Whereas, the Government desires to have the Contractor, as an independent Contractor on a fixed-price (lump-sum) basis, furnish management service covering supervision,

direction and control of the production aspects of layout, engineering, and construction (including plant and equipment layouts) of said Plant and train key personnel; as an independent contractor on a cost-plus-a-fixed-fee basis procure and supervise the layout and installation of equipment; and

Whereas, the accomplishment of the above-described work under a contract entered into after negotiations approved by the [Secretary] of War, and without advertising for proposals, is authorized by law; and

Whereas, as a result of such negotiations, the Secretary of War has directed that the Government enter into such a contract with the Contractor for the accomplishment of the above-described work;

Now, Therefore, the parties hereto do mutually agree as follows:

[fol. 1423] Title I.

Management Service.

Article I-A—Description of Plant.

The construction project (hereinafter referred to as "the Plant") shall comprise a plant located at one or more places at or near St. Louis, Missouri, for the manufacture of Caliber .30 and Caliber .50 Ammunition of certain types (hereinafter sometime referred to as the "Ammunition") as specified in Title I of a certain contract of even date herewith between the Government and The United States Cartridge Company, a wholly-owned subsidiary of the Contractor, having a daily capacity as follows:

2,000,000 rounds packed and ready for shipment of Caliber .30 Ammunition, of which [sixty-five] percent (65%) is to be Ball, twenty percent (20%) Armor Piercing, and fifteen percent (15%) Tracer Cartridges;

1,200,000 rounds packed and ready for shipment of Caliber .50 Ammunition, of which eighty percent (80%) is to be Armor Piercing and twenty percent (20%) Tracer Cartridges

Said Plant shall include parts manufacturing and loading buildings, powder storage area separate from manufacturing and loading units and removed from populous area, administration buildings, training school, magazines, shops, railroads, (including connections, sidings and industrial railroads) roads, curbs, sidewalks, sewers, planting, steam lines, air lines, electric lines, telephone lines, fencing, lighting power house, water system, staff dwellings, cafeterias, guard quarters, fire fighting and housing thereof, and other buildings necessary or appropriate for a Plant of the approximate capacity aforesaid, with storage buildings in connection with the manufacturing and loading units adequate for about one (1) days' supply of incoming powder and twenty days' (20) supply of other materials and [anout] two (2) days' production of finished product. There shall be included a testing range at least 2000 yards in length with adequate safety width and length, or arrangements made for such testing elsewhere, with all necessary buildings, instruments, and equipment for testing. The powder storage area shall be of such capacity as to provide about thirty (30) days' storage of powder and about thirty (30) days' storage of finished Ammunition. The said Plant shall conform, insofar as is practicable, with the designs, drawings, specifications, details, standards and safety practices which are on file in the offices of The Quartermaster General or Chief of Ordnance and which shall be furnished to the Contractor. The estimated total cost of said Plant, fully equipped, based on estimates on file in the Office of the Chief of Ordnance and the Quartermaster General (including acquisition of site,) is Twenty Eight Million Seven Hundred Eighty-Eight Thousand Seven Hundred Dollars ($28,788,700.00). The Contractor does not guarantee the correctness of the estimate.

[fol. 1424] Article I-B Character and Extent of Services.

1. The Contractor shall determine the requirements for a Plant of the type and capacity described in Article I-A hereof, the layout, engineering, construction, and installation of equipment which will be provided under the Collateral Contracts; and shall manage, supervise, direct and control the production aspects of the layout, engineering and construction (including plant and equipment layouts) of said Plant.

2. The extent and character of the work to be done by the Contractor under this Title I shall be subject to the approval of the Contracting Officer to whom the Contractor shall report and be responsible. In the event that there should be any dispute with regard to the extent and character of the work to be done, the decision of the Contracting Officer shall govern, but the Contractor shall have the right of written appeal pursuant to the provisions of Article V-L of Title V hereof.

3. In the performance of the work provided for in Section 1 of this Article I-B, the Contractor shall at all times advise and consult with the Contracting Officer for the collateral Contracts executed for the design, engineering, construction and design and installation of equipment in the Plant. The Collateral Contract with the Architect-Engineer shall expressly provide that all work and services thereunder shall be performed subject to consultation with and advice from the Contractor herein, as provided in this Title I.

4. The Government shall furnish the Contractor such available schedules of preliminary data, layout sketches, and other available information respecting machinery, equipment, tools, gages, etc., outside utilities and equipment, and shall make available to the standards and safety practices as are on hand in the offices of The Quartermaster General or the Chief of Ordnance and are applicable to the design, construction, and equipping of the said Plant.

5. All notes and other data used by the Contractor in connection with the work under this Title I are to become the property of the Government and the Government shall have full right subject to the provisions of Article V-O hereof to use said notes and other data for any purpose it may desire without any claim on the part of the Contractor for additional compensation. All such notes and other data concerning the design, construction and equipping of the Plant shall be delivered to the Government whenever requested by the Contracting Officer and, furthermore, access to such notes and data shall be restricted to trusted and duly authorized representatives of the Government and of the Contractor. It is further understood

that such plans and designs shall be furnished to the [fol. 1425] Architect-Engineer or the Construction Contractor under the Collateral Contracts on the condition that they shall not use or disclose the same except in the performance of the Collateral Contracts or for the use of the Government.

6. The Government shall provide suitable office space and the necessary utilities on the site of the Plant, under the Collateral Contracts, for the use of the Contractor's field organization during the period covered by the work and services under this Title I.

Article I-C—Estimates.

It is estimated by the parties hereto that the work under this Title I will be completed within ten (10) months from the date of this contract. It is expressly understood, however, that the Contractor does not guarantee the correctness of this estimate which was arrived at as a result of negotiation between the Government and the Contractor.

Article I-D—Consideration.

1. As complete consideration for its undertaking under this Title I the Contractor shall receive the fixed-price (lump-sum) of Three Hundred Thirteen Thousand Dollars ($313,000.00), which sum has been determined by negotiation between the Contractor and the Chief of Ordnance.

2. The consideration provided in section 1 of this Article I-D shall be paid to the Contractor in ten (10) equal monthly installments of Thirty-One Thousand Three Hundred Dollars ($31,300.00) per month, the first installment to be paid at the close of the calendar month during which this agreement is executed. In the event of termination of this contract, any installments of said amount which accrue after the close of the calendar month in which such termination occurs, shall be cancelled.

[fol. 1426] Title II.

Training of Key Personnel.

Article II-A—Statement of Work.

1. Concurrently with the performance of the work required of it under Title I hereof, the Contractor shall hire the key personnel necessary for the supervision, management and operation of the Plant, including, but not limited to the classifications set forth in Schedule A attached hereto and made a part hereof, and shall proceed to train such personnel in all the duties and functions of their respective positions, and shall insure the readiness of an efficient and trained group of key personnel at any time when the Plant shall be put into operation under the provisions of the contract of even date herewith, between the Government and The United States Cartridge Company.

2. The extent and character of the work to be done by the Contractor under this Title II shall be subject to the approval of the Contracting Officer. In the event that there should be any dispute with regard to the extent and character of the work to be done, the decision of the Contracting Officer shall govern, but the Contractor shall have the right of written appeal pursuant to the provisions of Article V-L of Title V hereof.

Article II-B—Consideration.

1. As complete consideration for its undertaking under this Title II the Contractor shall receive the fixed-price (lump-sum) of One Million Three Hundred Thousand Dollars ($1,300,000.00), which sum has been determined by negotiation between the Contractor and the Chief of Ordnance.

2. The consideration provided in section 1 of this Article II-B shall be paid to the Contractor in twelve (12) equal monthly installments of One Hundred Eight Thousand Three Hundred Thirty-Three Dollars and Thirty-Three Cents ($108,333.33) per month, the first installment to be paid at the close of the calendar month, during which this agreement is executed. In the event of termination of this contract any installments of said amount which accrue after the close of the calendar month in which such termination occurs, shall be cancelled.

[fol. 1427] Article II-C—Eight-Hour Law—Applicable to Titles I and II.

No laborer or mechanic doing any part of the work contemplated by Titles I and II of this contract, in the employ of the Contractor or any subcontractor contracting for any part of said work contemplated, shall be required or permitted to work more than eight hours in any one calendar day upon such work at the site thereof, except upon the condition that compensation is paid to such laborer or mechanic in accordance with the provisions of this Article. The wages of every laborer and mechanic employed by the Contractor or any subcontractor engaged in the performance of this contract shall be computed on a basic day rate of eight hours per day and work in excess of eight hours per day is permitted only upon the condition that every such laborer and mechanic shall be compensated for all hours worked in excess of eight hours per day at not less than one and one-half times the basic rate of pay. For each violation of the requirements of this article a penalty of five dollars shall be imposed upon the Contractor for each laborer or mechanic for every calendar day in which such employee is required or permitted to labor more than eight hours upon said work without receiving compensation computed in accordance with this article, and all penalties thus imposed shall be withheld for the use and benefit of the Government; provided, that this stipulation shall be subject in all respects to the exceptions and provisions of U. S. Code, title 40, sections, 321, 324, 325, and 326, relating to hours of labor, as in part modified by the provisions of Section 303 of Public Act No. 781, 76th Congress, approved September 9, 1940, relating to compensation for overtime.

[fol. 1428]

Title III.

Procurement of Equipment and Supervision of Design and of Plans for Installation Thereof.

Article III-A—Statement of Work.

1. The Contractor shall, as an independent contractor and not as an agent of the Government, purchase, produce, and supervise the engineering and layout of all ma-

chinery, jigs, fixtures, tools, gages, testing equipment and miscellaneous manufacturing and production equipment (except utilities) necessary for a Plant of the type and capacity described in Article I-A of Title I hereof (all of the above being sometimes hereinafter referred to as "Equipment"); shall supervise the plans to be drawn for the installation of said Equipment by the Architect Engineer under the Collateral Contracts; and shall do all other things necessary and incident to the purchase or production, supervision of the engineering and layout, and supervision of the plans for the installation of the Equipment of the Plant. Said Equipment shall be listed in Schedule B, attached hereto and made a part hereof, but such listing in Schedule B shall not limit the general obligation of the Contractor under this Article III-A nor shall the Contractor be limited to the equipment therein specified in complying with this section, but any changes in said Schedule B shall have the written approval of the Contracting Officer.

2. The Government reserves the right to furnish any Equipment necessary for the equipping of the Plant, provided said Equipment shall be of a suitable type and in satisfactory operating condition, upon so notifying the Contractor prior to any commitment by the latter therefor. In the equipping of the Plant the Contractor shall be free (but shall not be obligated) to use any material and equipment of its own manufacture, upon advising the Government in advance as to the prices at which and the conditions upon which such material and equipment will be supplied. In the event the Government is able to obtain material and equipment of equal quality and quantity at a lower price or on more favorable conditions from any responsible competitive source or from its own manufacture, it may undertake to do so upon so informing the Contractor within ten (10) days after being advised of the Contractor's price for such material, the Contractor first having the right to meet such lower price or more favorable conditions.

3. In the performance of the work provided for in this Title III, the Contractor shall at all times advise and consult with the Contracting Officer for the Collateral Contracts excepted for the design, engineering and construc-

tion of the Plant, and installation of Equipment therein. All such Collateral Contracts shall expressly provide that all work and services thereunder shall be subject to consultation with and advice from the Contractor herein.

[fol. 1429] 4. The Government shall furnish the Contractor such available schedules of preliminary data, layout sketches, and other available information respecting the work to be done under this Title III, and shall make available to the Contractor such Government designs, drawings, specifications, details, standards and safety practices as are on hand in the offices of The Quartermaster General or the Chief of Ordnance and which are applicable to the work to be done under this Title III.

5. The title to all work under this Title III, shall be in the Government. Likewise, upon delivery at the site of the work, or at an approved storage site, title to all purchased materials, tools, machinery, equipment and supplies, for which the Contractor shall be entitled to be reimbursed under Title IV hereof, shall vest in the Government. The Government shall bear all risk incident to such ownership. These provisions as to title being vested in the Government shall not operate however, to relieve the Contractor from any duties imposed upon it under the terms of this contract.

6. The Contractor hereby agrees that it will:

(a) Procure and thereafter maintain such surety bonds and insurance in such forms and in such amounts and for such periods of time as the Contracting Officer may require in writing, provided same are obtainable.

(b) Procure all necessary permits and licenses whenever obtainable; obey and abide by all applicable laws, regulations, ordinances and other rules of the United States of America, of the State, Territory or sub-division thereof wherein the work is done, or of any other duly constituted public authority.

(c) Unless the provisions of this paragraph (c) are waived in writing by the Contracting Officer, reduce to writing every contract in excess of Two Thousand Dollars

($2000.00) made by it for the purpose of the work under this Title III for services (except contracts for employment), materials, supplies, machinery, or equipment, or for the use thereof; insert therein a provision that such contract is assignable to the Government; make all such contracts in its own name, and not bind or purport to bind the Government or the Contracting Officer thereunder.

(d) Enter into no sub-contract for any portion of the work without the written approval of the Contracting Officer. Sub-contracts are defined as contracts entered into by the Contractor with others which involve the performance, wholly or in part, at the site of the work, of some part of the work described in this Title III.

[fol. 1430] 7. If the performances of any work under this Title III is interrupted or prevented by reason of inability to obtain equipment or essential materials, or by reason of labor shortage or labor disputes, from whatever cause arising, and whether or not the demands of the employees involved shall be reasonable and within the Contractor's power to concede, or by reason of fire, explosion, accident, sabotage, or any cause beyond its control, whether of a nature similar or dissimilar to those hereinbefore set forth, the Contractor shall be excused from performing work while or to the extent that it is prevented from so doing by one or more of such causes, and all such work shall be performed as soon as practicable after such disability is removed. It is further understood and agreed that the Contractor shall not be liable for any failure or delay in the performance of this contract, or accountable for the loss or destruction of or damages to any materials, tools, machinery, equipment, supplies, or other property located or stored at said Plant except to the extent that such failure, delay, loss, destruction or damage is due to the personal failure on the part of the corporate officers of the Contractor or of other representatives of the Contractor having supervision and direction of the work as a whole under this Title III, to exercise good faith or that degree of care which they normally exercise in the conduct of the Contractor's business.

8. The extent and character of the work to be done by the Contractor under this Title III shall be subject to the approval of the Contracting Officer to whom the Contractor shall report and be responsible. In the event that there should be any dispute with regard to the extent and character of the work to be done, the decision of the Contracting Officer shall govern, but the Contractor shall have the right of written appeal pursuant to the provisions of Article V-L of Title V hereof.

Article III-B—Walsh-Healey Act.

1. The following representations and stipulations pursuant to the Walsh-Healey Public Contracts Act (Act of June 30, 1936: 49 Stat. 2036; 41 USC 35-45), shall apply to the work under Title III of this contract:

a. The Contractor is the manufacturer of or a regular dealer in the materials, supplies, articles, or equipment to be manufactured or used in the performance of the contract.

b. All persons employed by the Contractor in the manufacture [of] furnishing of the materials, supplies, articles, or equipment used in the performance of the contract will be paid, without subsequent deduction or rebate on any account, not less than the minimum wages as determined by the Secretary of Labor to be the prevailing minimum wages for persons employed on similar work or in the particular or similar industries or groups of industries currently operating in the locality in which the materials, [fol. 1431] supplies, articles, or equipment are to be manufactured or furnished under the contract; Provided, However, that this stipulation with respect to minimum wages shall apply only to purchases or contracts relating to such industries as have been the subject matter of a determination by the Secretary of Labor.

c. No person employed by the Contractor in the manufacture [of] furnishing of the materials, supplies, articles, or equipment used in the performance of the contract shall be permitted to work in excess of 8 hours in any 1 day or in excess of 40 hours in any 1 week, unless such person is

paid such applicable overtime rate as has been set by the Secretary of Labor.

d. No male person under 16 years of age and no female person under 18 years of age and no convict labor will be employed by the Contractor in the manufacture or production or furnishing of any of the materials, supplies, articles, or equipment included in the contract.

e. No part of the contract will be performed, nor will any of the materials, supplies, articles, or equipment to be manufactured or furnished under said contract be manufactured or fabricated in any plants, factories, buildings, or surroundings or under working conditions which are unsanitary or hazardous or dangerous to the health and safety of employees engaged in the performance of the contract. Compliance with the safety, sanitary, and factory inspection laws of the State in which the work or part thereof is to be performed shall be prima-facie evidence of compliance with this sub-section.

f. Any breach or violation of any of the foregoing representations and stipulations shall render the party responsible therefor liable to the United States of America for liquidated damages, in addition to damages for any other breach of the contract, in the sum of $10 per day for each male person under 16 years of age or each female person under 18 years of age, or each convict laborer knowingly employed in the performance of the contract, and a sum equal to the amount of any deductions, rebates, refunds, or under-payment of wages due to any employee engaged in the performance of the contract; and, in addition, the agency of the United States entering into the contract shall have the right to cancel same and to make open-market purchases or enter into other contracts for the completion of the original contract, charging any additional cost to the original contractor. Any sums of money due to the United States of America by reason of any violation of any of the representations and stipulations of the contract as set forth herein may be withheld from any amounts due on the contract or may be recovered in a suit brought in the name of the United States of America by the Attorney General thereof. All sums withheld or recovered as deductions,

rebates, refunds, or underpayments of wages shall be held in a special deposit account and shall be paid, on order of the Secretary of Labor, directly to the employees who have been paid less than minimum rates of pay as set forth in such contracts and on whose account such sums [fol. 1432] were withheld or recovered: Provided, That no claims by employees for such payments shall be entertained unless made within 1 year from the date of actual notice [to] the Contractor of the withholding or recovery of such sums of the United States of America.

g. The Contractor shall post a copy of the stipulations in a prominent and readily accessible place at the site of the contract work and shall keep such employment records as are required in the Regulations under the act available for inspection by authorized representatives of the Secretary of Labor.

h. The foregoing stipulations shall be deemed inoperative if this contract is for a definite amount not in excess of $10,000.00.

2. Stipulation (b) of Section 1 of this Article III-B is inoperative due to lack of determination by the Secretary of Labor of minimum wage standards for the industry involved.

Article III-C—Estimates.

It is estimated that the total cost of the work covered by this Title III will be approximately Sixteen Million Five Hundred Thousand Dollars ($16,500,000.00), exclusive of the Contractor's Fee, and that the work herein contracted for will be ready for utilization in the manufacture of Small Arms Ammunition within Fifteen (15) Months from the date of this contract. It is expressly understood, however, that the Contractor does not guarantee the correctness of either of these estimates. The estimated total cost set forth above is based upon a detailed estimate agreed upon by both the Government and the Contractor, a copy of which is on file in the office of the Chief of Ordnance.

Article III-D. Consideration.

In consideration for its undertaking under this Title III the Contractor shall receive the following:

(a) Reimbursement for expenditures as provided in Title IV.

(b) A fixed fee in the amount of Four Hundred Ninety-five Thousand Dollars ($495,000.00), which shall constitute complete compensation for the Contractor's services, including profit.

[fol. 1433] Title IV.

Cost of the Work Under Title III.

Article IV-A—Reimbursement for Contractor's Expenditures.

1. The Government shall bear all costs and expenses of every character and description incurred by the Contractor under Title III, when approved in advance or subsequently ratified by the Contracting Officer, which costs and expenses shall include but shall not be limited to the following items, to wit:

(a) All materials, tools, machinery, equipment, designs, plans and supplies necessary for either temporary or permanent use for the benefit of the work under Title III.

(b) All subcontracts made in accordance with the provisions of Title III.

(c) Transportation charges on materials, supplies and equipment, including loading and unloading, necessary storage, and transportation charges prepaid by the Contractor on outgoing shipments.

(d) Expenses of expediting the production and transportation of material and equipment.

(e) Salaries of resident engineers, superintendents, accountants, and all other employees of the Contractor in connection with the work. In case the full time of any employee of the Contractor is not applied to the work, his salary shall be included in this item only in proportion to the actual time applied thereto.

(f) Premiums on such bonds as may be required under Section 6 of Article III-A and under the provisions of Article IV-C and such insurance policies as may be required under this contract; the cost of all public liability, employer's liability, workmen's compensation, fidelity, fire theft, burglary and other insurance that the contracting officer may approve as reasonably necessary for the protection of the Contractor.

(g) Losses and expenses, not compensated by insurance or otherwise (including settlements of claims between the Contractor and third parties, made with the written consent of the Contracting Officer), actually sustained by the Contractor in connection with the work and found and certified by the Contracting Officer as not being due to the personal failure on the part of the corporate officers of the Contractor or of other representatives of the Contractor having supervision and direction of the work as a whole, to exercise good faith or that degree of care which they normally exercise in the conduct of the Contractor's business.

[fol. 1434] (h) The cost of replacing any of the work destroyed or damaged, and not compensated by insurance, but expenditures under this item must have the written authorization of the Contracting Officer in advance. Such replacing shall be considered as additional work under the provisions of Article V-X.

(i) Payments made by the Contractor under the Federal Social Security Act (employer's contributions), and any applicable state or local taxes, permits, license fees, or other charges which the Contractor may be required to pay on account of or in connection with the work under Title III hereof, and, if approved in writing by the Contracting Officer in advance, royalties on patents, including those owned by the Contractor; and expenses incident to patent searches which may be necessary under the provisions of Article V-O hereof.

(j) Such portion of the transportation, traveling and hotel expense of engineers and other employees of the Contractor as is actually incurred in connection with this work. It is agreed that all allowances of cost under this item shall conform to and not exceed the ordinary allow-

ances authorized by the contractor for its employees in the normal conduct of its business.

(k) Accounting (including salaries and other expenses) in connection with special audits of accounts for the Government in connection with the work hereunder.

(l) Such other items as should, in the opinion of the Contracting Officer, be included in the cost of the work. When such an item is allowed by the Contracting Officer, it shall be specifically certified as being allowed under this paragraph.

2. The Government reserves the right to pay directly to persons concerned all sums due from the Contractor for labor, materials, or other charges.

3. No salaries of the Contractor's executive officers, no part of the expense incurred in conducting the contractor's main office or regularly established branch offices, and no overhead expenses of any kind, except as specifically authorized in Section 1 of Article IV-A of this Title IV shall be included in the cost of the work; nor shall any interest on capital employed or on borrowed money be included in the cost of the work.

[fol. 1435] 4. The Contractor shall, to the extent of its ability, take all cash and trade discounts, rebates, allowances, credits, salvage, commissions and direct bonifications, and when unable to take advantage of such benefits, it shall promptly notify the Contracting Officer to that effect and the reason therefor. In determining the actual net cost of articles and materials of every kind required for the purpose of this contract, there shall be deducted from the gross cost thereof all cash and trade discounts, rebates, allowances, credits, salvage, commissions and direct bonifications which have accrued to the benefit of the Contractor. Any such benefits lost shall be deducted from gross costs to the extent that their loss is due to the personal failure on the part of the corporate officers of the Contractor [of] of other representatives of the Contractor, having supervision and direction of the work as a whole, to exercise good faith or that degree of care which they normally exercise in the conduct of the Contractor's busi-

ness. Any such benefits lost through the fault of the Government or lost through compliance with the provisions of Section 5 of Article IV-C shall not be deducted from the gross costs.

Article IV-B—Payments.

1. Reimbursement for Cost.

(a) All payments hereunder shall be subject to the provisions of Section 2 of Article IV-C.

(b) The Government shall currently reimburse the Contractor for expenditures made in accordance with Article IV-A of this Title IV upon certification to and verification by the Contracting Officer of the original certified payrolls for labor, or the original paid invoices for materials, or other original papers, or other evidence satisfactory to the Contracting Officer. Except as otherwise provided in Section 1 of Article IV A, reimbursement will be made weekly but may be made at more frequent intervals if the conditions so warrant.

2. Payment of the Fixed Fee.

The Fixed fee of Four Hundred Ninety-five Thousand Dollars ($495,000.00) provided in Article III-D of Title III hereof shall be paid in fifteen (15) equal monthly installments, the first such installment to be paid at the close of the calendar month during which this contract is executed, the next thirteen (13) such installments to be paid at the close of each succeeding calendar month, and the fifteenth (15th) such installment to be paid promptly upon the completion and acceptance of the work under Title III. In the event of termination of this contract, any installments of said amount which accrue after the close of the calendar month in which such termination occurs, shall be cancelled.

3. Payments by Contractor.

If any bills for the purchase of material, machinery or equipment, incurred by the Contractor or by any Subcontractor hereunder are not promptly paid by the Con-

tractor or Sub-contractor as the case may be, and should the Contractor neglect or refuse to pay such bills or payrolls or to direct any Sub-contractor to pay such [fol. 1436] bills within five (5) days after notice from the Contracting Officer so to do, the Government shall have the right, provided the same are not disputed in good faith by the Contractor or Sub-contractor, to pay such bills directly.

4. Failure of Government to Make Payments.

In the event of failure of the Government to make any payments or advances as provided in this Title IV (other than by reason of normal delay in the payment of current expenditures incident to the checking by the disbursing officer of statements of such expenditures), the Contractor may suspend its performance hereunder until the full amount of any deficiency shall have been paid. The exercise of this right shall be without prejudice to any other rights or remedies of the Contractor on account of such failure by the Government; and failure of the Contractor to exercise such right shall not constitute a waiver thereof with respect to any continuing or subsequent failure on the part of the government.

Article IV-C—Advances.

1. At any time, and from time to time, after the execution of this Contract the Government, at the request of the Contractor, and subject to the approval of Chief of Ordnance as to the necessity therefor, shall advance to the Contractor without payment of interest thereon by the Contractor, a sum not in excess of thirty percent (30%) of the estimated cost of the work under Title III hereof (as increased or decreased pursuant to the provisions of Article V N of Title V). When approximately sixty percent (60%) of said estimated cost (as increased or decreased pursuant to the provisions of Article V-N of Title V) shall have been paid under Section 1 of Article IV-B, a revised estimate of such costs shall be made by the Contractor; and if it appears that the then estimated cost exceeds the amount of the original estimate (increased or decreased as provided above), and the revised estimate

is approved by the Chief of Ordnance, the Government shall under the conditions stated above advance to the Contractor without interest, not to exceed thirty percent (30%) of such excess. Such advance or advances shall be made in each case upon the furnishing of such surety bonds in such penal sums not exceeding the total aggregate advance as the Secretary of War may prescribe; provided that the Secretary of War shall have prescribed the furnishing of a surety bond in connection with such advances as security additional to that provided for in this contract; and provided, further, that if at any time the Secretary of War deems the security for any advance or advances therefofore made inadequate, the Contractor shall furnish on demand such other security, in the form of a surety bond or surety bonds, as will be satisfactory to the Secretary of War; but at no time shall the Contractor [fol. 1437] be required to maintain in force a surety bond or surety bonds, the total aggregate penal sums of which exceed the aggregate amount of the advances authorized by the Secretary of War under this contract. It is understood that the Government will advance to the Contractor, pursuant to this Article IV-C, the sums currently necessary to the Contractor for working capital, to carry on the work contemplated under Title III hereof, not in excess of 30% of the estimated cost of such work.

2. Whenever there shall be paid to the Contractor, pursuant to section 1 of Article IV-B of this contract reimbursement which, when added to the advance payment or payments made pursuant to section 1 of this Article (IV-C), no additional payment on account of said work shall be made to the Contractor by the Government until said advance payments are expended; provided, however, that if the total cost of the work shall be in excess of the amount so paid to the Contractor including said advance payments, the Government, upon presentation of satisfactory evidence, shall currently and promptly reimburse the Contractor to the extent of such excess cost (subject to any delay in the availability of appropriated funds); provided, further, that if upon termination of the contract for other than the fault of the Contractor there shall remain due the Government from the Contractor any sum

theretofore advanced by the Government under this contract and not fully liquidated as above provided the same shall be deducted from any payments due the Contractor and any remaining balance of such sums shall be returned to the Government forthwith after final audit by the Government of all accounts hereunder.

3. In the event of cancellation or termination of this Contract because of the fault of the Contractor, the Contractor agrees to return to the Government, upon demand, without set-off of any sum alleged to be due the Contractor, the outstanding balance of any advance payment: Furthermore, if, in the opinion of the Chief of Ordnance, the unliquidated balance of the advance or advances made by the Government under this contract exceeds the amount necessary for the current needs of the Contractor, as determined by the Chief of Ordnance, the amount of such excess shall, upon demand made by the Chief of Ordnance, be promptly returned to the Government and will be credited against the balance due the Government for advances previously made. If the demand made in either event set forth above is not met within fifteen (15) days after the receipt of such demand by the Contractor, the amount demanded will bear interest at the rate of six percent (6%) per annum from the date of the demand until payment is made.

4. All funds received as advance payments under this contract, together with all funds received as reimburse- [fol. 1438] ments for the cost of the work under Article IV-B of this contract, shall be deposited in a special bank account or accounts separate from the Contractor's general or other funds. Such special bank account or accounts shall be so designated as to indicate clearly to the bank their special character and purpose and shall be used by the Contractor exclusively as a revolving fund for carrying out the purposes of this contract, and not for the general business of the Contractor. Balances in such special account or accounts shall at all times secure the repayment of such advances in connection with which the special account or accounts are opened, and the Government shall have a lien upon such balances to secure the

repayment of such advances, which lien shall be superior to any lien of the bank upon such account or accounts by virtue of assignment to it of such contract or otherwise. Provided, however, that any bank in which such funds are deposited shall have no obligation whatever with respect to the use or disposition by the Contractor of funds withdrawn from such account or accounts or be liable for misuse by the Contractor of funds withdrawn prior to the receipt by such bank of notice from the Ordnance Department or the order of a court of competent jurisdiction directing it to refrain from permitting withdrawals by the Contractor. The Contracting Officer shall at all times be afforded proper facilities for inspection and audit of such special bank account or accounts.

5. The Contractor shall not pay to any third party for services in advance nor pay for materials or supplies in advance of delivery at the site of the work or at an approved storage site, any of the sums previously advanced to it by the Government under the provisions of this contract without the prior written approval of the Contracting Officer.

[fol. 1439] Title V.

Provisions Applicable to Entire Contract.

Article V-A—Status of Contractor.

It is expressly understood and agreed by the Contractor and the Government that in the performance of the work provided for in this contract, the Contractor is an independent contractor and in no wise an agent of the Government.

Article V-B—Termination of Contract by Government.

1. Should the Contractor at any time refuse, neglect, or fail to prosecute the work with promptness and diligence, or default in the performance of any of the agreements herein contained, or should conditions arise which make it advisable or necessary in the interest of the Government to cease work under this contract, the Government may terminate this contract by reasonable notice in writing

from the Contracting Officer to the Contractor. Such termination shall be effective in the manner and upon the date specified in said notice and shall be without prejudice to any claims which the Government may have against the Contractor. Upon receipt of such notice the Contractor shall, unless the notice directs otherwise, immediately discontinue all work and the placing of all orders for materials, facilities and supplies in connection with performance of this contract and shall proceed promptly to notify all vendors with whom the Contractor has placed orders to cease work on such orders and notify all Sub-Contractors to terminate work under all Sub-Contracts insofar as such orders of work are chargeable to this contract.

2. If this contract is terminated due to the fault of the Contractor, the Contracting Officer may enter upon the premises and take possession of all manufacturing facilities, materials, work finished or in process, and supplies, title to which has been acquired by the Government under this contract.

3. Upon the termination of this contract as hereinbefore provided, full and complete settlement of all claims of the Contractor arising out of this contract shall be made as follows:

(a) The Government shall assume and become liable for all obligations, commitments and claims that the Contractor may have theretofore in good faith undertaken or incurred in connection with the work under Title III and in accordance with the provisions of said Title; and the Contractor shall as a condition of receiving the payment mentioned in this Article, execute and deliver all such papers and take all such steps as the Contracting Officer may require for the purpose of fully vesting in the Government the rights of the Contractor under such obligations or commitments.

[fol. 1440] (b) The Government shall reimburse the Contractor for all expenditures made in accordance with Title IV, not previously reimbursed, and except as otherwise provided in this contract shall pay to the Contractor all fees and lump-sum payments which have accrued at the date of termination.

(c) If this contract is terminated for the convenience of the Government, the Government shall reimburse the Contractor for such further expenditures after the date of termination for the protection of Government property and for accounting services in connection with the settlement of this contract and other expenses incident thereto as the Contracting Officer may approve.

(d) The obligation of the Government to make any of the payments required by this contract, shall be subject to any unsettled claims for labor or material or any claim the Government may have against the Contractor under this contract.

Article V-C—General.

1. The Contracting Officer may require the Contractor to dismiss from the work any employee the Contracting Officer deems incompetent or whose retention is deemed to be not in the Public Interest, subject however to appeal under the provisions of Article V-I, for reinstatement of such employee.

2. At all times the Contractor will use all reasonable efforts in all acts hereunder to protect and subserve the interest of the Government.

3. At all times during the progress of the work, the Contractor will keep at its plant a duly appointed and qualified representative who shall receive on the part of the Contractor such notices and other communications as the Contracting Officer may give.

4. The obligations and commitments incurred by the Contractor in accordance with the provisions of the letter of intent from the Government to the Contractor, dated Nov. 13, 1940, and accepted by the Contractor with modifications by letters dated Nov. 18, 1940, and Dec. 2, 1940, are hereby expressly ratified.

Article V-D—Records and Accounts—Inspection and Audit.

1. The Contractor agrees to keep records and books of account on a recognized cost accounting basis, showing

the actual or agreed cost to it of all items of labor, materials, equipment, supplies, services, and other expenditures of whatever nature for which reimbursement is authorized [fol. 1441] under the provisions of this contract. The system of accounting to be employed by the Contractor shall be such as is satisfactory to the Contracting Officer.

2. The Contracting Officer shall at all times be afforded proper facilities for inspection of the work and of the special bank account or accounts provided for in Article IV-C of Title IV, and shall at all times have access to the premises, work and materials, to all books, records, correspondence, instructions, plans, drawings, receipts, vouchers and memoranda of every description of the Contractor pertaining to said work; and the Contractor shall preserve for a period of three (3) years after completion of termination of this contract, all the books, records and other papers herein mentioned, but the Government undertakes and agrees that final audit of the accounts for each calendar year shall be made by the Government not later than six months after the end of each such year.

3. Any duly authorized representative of the Contractor shall be accorded the privilege of examining the books, records and papers of the Contracting Officer relating to the cost of the work for the purpose of checking up and verifying such cost.

Article V-E—Preference for Domestic Articles.

1. In the performance of the work covered by this contract the Contractor, sub-contractors, materialmen or suppliers, shall use only such unmanufactured articles, materials, and supplies as have been mined or produced in the United States, and only such manufactured articles, materials, and supplies as have been manufactured in the United States substantially all from articles, materials, or supplies mined, produced, or manufactured, as the case may be, in the United States. The foregoing provision shall not apply to such articles, materials, or supplies of the class or kind to be used or such articles, materials, or supplies from which they are manufactured, as are not mined, produced, or manufactured, as the case may be, in

the United States in sufficient and reasonably [availabel] commercial quantities and of a satisfactory quality, or to such articles, materials, or supplies as may be excepted by the head of the department under the provisions of Title III, section 3, of the Act of March 3, 1933, 47 Stat. 1520 (US Code, Title 41, section 10b).

2. Inasmuch as the materials listed below or the materials from which they are made are not mined, produced or manufactured, as the case may be, in the United States in sufficient and reasonably available commercial quantities and of satisfactory qualities, their use in the work herein specified is hereby authorized without regard to the country of origin:

Asbestos	Chromium	Nickel	Silk
Balsa Wood	Cork	Nickel Alloy	Sisal
China Wood Oil	Iridium	(Monel Metal)	Teak Wood
(Tung oil)	Jute	Platinum	Tin
	Kaurigum	Rhodium	
	Lao	Rubber	

[fol. 1442] Articles, materials, or supplies made in the United States and containing mercury, antimony, tungsten or mica of foreign origin may be used (subject to the requirements of applicable specifications) in the work herein specified, if such manufactured articles, materials or supplies have been made in the United States substantially all from articles, materials, or supplies mined, produced or manufactured, as the case may be, in the United States.

Article V-F—Convict Labor.

The Contractor shall not employ any person undergoing sentence of imprisonment at hard labor.

Article V-G—Workmen's Compensation Law.

The Act of June 25, 1936 (49 Stat. 1938, 1939; 40 USC 290), provides that the several States have authority to make their Workmen's Compensation Laws applicable to contracts for the construction, alteration or repair of a

public building or public work of the United States, and the several States are vested with the power and authority to enforce such State Laws on lands of the United States.

Article V-H—Accident Prevention.

The Contractor shall, at all times, exercise reasonable precautions for the safety of employees on the work and shall comply with all applicable provisions of Federal, State, municipal and local safety laws and building and construction codes.

Article V-I—Officials Not to Benefit.

No member of or Delegate to Congress, or Resident Commissioner, shall be admitted to any share or part of this Contract or to any benefit that may arise therefrom, but this provision shall not be construed to extend to this contract if made with a corporation for its general benefit.

Article V-J—Approval Required.

This contract shall be subject to the written approval of the Secretary of War and shall not be binding until so approved. The date of such approval shall be considered the date of this contract, anything to the contrary herein, notwithstanding.

[fol. 1443] Article V-K—Covenant Against Contingent Fees.

The Contractor warrants that he has not employed any person to solicit or secure this contract upon any agreement for a commission, percentage, brokerage or contingent fee. Breach of this warranty shall give the Government the right to terminate the contract, or in its discretion, to deduct from payments due the Contractor the amount of such commission, percentage, brokerage or contingent fee. This warranty shall not apply to commissions payable by Contractor upon contracts or sales secured or made through bona fide established commercial or selling agencies maintained by the Contractor for the purpose of securing business.

Article V-L—Disputes.

Except as otherwise specifically provided herein, all disputes concerning questions of fact arising under this contract shall be decided by the Contracting Officer, subject to written appeal by the Contractor within 30 days to the Chief of Branch concerned or his duly authorized representative, whose decision shall be final and conclusive upon the parties hereto, when the amount involved is $15,000 or less. When the amount involved is more than $15,000, the decision of the Chief of Branch shall be subject to written appeal within 30 days by the Contractor to the Secretary of War or his duly authorized representative, whose decision shall be final and conclusive upon the parties hereto. The Contracting Officer, the Chief of Branch, and the Secretary of War shall act with reasonable promptness in such matters. In the meantime, the Contractor shall proceed diligently with the work. Nothing in this Article V-L shall be construed to deprive the Contractor of its legal remedies.

Article V-M—Contractor's Organization and Methods.

Within a reasonable time after the execution of this contract, the Contractor shall submit to the Contracting Officer a chart showing the executive and administrative personnel to be regularly assigned for full or part-time service in connection with the work under this contract, together with a written statement of the duties of each person and the administrative procedure to be followed by the Contractor for the control and direction of the work; and the data so furnished shall be supplemented as additional pertinent data become available. There shall also be submitted to the Contracting Officer by the Contractor, charts of the various field organizations showing all personnel, other than artisans, mechanics, helpers, and laborers to be assigned for full or part-time service outside of the central-office organization together with a written statement of the duties and rates of pay of each person and the procedure proposed to be followed by the Contractor for the accomplishment of all field work, including temporary requirements; and the data so furnished shall be supplemented as additional pertinent data become available.

Statements of procedure shall include purchasing, disburs-
[fol. 1444] ing, accounting, transportation, storage, employment, housing, sanitation, subsistence, recreation, and similar essential activities and methods.

Article V-N—Changes.

The Contracting Officer, may at any time, by a written order and without notice to the sureties, make changes in or additions to the drawings and specifications, issue additional instructions, require additional work or direct the omission of work covered by the contract. If such changes cause a material increase or decrease in the amount or character of the work to be done under this contract, or in the time required for its performance, an equitable adjustment of the amount of the fixed-fee or lump-sum to be paid to the Contractor shall be made and the contract shall be modified in writing accordingly. Any claim for adjustment under this Article must be asserted within 30 days from the date the change is ordered: Provided, however, That the Contracting Officer, if he determines that the facts justify such action, may receive and consider, and with the approval of the Chief of Branch, adjust any such claim asserted at any time prior to the date of final settlement of the contract. If the parties fail to agree upon the adjustment to be made the dispute shall be determined as provided in Article V-L hereof. But nothing provided in this Article shall excuse the Contractor from proceeding with the prosecution of the work so changed.

Article V-O—Patents and Processes.

The Contractor, during the performance of this contract, shall hold and save the Government, its officers, agents, servants and employees, harmless from liability of any nature or kind, including costs and expenses, for and on account of any invention, article (except materials supplied by the Government), or appliances manufactured or used in the performance of this contract (except appliances [heretofor] used by the Government) upon which letters patent have been issued prior to their manufacture or use in the performance of this contract, including their use by the Government at the Plant; and the Contractor hereby

grants to the Government a perpetual royalty free license to practice in the Plant, but not elsewhere, and then only for purposes of National Defense, all patented inventions, secret processes, technical information and know-how owned by the Contractor which may be incorporated in the design of the Plant by the Contractor. In the event that the Contractor has utilized in its equipping of the Plant, appliances or processes upon which it is obligated to pay royalties to others, the Contractor will endeavor to secure to the Government the right to the use, of such appliances or processes on terms not less favorable to the Government than the terms of their use by the Contractor. This license shall not be assignable to any transferee of the Plant or any part thereof, and the Contractor reserves the privilege of asserting any and all legal rights in and to such patented inventions, secret processes, technical information and know-how against any person, firm or corporation; provided, however, that the provisions of this Article shall [fol. 1445] not supersede or modify any existing agreements between the Contractor and the Government applying to any such inventions, processes, information or know-how.

Article V-P—Statutory Provisions.

It is understood that the respective undertakings to conform to the requirements of the several statutes hereinbefore referred to shall be operative only so long as and to the extent that such statutory requirements are applicable hereunder.

Article V-Q—Definitions.

[L.] The term "Chief of Branch" refers to the Chief of Ordnance or The Quartermaster General.

2. The terms "The Secretary of War" or "Chief of Branch" shall include their duly authorized representatives as the case may be, other than the Contracting Officer.

3. Except for the original signing of this contract, the term "Contracting Officer" shall include his duly appointed successor or authorized representative.

4. The term "Contracting Officer" as used herein with reference to the services provided for under Title I, and the work called for under Title III with the engineering and construction contractors under Collateral Contracts refers to the Contracting Officer appointed by The Quartermaster General; as used with reference to all other work and services provided herein, it refers to the Contracting Officer appointed by the Chief of Ordnance.

Article V-R—Alterations.

The following changes were made in this contract before it was signed by the parties hereto:

1. Page 6a added.

Page 1, Paragraph beginning with "Contract for", 6th line, "all" changed to "certain"; 8th line "design" changed to "layout".

Page 2, Second Whereas clause, 7th line, "design" changed to "layout."

Page 4, Paragraph k, 2nd line, "design" changed to "layout";

Page 7, Paragraph 1, 3rd line, "designing" changed to "layout"; 11th line, "designing" changed to "layout".

Page 9, Paragraph 7, 20th line, insert "as a whole" after "work".

Page 12, Paragraph 1 (g) 8th line, insert "as a whole" after "work".

Page 13, Paragraph i (i) insert at end of paragraph "and, if approved in writing by the Contracting Officer in advance, royalties on patents, including those owned by the Contractor; and expenses incident to patent searches which may be necessary under the provisions of Article V-O hereof."

Page 14, Paragraph 4, 14th line, insert "as a whole" after "work".

[fol. 1446] In Witness Whereof, The parties hereto have executed this contract in triplicate as of the day and year first above written.

THE UNITED STATES OF AMERICA,
By C. D. HARTMAN,
Brig. Gen., Assistant Quartermaster General,
(Contracting Officer).

Approval Recommended:
Dec 9, 1940,
E. B. GREGORY,
Major Gen., The Quartermaster General.
By L. H. CAMPBELL, JR.,
Brig. Gen., U. S. Army,
(Contracting Officer.)

Approval Recommended:
Dec 7, 1940.
C. M. WESSON,
Major Gen., Chief of Ordnance.

WESTERN CARTRIDGE COMPANY, INC.,
By J. M. OLIN, Vice-Pres.,
East Alton, Illinois,
(Business Address:)

Two Witnesses as to execution by the Contractor:
SIDNEY G. De KAY,
New York, New York,
30 Rockefeller Plaza.
(Address)
GRACE L. OLSEN,
New York, New York,
30 Rockefeller Plaza.
(Address)

Approved December 14, 1940, by direction of the Secretary of War.

ROBERT P. PATTERSON,
The Assistant Secretary of War.

[fol. 1447] I, Spencer T. Olin, certify that I am the Secretary of the Corporation named as Contractor herein; that J. M. Olin, who signed this contract on behalf of the Contractor was then Vice-President of said Corporation; that said contract was duly signed for and in behalf of said corporation by authority of its governing body, and is within the scope of its corporate powers.

Corporate Seal SPENCER T. OLIN.

I hereby certify that, to the best of my knowledge and belief, based upon observation and inquiry, J. M. Olin, who signed this contract for the Western Cartridge Company, had authority to execute the same, and is the individual who signs similar contracts on behalf of this corporation with the public generally.

L. H. CAMPBELL, JR.,
Brig. Gen., U. S. Army.

[fol. 1448] Schedule A.

Key Personnel for Small Arms Ammunition Plant.

Plant Manager
Assistant Plant Manager
Secretary (Legal)

Production Superintendent .30 Cal.
Production Superintendent .50 Cal.
Production Superintendent Tool and Gage

Powder Superintendent

Production Scheduling Supervisor

Comptroller and Staff
Cashier and Paymaster
Cost Accountant and Staff
Time and Rate Supervisor

Purchasing Agent and Staff
Storekeeper—Receiving and Shipping

Personnel Director
Employment Manager & Staff
Training School Supervisor

Safety Director & Staff
Protection Chief
First Aid Supervisor

Traffic and Freight Supervisor

Chief Engineer
Plant Engineer—Mechanical
Plant Engineer—Electrical
Chief Draftsman—Tool Designers
Master Mechanic

Technical Director & Staff
Metallurgist

Chief Inspector & Staff

Ballistic Engineer

[fol. 1449] General Foremen
Machinist Foremen
Tool and Gage Foremen
Principal Foremen for Manufacturing Depts.
Ballistic Foremen
Primer Mixing Foremen
Tracer Mixing Foremen

Adjusters and Tool Setters in sufficient numbers and type to train the working force

Head operators and apprentice operators

Matrons—Female Operators

Head—Female Operators

We estimate but do not guarantee that the foregoing will comprise about 450 persons. In selecting, training and fitting these persons to their duties, it is anticipated that the turnover may be 15%.

[fol. 1465] Q. (Mr. McRoberts) Now Mr. Casteel, did the Western Cartridge Company proceed to render the service and do the work described in this contract? A. It did.

Q. And more specifically, acquired the equipment and saw to its installation in the plant? A. That is right.

Q. And that was done pursuant to these terms and provisions and upon the conditions set forth herein?

A. Correct.

Q. Now Mr. Casteel, I believe there were three supplements to that contract executed, were there not?

A. I think that is right, yes, sir.

Mr. Bond: I want to say, Your Honor, in case I should desire to object further to this document that it was just lent to me this morning when court convened and I have not read it.

The Court: If you want to object on some other ground later, the opportunity will be given to you.

Mr. McRoberts: Now, if Your Honor please, I would like to state into the record that there were three supplements to this contract which were entered into, the first under date of June 27, 1941; the second under date of September 10, 1941; and the third under date of January 26, 1942, the general effect of which was merely to extend the scope of the work by reason of an enlargement of the plant. For [fol. 1466] my purpose I do not propose to offer those supplements in evidence, but I have advised Judge Bond that he might have an opportunity to examine them and if there is any part of them he deems material, I will be glad—

Mr. Bond: I will have an opportunity to put it in the record?

Mr. McRoberts: Yes, sir.

Q. (Mr. McRoberts) Now Mr. Casteel, in addition to the work which you did, which the Western Cartridge Company did in the acquisition and installation of the equipment in the plant, did the United States Cartridge Company enter into a contract with the Government for the operation of the plant? A. It did.

Q. I have already shown you the document which has been identified as "Defendant's Exhibit No. 20" and I ask you if that is the contract between the defendant in this case and the Government providing for the operation of the St. Louis Ordnance plant? A. It is.

Q. And did the United States Cartridge Company following the execution of this contract proceed to operate the St. Louis Ordnance plant in accordance with its terms?

A. It did.

Q. And except for certain supplements of this contract to which I will refer later on, was this the only contract [fol. 1467] between the company and the United States Government for the operation of that plant? A. It was.

Q. And were all operations carried on between the United States Cartridge Company at the St. Louis Ordnance plant, carried on pursuant to this contract and its supplements? A. They were.

Q. Or to put that question in a different way, did the United States Cartridge Company do any work at the St. Louis Ordnance Plant for any other branch of the Government or for anyone else in or out of the Government, except this contract, Defendant's Exhibit 20?

Mr. Bond: Object; that is a conclusion on the part of the witness.

Mr. McRoberts: We were not engaging in any other activities, we made no ammunition for anyone else except the ammunition under this contract.

The Court: He may answer subject to the objection.

A. The only business that was carried on there was under the terms of the contract and its supplements. Now the supplements covered some activities that were not mentioned in the contract.

Q. I am going to bring those supplements out. I am merely trying to exclude other branches of the Government. Were there other contracts of the Ordnance Department with any outside interests?

[fol. 1468] A. There were not.

Q. Were all products then produced by the United States Cartridge Company at the St. Louis Ordnance Plant dur-

ing this entire period of operation produced in pursuance of contract, Defendant's Exhibit 20 and various supplements thereto?

Mr. Bond: Object as calling for a legal conclusion.

(Last preceding question was read)

Mr. Bond: That is a legal conclusion that everything they did out there was pursuant to contract.

Mr. McRoberts: I am not attempting to ask that particular question.

Q. Did you manufacture any cartridges or any ammunition or any products for anyone other than the United States Government out there? A. No.

Q. And were all of the products manufactured for the United States Government, manufactured under this contract?

Mr. Bond: Objected to as leading.

The Court: Overruled.

Q. This contract and its supplements? A. They were.

Q. Now Mr. Casteel this contract appears to cover ammunition, and I don't know whether it is defined in here. What kind of ammunition is it that you manufactured out there? I am not referring to quality.

[fol. 1469] A. Thirty calibre and fifty calibre small arms ammunition is various types of ball and armor-piercing.

Q. Was it all military? A. All military.

Q. You manufactured no sporting or commercial ammunition such as the American Cartridge Company manufactures in its ordinary activities? A. None whatsoever.

Mr. McRoberts: I offer in evidence Defendant's Exhibit No. 20, and I call the Court's particular attention to these parts of the contract. It is dated December 5, 1940. It recites:

> "Whereas, the Government contemplates entering into contracts, hereinafter referred to as Collateral Contracts, with other parties for construction, including designing, engineering and installation and manu-

facture of the facilities incident thereto of a plant hereinafter described in Title One.

"And, whereas, the Government contemplates entering into a contract of even date herewith with the Western Cartridge Company." That is the other contract, Defendant's Exhibit 20.

"And, whereas, the Government desires to have the contractor as an independent contractor on a cost-plus basis to make all necessary preparations for the operation of the plant and so forth.

[fol. 1470] "Now, therefore, it is agreed as follows:"

Mr. Bond: What page?

Mr. McRoberts: The plant is described. And over on page 5 there is a statement of the work which the contractor is to do which in substance was, the contractor shall perform all organization service and as each operating line of the plant is completed the contractor shall proceed to operate it for the manufacture of ammunition, and when all operating lines of the plant have been completed and ready for operation, the contractor shall operate the plant until the quantities set forth herein have been manufactured, and that the contractor agrees to manufacture subject to the terms and conditions hereof quantities of ammunition. And then are set forth various many numbers of rounds of different kinds and classes of military ammunition that was to be made at that plant. The contract provides that the Government shall furnish all smokeless powder required for the foregoing ammunition. The contract further provides that the armor piercing core shall not be manufactured at this plant by this contractor but shall be furnished by the Government. Furnished by McQuay-Norris in its operation of the one portion of the plant. The contract provides on page 7:

"It is the understanding of the parties hereto and the intention of this contract that all work, including the handling of funds under this Title One is to be [fol. 1471] performed at the expense and risk of the Government, and that the Government shall indemnify and hold the contractor harmless against any loss, expense, damage or liability of any kind whatsoever

arising out of or in connection with the performance of the work under this Title One, except of course in the event that such loss, expense, damage or liability is due to the personal failure on the part of the corporate officers of the contractor or other representatives of the contractor having supervision and direction of the operation of the plant as a whole to exercise good faith or that degree of care which is normally exercised in the conduct of the contractor's business."

Then it provides that the contractor shall be paid a fixed fee per thousand cartridges, varying from time to time, produced at the plant. It provides that the Government shall bear all costs and expense of every character and description incurred by the contractor under this contract when approved in advance or subsequently and subsequently ratified by the Contracting Officer, which costs and expenses shall include but shall not be limited to the following items: And then there is a detail of various elements of cost.

There is a provision in the contract for advancing—it is rather lengthy, but it provides for the Government from time to time to advance to the contractor the funds with which to purchase material and meet pay rolls and operate [fol. 1472] the plant, which fund shall be held and accounted for in accordance with the special restrictions and limitations set forth herein. Such restrictions, for example, being this:

"All funds received as advance payments under this contract together with all funds received as reimbursement for the cost of work under Article 2b of this contract, shall be deposited in a special bank account or accounts separate from the contractor's general or other funds, and shall be especially designated and shall be used only for the purpose set forth herein. The Government reserves the right to terminate the contract at any time when it deems it to the best interest of the Government to do so. The extent and character of the work to be done by the contractor under this contract shall be subject to approval of the Contracting Officer."

And then this provision, page 21:

"The title to all work, under this contract, completed or in the course of construction or manufacture, and to all the ammunition manufactured or in process of being manufactured, shall be in the Government. Likewise, upon delivery at the site of the work or at an approved storage site, title to all purchased materials, tools, machinery, equipment and supplies for which the contractor shall be entitled to be reimbursed under Title Two hereof, shall vest in the Government. The Government shall bear all [fol. 1473] risk incident to such ownership."

In other words, the contractor carries no insurance.

"This provision as to title being vested in the Government shall not operate, however, to relieve the contractor from any duties imposed upon it under the terms of this contract. The Government reserves the right to furnish not only smokeless powder, but any other materials that might be required."

It is provided that any dispute shall be settled by the Government; that the contractor's organizations and methods under which it proposes to carry out the contract should be submitted to the Government and approved by the Government. That the Government reserves the right to make changes from time to time, and other provisions which may be material.

I offer in evidence "Defendant's Exhibit No. 20."

Mr. Bond: Your Honor please, I desire to make the same objections to the reception in evidence of this contract as I made to the offer of the contract with the Western Cartridge Company, which I believe has been marked Exhibit 22. And to amplify those objections and calling the Court's attention to the fact I object to it on the same grounds as I did on Exhibit 22, I desire to further point out that the Fair Labor Standards Act does not exclude from its operation goods produced for the Government, nor for materials made, nor when made from [fol. 1474] materials the title to which may be in the Government.

The Court: It will be received subject to the objection;

[fol. 1475] Defendant's Exhibit 20.

Original Contract in Treasurers Files.

Copy to J. M. Olin 1/16/41
" " B. E. Bassett
" " Booz, Frye, Allen & Hamilton

Contract No. W-ORD-491

Cost-Plus-A-Fixed-Fee Operation Contract
War Department

Contractor: United States Cartridge Company, Baltimore, Maryland

Fixed Fee for Operation: $ 2.00 per thousand cartridges, Bal. Cal. .30, M2;

$ 3.60 per thousand cartridges, A. P., Cal. .30, M2;

$ 3.00 per thousand cartridges, Tracer, Cal. .30, M1;

$11.00 per thousand cartridges, A. P., Cal. .50, M1;

$10.00 per thousand cartridges, Tracer, Cal. .50, M1;

Contract for: Operation of a plant for the manufacture of Caliber .30 and Caliber .50 Small Arms Ammunition of all types.

Place: St. Louis, Missouri.

Estimated Cost of Operating the Plant: $87,279,790.00

Payments to be made by the Finance Officer, U. S. Army, at:
St. Louis, Missouri

(Seal)

The supplies and services to be obtained by this instrument are authorized by, are for the pur-

poses set forth in, and are chargeable to the following Procurement Authorities, the available balances of which are sufficient to cover the cost of the same.

ORD 8026 P11-0270 A 1005-01

L. H. CAMPBELL, JR.,
Brig. Gen., U. S. Army

This contract is authorized by the following laws:

Act of July 2, 1940 (Public No. 703, 76th Cong.)

[fol. 1476] Cost-Plus-A-Fixed-Fee Operation Contract.

This Contract, entered into this 5th day of December, 1940, by the United States of America, hereinafter called the Government, represented by the Contracting Officer executing this contract, and The United States Cartridge Company, Baltimore, Maryland, a corporation organized and existing under the laws of the State of Maryland, with its principal office in Baltimore, Maryland, hereinafter called the Contractor, witnesseth that:

Whereas, The Government contemplates entering into contracts (hereinafter referred to as the "Collateral Contracts") with other parties for the construction, including the design and engineering, and installation of manufacturing facilities incident thereto, of a plant hereinafter described in Title I; and

Whereas, The Government contemplates entering into a contract of even date herewith with the Western Cartridge Company, East Alton, Illinois, (hereinafter referred to as "Western") for management service covering supervision, direction and control of the production aspects of the layout, engineering and construction (including plant and equipment layouts) of said plant; for training of key personnel; and for procurement, supervision of layout, and supervision of installation (including supervision of plans therefor) of manufacturing facilities; and

Whereas, The Contractor is a wholly-owned subsidiary of Western; and

Whereas, Western proposes to execute a performance bond running to the Government substantially similar to United States Standard Form No. 25 (Revised) in an unlimited amount to secure the performance by the Contractor of all the undertakings, covenants, terms, conditions, and agreements of this contract; and

Whereas, The Government desires to have the Contractor, as an independent contractor on a cost-plus-a-fixed-fee basis, make all necessary preparations for the operation of said plant, including the training of operating personnel (other than the key personnel required to be trained by Western under the terms of its contract with the Government previously referred to), but excluding the procurement and supervision of the installation of manufacturing facilities; and operate said plant; and

Whereas, the accomplishment of the above-described work under a cost-plus-a-fixed-fee contract entered into after negotiations approved by the Secretary of War, and without advertising for proposals, is authorized by law; and

[fol. 1477] Whereas, as a result of such negotiations, the Secretary of War has directed that the Government enter into such a contract with the Contractor for the accomplishment of the above-described work;

Now, Therefore, the parties hereto do mutually agree as follows:

[fol. 1478]

Title I.

Operation.

Article I-A—Description of Plant.

The small arms ammunition plant (hereinafter referred to as "the Plant") to be provided under the Collateral Contracts and under the contract between the Government and Western of even date herewith shall comprise a plant

located at one or more places at or near St. Louis, Missouri, for the manufacture of Caliber .30 and Caliber .50 Ammunition of certain types as specified in Article I-B (hereinafter sometimes referred to as the "Ammunition"), having a daily capacity as follows:

2,000,000 rounds packed and ready for shipment of Caliber .30 Ammunition, of which sixty-five percent (65%) is to be Ball, twenty percent (20%) Armor Piercing, and fifteen percent (15%) Tracer Cartridges;

1,200,000 rounds packed and ready for shipment of Caliber .50 Ammunition, of which eighty percent (80%) is to be Armor Piercing and twenty percent (20%) Tracer Cartridges.

Said Plant shall include parts manufacturing and loading buildings, powder storage area separate from manufacturing and loading units and removed from populous area, administration buildings, training school, magazines, shops, railroads (including connections, sidings and industrial railroads), roads, curbs, sidewalks, planting, sewers, steam lines, air lines, electric lines, telephone lines, fencing, lighting, power house, water system, staff dwellings, cafeterias, guard quarters, fire fighting and housing thereof, and other buildings necessary or appropriate for a plant of the approximate capacity aforesaid, with storage buildings in connection with the manufacturing and loading units adequate for about one (1) day's supply of incoming powder and twenty (20) days' supply of other materials and about two (2) days' production of finished product. There shall be included a testing range at least 2000 yards in length with adequate safety width and length, or arrangements made for such testing elsewhere, with all necessary buildings, instruments, and equipment for testing. The powder storage area shall be of such capacity as to provide about thirty (30) days' storage of powder and about thirty (30) days' storage of finished Ammunition. The said Plant shall conform, insofar as is practicable, with the designs, drawings, specifications, details, standards and safety practices which are on file in the offices of The Quartermaster General or Chief of Ordnance.

[fol. 1479] Article I-B—Statement of Work.

1. The Contractor shall perform all organization service in connection with the planning of and the making of all necessary preparations for the operation of the Plant, including the training of operating personnel (other than the key personnel required to be trained by Western under the terms of its contract with the Government of even date herewith), in the Plant when available, or at a school to be set up under the Collateral Contracts and said Western contract, but excluding the procurement and supervision of installation of manufacturing facilities; and all other services incident to setting up an efficient and going operating force.

2. As each operating line of the Plant is completed under the Collateral Contracts and the contract with Western previously referred to, and is ready for operation, the Contractor shall proceed to operate it for the manufacture of Ammunition. When all operating lines of said Plant shall have been completed and ready for operation (irrespective of whether or not the construction and equipment of the remainder of said Plant shall have been completed) the Contractor shall so notify the Contracting Officer in writing, and the Contractor shall operate said Plant until the quantities of Ammunition listed in Section 3 of this Article I-B shall have been manufactured.

3. The Contractor agrees to manufacture, subject to the terms and conditions hereof, the following quantities of Ammunition:

(a) 150,000,000 rounds, packed and ready for shipment, Cartridges, Ball, Cal. .30 M2, as per Drawing Number B-137544, dated September 20, 1940, and drawings and specefications as listed thereon, of which a minimum of fifty per cent (50%) shall be of Aircraft Grade.

(b) 150,000,000 rounds, packed and ready for shipment, Cartridges, Armor Piercing, Cal. .30 M2, as per Drawing Number B-138194, dated September 20, 1940, and drawings and specifications as listed thereon, of which a minimum of seventy-five per cent (75%) shall be of Aircraft Grade.

(c) 100,000,000 rounds, packed and ready for shipment, Cartridges, Tracer, Cal. .30 M1, as per Drawing Number

B-6764, dated September 20, 1940, and drawings and specifications as listed thereon, of which a minimum of sixty per cent (60%) shall be of Aircraft Grade.

(d) 280,000,000 rounds, packed and ready for shipment, Cartridges, Armor Piercing, Cal. .50 M2, as per Drawing Number C-69930, dated September 20, 1940, and drawings and specifications as listed thereon, of which a minimum of eighty-seven per cent (87%) shall be of Aircraft Grade.

[fol. 1480] (e) 53,000,000 rounds, packed and ready for shipment, Cartridges, Tracer, Cal. .50 M1, as per Drawing Number C-44843, dated September 20, 1940, and drawings and specifications as listed thereon, of which a minimum of eighty per cent (80%) shall be of Aircraft Grade.

While the Contractor shall make every reasonable effort to manufacture Ammunition conforming to the specifications referred to herein it is recognized that variances therefrom are unavoidable and the Contractor shall, if possible, at the direction of the Contracting Officer, re-work rejected Ammunition and shall not be responsible for Ammunition finally rejected.

The Government shall deliver to the Contractor at the time of execution of this contract copies of the above Drawing Numbers, B-137544, B-138194, B-6764, C-69930, and C-44843, all dated September 20, 1940, and drawings and specifications listed thereon, which will be identified by the signatures of the parties appearing on the copies of such Drawing Numbers in the office of the Chief of Ordnance.

4. Upon written notice to the Contractor not less than ninety (90) days before the completion of the manufacture of the total quantity of any type of Ammunition specified herein, the Government may place additional orders for any quantity of such type of Ammunition upon terms which shall be mutually agreed upon after negotiation by the parties to this agreement.

5. The Government shall furnish all smokeless powder required for the foregoing Ammunition, when and as requisitioned from time to time by the Contractor, and which will be delivered from time to time, f. o. b. said Plant, in

sufficient quantities and of a satisfactory quality to enable the Contractor to carry out the delivery schedule for loaded Ammunition established from time to time by the Contractor with the approval of the Contracting Officer: Provided, however, that if at any time during the period of operation under this Title I, the smokeless powder manufactured by Western shall be approved by the Government for use in the manufacture of Ammunition under Government specifications, the Government may require the Contractor to furnish such powder manufactured by Western as may be required for the purposes of this contract, under terms and conditions to be mutually agreed upon after negotiations between the parties hereto. The Contractor shall be under no obligation to accept or to store or permit to be stored at said Plant any explosives which in the opinion of the Contractor would render the work to be done by the Contractor herewith or the operations at said Plant hazardous beyond what is usual in the normal operation of an ammunition plant of the type provided for herein.

[fol. 1481] 6. It is understood and agreed that in the manufacture of Ammunition provided for in this Title I, the Contractor will not manufacture at the Plant the Armor Piercing Cores necessary for the Ammunition provided for in items (b) and (d) of Section 3 of this Article I-B. Such Cores shall be procured by the Contractor from commercial sources, Provided, however, that if the Contractor encounters difficulty in procuring such cores, it will apply to the Chief of Ordnance for assistance.

7. The Government reserves the right to furnish any materials necessary for the operation of the Plant, upon so notifying the Contractor prior to any commitment by the latter therefor. In the operation of the Plant the Contractor shall be free (but shall not be obligated) to use any materials of its own or Western's manufacture, upon advising the Government in advance as to the prices at which and the conditions upon which such materials will be supplied. In the event the Government is able to obtain material of equal quality and quantity at a lower price or on more favorable conditions from any responsible competitive source or from its own manufacture, it may undertake to do so upon so informing the Contractor within ten (10)

days after being advised of the Contractor's or Western's price for such material, the Contractor or Western first having the right to meet such lower price or more favorable conditions.

8. The Contractor shall be under no obligation to operate said Plant or any part thereof, under this Title I if in its opinion such operation would be hazardous beyond what is usual in the normal operation of an ammunition plant of the type provided for herein, due to the manner in which the same has been constructed and equipped by the Construction Contractor under the Collateral Contracts.

9. It is the understanding of the parties hereto, and the intention of this contract, that all work, including the handling of funds, under this Title I is to be performed at the expense and risk of the Government and that the Government shall indemnify and hold the Contractor harmless against any loss, expense, damage or liability of any kind whatsoever arising out of or in connection with the performance of the work under this Title I, except to the extent that such loss, expense, damage or liability is due to the personal failure on the part of the corporate officers of the Contractor or of other representatives of the Contractor having supervision and direction of the operation of the Plant as a whole, to exercise good faith or that degree of care which they normally exercise in the conduct of the Contractor's business.

[fol. 1482] Article I C—Estimates.

It is estimated that the total cost of the Contractor's performance under Title I of this contract will be approximately Eighty Seven Million Two Hundred Seventy Nine Thousand Seven Hundred Ninety Dollars ($87,279,790.00), exclusive of the Contractor's fee, and that the total quantity of Ammunition to be manufactured under this Title I will have been delivered to the Government within twenty five (25) months from the signing of this contract. It is expressly understood, however, that the Contractor does not guarantee the correctness of these estimates. The estimates set forth above are based upon the estimates agreed to by both the Government and the Contractor.

copies of which are on file in the office of the Chief of Ordnance.

Article I-D—Consideration.

In consideration for its undertaking under this Title I the Contractor shall receive the following which shall constitute complete compensation for the Contractor's services under this Title I, including profit:

1. Reimbursement for expenditures as provided in Title II.

2. Fixed-fees as listed below for operation of the Plant which fees shall constitute complete compensation for the Contractor's services under this Title I, including profit.

(a) Two Dollars ($2.00) fixed-fee per 1000 rounds packed and ready for shipment for the cartridges, Ball, Cal. .30 M2, and

(b) Three Dollars and Sixty Cents ($3.60) fixed fee per 1000 rounds packed and ready for shipment for the Cartridges, Armor Piercing, Cal. .30 M2; and

(c) Three Dollars ($3.00) fixed-fee per 1000 rounds packed and ready for shipment for the Cartridges, Tracer, Cal. .30 M1; and

(d) Eleven Dollars ($11.00) fixed-fee per 1000 rounds packed and ready for shipment for the Cartridges, Armor Piercing, Cal. .50 M2; and

(e) Ten Dollars ($10.00) fixed-fee per 1000 rounds packed and ready for shipment for the Cartridges, Tracer, Cal. .50 M1.

3. The above fees shall apply on all cartridges used by the Government in its independent testing in connection with lots accepted by the Government.

[fol. 1483] Article I-E—Authority of the Contractor.

In carrying out the work under this Title I the Contractor is authorized to do all things necessary or con-

venient in and about the operating and closing down of the Plant, or any part thereof, including (but not limited to) the employment of all persons engaged in the work hereunder, (who shall be subject to the control and constitute employees of the Contractor), the providing of all materials except such materials as the Government is to furnish or supply, as elsewhere specifically provided herein the storage of raw materials and supplies and of finished Ammunition to the extent of the storage facilities at said Plant, and the loading of Ammunition on cars or other carriers in accordance with the Government's shipping instructions.

Article I-F—Contractor's Inspection System.

The Contractor shall maintain a satisfactory system of inspection, gaging and gage checking concurrent with manufacture, and no ordnance material shall be submitted for the Government inspector's approval which has not previously been inspected by agents of the Contractor and found to be up to the contract standard.

[fol. 1484] Title II.

Cost of the Work and Payment Therefor.

Article II-A—Reimbursement for Contractor's Expenditures.

1. The Government shall bear all costs and expenses of every character and description incurred by the Contractor under this contract, when approved in advance or subsequently ratified by the Contracting Officer, which costs and expenses shall include but shall not be limited to the following items, to wit:

(a) All labor (including guards and fire protection forces), materials, tools, machinery, equipment, designs, plans, supplies, services, power and fuel necessary for either temporary or permanent use for the benefit of the work under this contract.

(b) All subcontracts made in accordance with the provisions of Title I.

(c) Transportation charges on materials, supplies and equipment, including loading and unloading, necessary storage, and transportation charges prepaid by the Contractor on outgoing shipments.

(d) Expenses of procuring labor and expediting the production and transportation of material and equipment.

(e) Salaries of resident engineers, superintendents, timekeepers, accountants, foremen and all other employees of the Contractor in connection with the work. In case the full time of any employee of the Contractor is not applied to the work, his salary shall be included in this item only in proportion to the actual time applied thereto. It is recognized that in transferring men from their regular positions to the Plant, it may be necessary to make some increase in their remuneration, which shall be subject to the approval of the Contracting Officer.

(f) Premiums on such bonds as may be required under Section 4 of Article III-F and under the provisions of Article II-C and such insurance policies as may be required under this contract; the cost of all public liability, employer's liability, workmen's compensation, fidelity, fire, theft, burglary and other insurance that the Contracting Officer may approve as reasonably necessary for the protection of the Contractor.

(g) Losses and expenses, not compensated by insurance or otherwise (including settlements of claims between the Contractor and third parties, made with the written consent of the Contracting Officer), actually sustained by the Contractor in connection with the work and found and certified by the Contracting Officer as not being due to the personal failure on the part of the corporate officers of [fol. 1485] the Contractor or of other representatives of the Contractor having supervision and direction of the operation of the Plant as a whole, to exercise good faith or that degree of care which they normally exercise in the conduct of the Contractor's business.

(h) The cost of reconstructing and replacing any of the work destroyed or damaged, and not compensated by insurance, but expenditures under this item must have the

written authorization of the Contracting Officer in advance. Such reconstruction or replacing shall be considered as additional work under the provisions of Article III-Q.

(i) Payments made by the Contractor under the Federal Social Security Act (employer's contributions), and any applicable state or local taxes, permits, license fees, or other charges which the Contractor may be required to pay on account of or in connection with the work under this contract; and, if approved in writing by the Contracting Officer in advance, royalties on patents, including those owned by the Contractor; and expenses incident to patent searches which may be necessary under the provisions of Article III-R hereof.

(j) Such portion of the transportation, traveling and hotel expense of engineers and other employees of the Contractor as is actually incurred in connection with this work; and, when approved in advance in writing by the Contracting Officer in specific cases, all costs and expenses reimbursed to employees transferred to or from the Plant on account of transportation and living expenses of themselves and their families, losses due to sale of homes at less than the appraisal value as fixed by the Contractor in handling similar matters concerning its employees, unexpired leases, and living expenses while obtaining new residences. It is agreed that all allowances of cost under this item shall conform to and not exceed the ordinary allowances authorized by the Contractor for its employees in the normal conduct of its business.

(k) General administrative and other general expenses of the Contractor (other than expenses which are directly attributable to the work hereunder and are covered by other paragraphs of this Section 1 of Article II-A) deemed for the purpose of this contract to be incident to the operation of the Plant under this contract in the amount of Sixty Thousand Six Hundred Fifteen Dollars ($60,615.00) per month throughout the period required for production of the Ammunition listed in Section 3 of Article I-B of Title I, but such monthly payments shall not exceed twenty (20) in number. The first of such payments shall be made at the close of the first calendar month during which any

completed Ammunition is manufactured by the Contractor in the Plant. Should the period required for production of Ammunition under the terms of this agreement extend beyond the due date of the twentieth payment hereunder, the [fol. 1486] amount of the monthly payment provided in this paragraph (k) shall be renegotiated by the parties hereto.

(l) While the Contractor shall make every reasonable effort to manufacture Ammunition conforming to the specifications referred to in Article I-B, hereof, it is recognized that variances therefrom are unavoidable and the Contractor shall be allowed all costs determined in accordance with this Article II-A for Ammunition reworked because of rejection and for Ammunition finally rejected.

(m) Extra compensation to employees, any discontinuance wages, charges under and a proportionate share of the cost of welfare and other employee relations plans maintained by the Contractor to the extent that such plans are made applicable to its employees at said Plant. In the payment of extra compensation and in the making of expenditures pursuant to or in the maintenance of welfare or other plans for the benefit of employees at said Plant, the Government shall be chargeable therefor, when expressly authorized in writing by the Contracting Officer, insofar as the same are consistent with the Contractor's general employee relations policies throughout its organization, or are incurred pursuant to agreement made as a result of collective bargaining with representatives of employees, it being intended that the employees at said Plant shall be treated no less favorably than employees at other plants in the Contractor's organization.

(n) Accounting (including salaries and other expenses) in connection with special audits of accounts for the Government in connection with the work hereunder.

(o) Expenses in connection with any temporary or permanent closing down of the Plant.

(p) All costs and expenses of every kind and description incurred in the operation of the hospital, cafeteria, or any other facilities operated by the Contractor in connection with the work.

(q) It is recognized by the parties hereto that most of the operating personnel (other than the key personnel required to be trained by Western under its contract with the Government of even date herewith) of the Plant will have to be trained to some extent, at a school for this purpose to be set up at or near the site of the Plant or in the Plant. For the expenses of training personnel at the school referred to herein or at the Plant the Contractor shall be reimbursed in accordance with the provisions of this Section 1 of Article II-A.

(r) Such other items as should, in the opinion of the Contracting Officer, be included in the cost of the work. When such an item is allowed by the Contracting Officer, it shall be specifically certified as being allowed under this paragraph.

[fol. 1487] 2. The Government reserves the right to pay directly to persons concerned all sums due from the Contractor for labor, materials, or other charges.

3. No salaries of the Contractor's executive officers, no part of the expense incurred in conducting any main office which the Contractor may have elsewhere than at the Plant, no part of the expense incurred in conducting the Contractor's regularly established branch offices, and no overhead expenses of any kind, except as specifically authorized in Section 1 of this Article II-A shall be included in the cost of the work; nor shall any interest on capital employed or on borrowed money be included in the cost of the work.

4. The Contractor shall, to the extent of its ability, take all cash and trade discounts, rebates, allowances, credits, salvage, commissions and direct bonifications, and when unable to take advantage of such benefits, it shall promptly notify the Contracting Officer to that effect and the reason therefor. In determining the actual net cost of articles and materials of every kind required for the purpose of this contract, there shall be deducted from the gross cost thereof all cash and trade discounts, rebates, allowances, credits, salvage, commissions and direct bonifications which have accrued to the benefit of the Contractor. Any

such benefits lost shall be deducted from gross costs to the extent that their loss is due to the personal failure on the part of the corporate officers of the Contractor or of other representatives of the Contractor having supervision and direction of the operation of the Plant as a whole, to exercise good faith or that degree of care which they normally exercise in the conduct of the Contractor's business. Any such benefits lost through the fault of the Government or lost through compliance with the provisions of Section 5 of Article II-C shall not be deducted from gross costs.

5. All revenue from the operations of the hospitals, cafeteria, and all other facilities, or from rebates, discounts, refunds, and the like, shall be accounted for by the Contractor and applied in reduction of the cost of the work under this Title II.

Article II-B—Payments.

1. Reimbursement for Cost.

(a) All payments hereunder shall be subject to the provisions of Section 2 of Article II-C.

(b) The Government shall currently reimburse the Contractor for expenditures made in accordance with Article II-A of this Title II upon certification to and verification by the Contracting Officer of the original certified payrolls for labor, or the original paid invoices for materials, or other original papers, or other evidence satisfactory to the Contracting Officer. Except as otherwise pro- [fol. 1488] vided in Section 1 of Article II A, reimbursement will be made weekly but may be made at more frequent intervals if the conditions so warrant.

2. Payment of the Fixed-Fee.

The fixed-fee provided for in Title I shall be paid monthly as it accrues, dependent upon the quantities and types of Ammunition produced and accepted. If the Contract is terminated due to the fault of the Contractor, no additional payment on account of the fixed-fee will be made.

3. Payments by Contractor.

If any bills for the purchase of material, machinery or equipment, or payrolls covering employment of laborers or mechanics, incurred by the Contractor or by the Sub-Contractor hereunder are not promptly paid by the Contractor or Sub-Contractor as the case may be, and should the Contractor neglect or refuse to pay such bills, or payrolls or to direct any Sub-Contractor to pay such bills or payrolls within five (5) days after notice from the Contracting Officer so to do, the Government shall have the right, provided the same are not disputed in good faith by the Contractor or Subcontractor, to pay such bills or payrolls directly.

4. Failure of Government to Make Payments.

In the event of failure of the Government to make any payments or advances as provided in this Title II (other than by reason of normal delay in the payment of current expenditures incident to the checking by the disbursing officer of statements of such expenditures), the Contractor may suspend its performance hereunder until the full amount of any deficiency shall have been paid. The exercise of this right shall be without prejudice to any other rights or remedies of the Contractor on account of such failure by the Government; and failure of the contractor to exercise such right shall not constitute a waiver thereof with respect to any continuing or subsequent failure on the part of the Government.

Article II-C—Advances.

1. At any time, and from time to time, after the execution of this Contract, the Government, at the request of the Contractor, and subject to the approval of the Chief of Ordnance as to the necessity therefor, shall advance to the contractor without payment of interest thereon by the Contractor, a sum not in excess of thirty percent (30%) of the estimated cost of the work under this contract (as increased or decreased pursuant to the provisions of Article III-Q of Title III). When approximately sixty (60) per cent of said estimated cost (as increased or decreased

pursuant to the provisions of Article III-Q of Title III) shall have been paid under Section 1 of Article II-B, a revised estimate of such costs shall be made by the Contractor; and if it appears that the then estimated [fol. 1489] cost exceeds the amount of the original estimate (increased or decreased as provided above), and the revised estimate is approved by the Chief of Ordnance, the Government shall under the conditions stated above advance to the Contractor without interest, not to exceed thirty per cent (30%) of such excess. Such advance or advances shall be made in each case upon the furnishing of such surety bonds in such penal sums not exceeding the total aggregate advance as the Secretary of War may prescribe; provided that the Secretary of War shall have prescribed the furnishing of a surety bond in connection with such advances as security additional to that provided for in this contract; and provided, further, that if at any time the Secretary of War deems the security for any advance or advances theretofore made inadequate, the Contractor shall furnish on demand such other security, in the form of a surety bond or surety bonds, as will be satisfactory to the Secretary of War; but at no time shall the contractor be required to maintain in force a surety bond or surety bonds, the total aggregate penal sums of which exceed the aggregate amount of the advances authorized by the Secretary of War under this contract. It is understood that the government will advance to the Contractor, pursuant to this Article II-C, the sums currently necessary to the Contractor, for working capital, to carry on the work contemplated under this contract, not in excess of 30% of the estimated cost of such work.

2. Whenever there shall be paid to the Contractor, pursuant to section 1 of Article II-B of this contract reimbursement which, when added to the advance payment or payments made pursuant to Section 1 of this Article II-C, shall equal the full amount of the estimated cost of said work under this contract (as increased or decreased pursuant to the provisions of Section 1 of this Article II-C), no additional payment on account of said work shall be made to the Contractor by the Government until said advance payments are expended; provided, however, that if the

total cost of the work shall be in excess of the amount so paid to the contractor including said advance payments, the Government upon presentation of satisfactory evidence, shall currently and promptly reimburse the Contractor to the extent of such excess cost (subject to any delay in the availability of appropriated funds); provided, further, that if upon termination of the contract for other than the fault of the Contractor there shall remain due the Government from the Contractor any sum theretofore advanced by the Government under this contract and not fully liquidated as above provided the same shall be deducted from any payments due the Contractor and any remaining balance of such sums shall be returned to the Government forthwith after final audit by the Government of all accounts hereunder.

3. In the event of cancellation or termination of this Contract because of the fault of the Contractor, the Contractor agrees to return to the Government, upon demand, without set-off of any sum alleged to be due the Contractor, the outstanding balance of any advance payment. Furthermore, if, in the opinion of the Chief of Ordnance the unliquidated balance of the advance or advances made [fol. 1490] by the Government under this contract exceeds the amount necessary for the current needs of the Contractor, as determined by the Chief of Ordnance, the amount of such excess shall, upon demand made by the Chief of Ordnance, be promptly returned to the Government and will be credited against the balance due the Government for advances previously made. If the demand made in either event set forth above is not met within fifteen (15) days after the receipt of such demand by the Contractor, the amount demanded will bear interest at the rate of six per cent (6%) per annum from the date of the demand until payment is made.

4. All funds received as advance payments under this contract together with all funds received as reimbursements for the cost of the work under Article II-B of this contract, shall be deposited in a special bank account or accounts separate from the Contractor's general or other funds. Such special bank account or accounts shall be so

designated as to indicate clearly to the bank their special character and purpose and shall be used by the Contractor exclusively as a revolving fund for carrying out the purposes of this contract, and not for the general business of the Contractor. Balance in such special account or accounts shall at all times secure the repayment of such advances in connection with which the special account or accounts are opened, and the Government shall have a lien upon such balances to secure the repayment of such advances, which lien shall be superior to any lien of the bank upon such account or accounts by virtue of assignment to it of such contract or otherwise. Provided, however, that any bank in which such funds are deposited shall have no obligation whatever with respect to the use or disposition by the Contractor of funds withdrawn from such account or accounts or be liable for misuse by the Contractor of funds withdrawn prior to the receipt by such bank of notice from the Ordnance Department or the order of a court of competent jurisdiction directing it to refrain from permitting withdrawals by the Contractor. The Contracting Officer shall at all times be afforded proper facilities for inspection and audit of such special bank account or accounts.

5. The Contractor shall not pay to any third party for services in advance nor pay for materials or supplies in advance of delivery at the site of the work or at an approved storage site, any of the sums previously advanced to it by the Government under the provisions of this contract without the prior written approval of the Contracting Officer.

[fol. 1491]

Title III.

General Provisions.

Article III-A—Status of Contractor.

It is expressly understood and agreed by the Contractor and the Government that in the performance of the work provided for in this contract, the Contractor is an independent contractor and in no wise an agent of the Government.

Article III-B—Termination of Contract by Government.

1. Should the Contractor at any time refuse, neglect, or fail to prosecute the work with promptness and diligence, or default in the performance of any of the agreements herein contained, or should conditions arise which make it advisable or necessary in the interest of the Government to cease work under this contract, the Government may terminate this contract by reasonable notice in writing from the Contracting Officer to the Contractor. Such termination shall be effective in the manner and upon the date specified in said notice and shall be without prejudice to any claims which the Government may have against the Contractor. Upon receipt of such notice the Contractor shall, unless the notice directs otherwise, immediately discontinue all work and the placing of all orders for materials, facilities and supplies in connection with performance of this contract and shall proceed promptly to notify all vendors with whom the Contractor has placed orders to cease work on such orders and notify all Sub-Contractors to terminate work under all Sub-Contracts insofar as such orders or work are chargeable to this contract; Provided however, that if termination is based on the advisability or necessity of ceasing work under this contract in the interest of the Government, the termination notice shall specify that the Contractor be permitted to operate the Plant for one hundred and sixty (160) working hours (which is estimated as the time necessary for the completion of Ammunition in process of manufacture) after the delivery of such notice to the Contractor.

2. If this contract is terminated due to the fault of the Contractor, the Contracting Officer may enter upon the premises and take possession of the Plant and all manufacturing facilities, materials, work finished or in process, and supplies, title to which has been acquired by the Government under this contract.

3. Upon the termination of this contract as hereinbefore provided, full and complete settlement of all claims of the Contractor arising out of this contract shall be made as follows:

[fol. 1492] (a) The Government shall assume and become liable for all obligations, commitments and claims that the Contractor may have theretofore in good faith undertaken or incurred in connection with said work and in accordance with the provisions of this contract; and the Contractor shall as a condition of receiving the payment mentioned in this Article, execute and deliver all such papers and take all such steps as the Contracting Officer may require for the purpose of fully vesting in the Government the rights of the Contractor under such obligations or commitments.

(b) The Government shall reimburse the Contractor for all expenditures made in accordance with Title II, not previously reimbursed, and except as otherwise provided in this contract shall pay to the Contractor all fees and lump-sum payments which have accrued at the date of termination.

(c) If this contract is terminated for the convenience of the Government, the Government shall reimburse the Contractor for such further expenditures after the date of termination for the protection of Government property and for accounting services in connection with the settlement of this contract and other expenses incident thereto as the Contracting Officer may approve.

(d) The obligation of the Government to make any of the payments required by this contract, shall be subject to any unsettled claims for labor or material or any claim the Government may have against the Contractor under this contract.

Article III-C—General.

1. The Contracting Officer may require the Contractor to dismiss from the work any employee the Contracting Officer deems incompetent or whose retention is deemed to be not in the public interest, subject however to appeal under the provisions of Article III-O for reinstatement of such employee.

2. At all times the Contractor will use all reasonable efforts in all acts hereunder to protect and subserve the interest of the Government.

3. At all times during the progress of the work, the Contractor will keep at the Plant a duly appointed and qualified representative who shall receive on the part of the Contractor such notices and other communications as the Contractor may give.

[fol. 1493] Article III-D—Walsh Healey Act.

1. The following representations and stipulations pursuant to the Walsh Healey Public Contracts Act (Act of June 30, 1936; 49 Stat. 2036; 41 USC 35-45), shall apply to the performance of this contract:

"(a) The Contractor is the manufacturer of or a regular dealer in the materials, supplies, articles, or equipment to be manufactured or used in the performance of the contract.

"(b) All persons employed by the Contractor in the manufacture or furnishing of the materials, supplies, articles, or equipment used in the performance of the contract will be paid, without subsequent deduction or rebate on any account, not less than the minimum wages as determined by the Secretary of Labor to be the prevailing minimum wages for persons employed on similar work or in the particular or similar industries or groups of industries currently operating in the locality in which the materials, supplies, articles, or equipment are to be manufactured or furnished under the contract: Provided, however, that this stipulation with respect to minimum wages shall apply only to purchases or contracts relating to such industries as have been the subject matter of a determination by the Secretary of Labor.

"(c) No person employed by the Contractor in the manufacture or furnishing of the materials, supplies, articles, or equipment used in the performance of the contract shall be permitted to work in excess of 8 hours in any 1 day

or in excess of 40 hours in any 1 week, unless such person is paid such applicable overtime rate as has been set by the Secretary of Labor.

"(d) No male person under 16 years of age and no female person under 18 years of age and no convict labor will be employed by the Contractor in the manufacture or production or furnishing of any of the materials, supplies, articles, or equipment included in the contract.

"(e) No part of the contract will be performed nor will any of the materials, supplies, articles, or equipment to be manufactured or furnished under said contract be manufactured or fabricated in any plants, factories, buildings, or surroundings or under working conditions which are insanitary or hazardous or dangerous to the health and safety of employees engaged in the performance of the contract. Compliance with the safety, sanitary, and factory inspection laws of the State in which the work or part thereof is to be performed shall be prima facie evidence of compliance with this subsection.

"(f) Any breach or violation of any of the foregoing representations and stipulations shall render the party responsible therefor liable to the United States of America [fol. 1494] for liquidated damages, in addition to damages for any other breach of the contract, in the sum of $10 per day for each male person under 16 years of age or each female person under 18 years of age, or each convict laborer knowingly employed in the performance of the contract, and a sum equal to the amount of any deductions, rebates, refunds, or underpayment of wages due to any employee engaged in the performance of the contract; and, in addition, the agency of the United States entering into the contract shall have the right to cancel same and to make open market purchases or enter into other contracts for the completion of the original contract, charging any additional cost to the original Contractor. Any sums of money due to the United States of America by reason of any violation of any of the representations and stipulations of the contract as set forth herein may be withheld from any amounts due on the contract or may be recovered in a

suit brought in the name of the United States of America by the Attorney General thereof. All sums withheld or recovered as deductions, rebates, refunds, or under-payments of wages shall be held in a special deposit account and shall be paid, on order of the Secretary of Labor, directly to the employees who have been paid less than minimum rates of pay as set forth in such contracts and on whose account such sums were withheld or recovered: Provided, that no claims by employees for such payments shall be entertained unless made within 1 year from the date of actual notice to the Contractor of the withholding or recovery of such sums by the United States of America.

"(g) The Contractor shall post a copy of the stipulations in a prominent and readily accessible place at the site of the contract work and shall keep such employment records as are required in the Regulations under the act available for inspection by authorized representatives of the Secretary of Labor.

"(h) The foregoing stipulations shall be deemed inoperative if this contract is for a definite amount not in excess of $10,000.00."

2. Stipulation (b) of section 1 of this Article III-D with respect to wages is operative due to determination by the Secretary of Labor of prevailing minimum wage rates for the industry involved.

Article III-E Neutrality Act.

Subsection 12-(g) of the Joint Resolution approved by the President, November 4, 1939, provides:

"No purchase of arms, ammunition, or implements of war shall be made on behalf of the United States by any officer, executive department, or independent establishment of the Government from any person who shall have failed to register under the provisions of this joint resolution."

A copy of the Contractor's Certificate of Registration shall be filed in the office of the Chief of Ordnance.

[fol. 1495] Article III-F—Special Provisions.

1. The extent and character of the work to be done by the Contractor under this contract shall be subject to the approval of the Contracting Officer. In the event that there should be any dispute with regard to the extent and character of the work to be done, the decision of the Contracting Officer shall govern, but the Contractor shall have the right of written appeal pursuant to the provisions of Article III-O of this Title III.

2. The Government shall furnish the Contractor such available schedules of preliminary data, and other available information respecting the work to be done under this contract, and shall make available to the the Contractor such Government designs, drawings, specifications, details, standards and safety practices as are on hand in the office of The Quartermaster General or the Chief of Ordnance and which are applicable to the work to be done under this contract.

3. The title to all work under this contract, completed or in the course of construction or manufacture, and to all the Ammunition manufactured or in the process of being manufactured, shall be in the Government. Likewise, upon delivery at the site of the work, or at an approved storage site, title to all purchased materials, tools, machinery, equipment and supplies, for which the Contractor shall be entitled to be reimbursed under Title II hereof, shall vest in the Government. The Government shall bear all risk incident to such ownership. These provisions as to title being vested in the Government shall not operate however, to relieve the Contractor from any duties imposed upon it under the terms of this contract.

4. The Contractor hereby agrees that it will:

(a) Procure and thereafter maintain such surety bonds and insurance in such forms and in such amounts and for such periods of time as the Contracting Officer may require in writing, provided same are obtainable.

(b) Procure all necessary permits and licenses whenever obtainable; obey and abide by all applicable laws, regula-

tions, ordinances and other rules of the United States of America, of the State, Territory or sub-division thereof wherein the work is done, or of any other duly constituted public authority.

(c) Unless the provisions of this paragraph (c) are waived in writing by the Contracting Officer, reduce to writing every contract in excess of Two Thousand Dollars ($2,000.00) made by it for the purpose of the work under this contract for services (except contracts for employment), materials, supplies, machinery, or equipment, or for the use thereof; insert therein a provision that such con- [fol. 1496] tract is assignable to the Government; make all such contracts in its own name, and not bind or purport to bind the Government or the Contracting Officer thereunder.

(d) Enter into no sub-contract for any portion of the work without the written approval of the Contracting Officer. Sub-contracts are defined as contracts entered into by the Contractor with others which involve the performance, wholly or in part, at the site of the work, of some part of the work described in Article I-B of Title I.

5. If the performance of any work under this contract is interrupted or prevented by reason of inability to obtain equipment or essential materials to be used in the manufacture of the Ammunition, or by reason of labor shortage or labor disputes, from whatever cause arising, and whether or not the demands of the employees involved shall be reasonable and within the Contractor's power to concede, or by reason of fire, explosion, accident, sabotage, or any cause beyond its control, whether of a nature similar or dissimilar to those hereinbefore set forth, the Contractor shall be excused from performing work or manufacturing Ammunition while or to the extent that it is prevented from so doing by one or more of such causes, and all such work shall be performed and such Ammunition shall be manufactured as soon as practicable after such disability is removed. It is further understood and agreed that the Contractor shall not be liable for any failure or delay in the performance of this contract, or accountable for the loss or destruction of or damages to any materials, tools, machinery, equipment, supplies, Ammunition or

other property located or stored at said Plant or used in connection with the operation thereof except to the extent that such failure, delay, loss, destruction or damage is due to the personal failure on the part of the corporate officers of the Contractor or of other representatives of the Contractor having supervision and direction of the operation of the Plant as a whole, to exercise good faith or that degree of care which they normally exercise in the conduct of the Contractor's business.

Article III-G—Records and Accounts—Inspection and Audit.

1. The Contractor agrees to keep records and books of account on a recognized cost-accounting basis, showing the actual or agreed cost to it of all items of labor, materials, equipment, supplies, services, and other expenditures of whatever nature for which reimbursement is authorized under the provisions of this contract. The system of accounting to be employed by the Contractor shall be such as is satisfactory to the Contracting Officer.

[fol. 1497] 2. The Contracting Officer shall at all times be afforded proper facilities for inspection of the work and of the special bank account or accounts provided for in Article II-C of Title II, and shall at all times have access to the premises, work and materials, to all books, records, correspondence, instructions, plans, drawings, receipts, vouchers and memoranda of every description of the Contractor pertaining to said work; and the Contractor shall preserve for a period of three (3) years after completion or termination of this contract, all the books, records and other papers herein mentioned, but the Government undertakes and agrees that final audit of the accounts for each calendar year shall be made by the Government not later than six months after the end of each such year.

3. Any duly authorized representative of the Contractor shall be accorded the privilege of examining the books, records and papers of the Contracting Officer relating to the cost of the work for the purpose of checking up and verifying such cost.

Article III-H—Preference for Domestic Articles.

1. In the performance of the work covered by this contract the Contractor, sub-contractors, materialmen or suppliers, shall use only such unmanufactured articles, materials, and supplies as have been mined or produced in the United States, and only such manufactured articles, materials, and supplies as have been manufactured in the United States substantially all from articles, materials, or supplies mined, produced, or manufactured, as the case may be, in the United States. The foregoing provision shall not apply to such articles, materials, or supplies of the class or kind to be used or such articles, materials, or supplies from which they are manufactured, as are not mined, produced, or manufactured, as the case may be, in the United States in sufficient and reasonably available commercial quantities and of a satisfactory quality, or to such articles, materials, or supplies as may be excepted by the head of the department under the provisions of Title III, section 3, of the Act of March 3, 1933, 47 Stat. 1520 (US Code, Title 41, section 10b).

2. Inasmuch as the materials listed below or the materials from which they are made are not mined, produced or manufactured, as the case may be, in the United States in sufficient and reasonably available commercial quantities and of satisfactory qualities, their use in the work herein specified is hereby authorized without regard to the country of origin:

Asbestos	Chromium	Nickel	Silk
Balsa Wood	Cork	Nickel Alloy	Sisal
China Wood Oil	Iridium	(Monel Metal)	Teak Wood
(Tung oil)	Jute	Platinum	Tin
	Kaurigum	Rhodium	
	Lac	Rubber	

[fol. 1498] Articles, materials, or supplies made in the United States and containing mercury, antimony, tungsten or mica of foreign origin may be used (subject to the requirements of applicable specifications) in the work herein specified, if such manufactured articles, materials or supplies have been made in the United States substantially

all from articles, materials, or supplies mined, produced or manufactured, as the case may be, in the United States.

Article III-I—Convict Labor.

The Contractor shall not employ any person undergoing sentence of imprisonment at hard labor.

Article III-J—Workmen's Compensation Laws.

The Act of June 25, 1936 (49 Stat. 1938, 1939; 40 USC 290), provides that the several States have authority to make their Workmen's Compensation Laws applicable to contracts for the construction, alteration or repair of a public building or public work of the United States and the several States are vested with the power and authority to enforce such State Laws on lands of the United States.

Article III-K—Accident Prevention.

The Contractor shall, at all times, exercise reasonable precautions for the safety of employees on the work and shall comply with all applicable provisions of Federal, State, municipal and local safety laws and building and construction codes.

Article III-L—Officials Not to Benefit.

No member of or Delegate to Congress, or Resident Commissioner, shall be admitted to any share or part of this Contract or to any benefit that may arise therefrom, but this provision shall not be construed to extend to this contract if made with a corporation for its general benefit.

Article III-M—Approval Required.

This contract shall be subject to the written approval of the Secretary of War and shall not be binding until so approved. The date of such approval shall be considered the date of this contract, anything to the contrary herein, notwithstanding.

Article III-N—Covenant Against Contingent Fees.

The Contractor warrants that he has not employed any person to solicit or secure this contract upon any agreement for a commission, percentage, brokerage or contin-[fol. 1499] gent fee. Breach of this warranty shall give the Government the right to terminate the contract, or in its discretion, to deduct from payments due the Contractor the amount of such commission, percentage, brokerage or contingent fee. This warranty shall not apply to commissions payable by Contractor upon contracts or sales secured or made through bona fide established commercial or selling agencies maintained by the Contractor for the purpose of securing business.

Article III-O—Disputes.

Except as otherwise specifically provided herein, all disputes concerning questions of fact arising under this contract shall be decided by the Contracting Officer, subject to written appeal by the Contractor within 30 days to the Chief of Branch concerned or his duly authorized representative, whose decision shall be final and conclusive upon the parties hereto, when the amount involved is $15,000 or less. When the amount involved is more than $15,000, the decision of the Chief of Branch shall be subject to written appeal within 30 days by the Contractor to the Secretary of War or his duly authorized representative, whose decision shall be final and conclusive upon the parties hereto. The Contracting Officer, the Chief of Branch, and the Secretary of War shall act with reasonable promptness in such matters. In the meantime, the Contractor shall proceed diligently with the work. Nothing in this Article III-O shall be construed to deprive the Contractor of its legal remedies.

Article III-P—Contractor's Organization and Methods.

Within a reasonable time after the execution of this contract, the Contractor shall submit to the Contracting Officer a chart showing the executive and administrative personnel to be regularly assigned for full or part-time service in connection with the work under this contract, together

with a written statement of the duties of each person and the administrative procedure to be followed by the Contractor for the control and direction of the work; and the data so furnished shall be supplemented as additional pertinent data become available. There shall also be submitted to the Contracting Officer by the Contractor, charts of the various field organizations showing all personnel, other than artisans, mechanics, helpers, and laborers to be assigned for full or part-time service outside of the central-office organization together with a written statement of the duties and rates of pay of each person and the procedure proposed to be followed by the Contractor for the accomplishment of all field work, including temporary requirements; and the data so furnished shall be supplemented as additional pertinent data become available. Statements of procedure shall include purchasing, disbursing, accounting, transportation, storage, employment, housing, sanitation, subsistence, recreation, and similar essential activities and methods.

[fol. 1500] Article III-Q—Changes.

The Contracting Officer may, at any time, by a written order and without notice to the sureties, make changes in or additions to the drawings and specifications, issue additional instructions, require additional work (subject to the provisions of section 4 of Article I-B hereof), or direct the omission of work covered by the contract. If such changes cause a material increase or decrease in the amount or character of the work to be done under this contract, or in the time required for its performance, an equitable adjustment of the amount of the fixed-fee or lump-sum to be paid to the Contractor shall be made and the contract shall be modified in writing accordingly. Any claim for adjustment under this Article must be asserted within 30 days from the date the change is ordered: Provided, however, That the Contracting Officer, if he determines that the facts justify such action, may receive and consider, and with the approval of the Chief of Branch, adjust any such claim asserted at any time prior to the date of final settlement of the contract. If the parties fail to agree upon the adjustment to be made the dispute shall be determined as provided in Article III-O hereof. But nothing provided

in this article shall excuse the Contractor from proceeding with the prosecution of the work so changed.

Article III-R—Patents and Processes.

The Contractor, during the performance of this contract, shall hold and save the Government, its officers, agents, servants and employees, harmless from liability of any nature or kind, including costs and expenses, for and on account of any invention, article (except ammunition, or materials supplied by the Government), or appliances manufactured or used in the performance of this contract (except appliances [heretofor] used by the Government) upon which letters patent have been issued prior to their manufacture or use in the performance of this contract, including their use by the Government at the Plant; and the Contractor hereby grants to the Government a perpetual royalty free license to practice in the Plant, but not elsewhere, and then only for purposes of National Defense, all patented inventions, secret processes, technical information and know-how owned by the Contractor which may be incorporated in the design or operation of the Plant by the Contractor. In the event that the Contractor has utilized in its operation of the Plant, appliances or processes upon which it is obligated to pay royalties to others, the Contractor will endeavor to secure to the Government the right to the use, after the Contractor shall have ceased operating the Plant, of such appliances or processes on terms not less favorable to the Government than the terms of their use by the Contractor. This license shall not be assignable to any transferee of the Plant or any part thereof, and the [fol. 1501] Contractor reserves the privilege of asserting any and all legal rights in and to such patented inventions, secret processes, technical information and know-how against any person, firm or corporation; provided, however, that the provisions of this Article shall not supersede or modify any existing agreements between the Contractor and the Government applying to any such inventions, processes, information or know-how.

Article III-S Statutory Provisions.

It is understood that the respective undertakings to conform to the requirements of the several statutes herein-

before referred to shall be operative only so long as and to the extent that such statutory requirements are applicable hereunder.

Article III-T—Definitions.

1. The term "Chief of Branch" refers to the Chief of Ordnance or The Quartermaster General.

2. The terms "The Secretary of War" or "Chief of Branch", shall include their duly authorized representatives as the case may be, other than the Contracting Officer.

3. Except for the original signing of this contract, the term "Contracting Officer", shall include his duly appointed successor or authorized representative.

4. The term "Contracting Officer" as used herein refers to the Contracting Officer appointed by the Chief of Ordnance.

Article III-U—Alterations.

The following changes were made in this contract before it was signed by the parties hereto:

Page 7, Paragraph 6, next to last word on next to last line "he" changed to "it".

Page 7, Paragraph 7, in 5th and 12th lines insert the words, "or Western's" after "own" in line 5, and "Contractors," in line 12, and in line 13 insert the words "or Western" after "Contractor".

Page 10, Article II A (b) change Title III to Title I.

With reference to page 11, Paragraph (k), it is understood that the *** amount includes expenses for general administration incurred by Contractor prior to the date when the first payment, if any, accrues and that such monthly payments are cumulative for the 20 month period and shall not be deemed to be necessarily expendable in the amount specified in each month.

Page 2, 3rd whereas clause, line 7, "design" changed to "layout". *amount of the deemed general expense shall beconsidered fixed but such **

[fol. 1502] In Witness Whereof, The parties hereto have executed this contract in triplicate as of the day and year first above written.

THE UNITED STATES OF AMERICA,

L. H. CAMPBELL, JR.,
Brig. Gen., U. S. Army.
(Contracting Officer)

Approval Recommended:

Dec 7, 1940

C. M. WESSON, Major Gen.
Chief of Ordnance.

THE UNITED STATES CARTRIDGE COMPANY,
(Contractor)

By J. M. OLIN, Pres.,
East Alton, Illinois,
(Business Address)

Two Witnesses as to
execution by the Contractor:

SIDNEY De KAY,
New York, N. Y.,
30 Rockefeller Plaza,
(Address)

GRACE L. OLSEN,
New York, N. Y.,
30 Rockefeller Plaza.
(Address)

Approved December 14, 1940. By direction of the Secretary of War.

ROBERT P. PATTERSON,
The Assistant Secretary of War.

10,196 W-ORD-491

[fol. 1503] I, Spencer T. Olin, certify that I am the Secretary of the Corporation named as Contractor herein; that J. M. Olin, who signed this contract on behalf of the Con-

tractor was then President of said Corporation; that said contract was duly signed for and in behalf of said corporation by authority of its governing body, and is within the scope of its corporate powers.

Corporate Seal SPENCER T. OLIN.

I hereby certify that, to the best of my knowledge and belief, based upon observation and inquiry, J. M. Olin, who signed this contract for The United States Cartridge Company, had authority to execute the same; and is the individual who signs similar contracts on behalf of this corporation with the public generally.

L. H. CAMPBELL, JR.,
Brig. Gen., U. S. Army.

[fol. 1504] Performance Bond.

Know All Men by These Presents, That we, The United States Cartridge Company, Baltimore, Maryland, a corporation organized and existing under the laws of the State of Maryland, as Principal, and Western Cartridge Company, East Alton, Illinois, a corporation organized and existing under the laws of the State of Delaware, as Surety, are held and firmly bound unto the United States of America, hereinafter called the Government, in a penal sum unlimited in amount for the payment of which sum well and truly to be made, we bind ourselves, our heirs, executors, administrators, and successors, jointly and severally, firmly by these presents.

The Condition of This Obligation Is Such, that whereas the principal entered into a certain contract No. W-ORD-491 hereto attached, with the Government, dated December 5, 1940, for

"Operation of a plant for the manufacture of Caliber .30 and Caliber .50 Small Arms Ammunition of all types."

Now Therefore, If the Principal shall well and truly perform and fulfill all the undertakings, covenants, terms, conditions, and agreements of said contract during the original term of said contract and any extensions thereof that may be granted by the Government, with or without notice to

he surety, and during the life of any guaranty required under the contract, and shall also well and truly perform and fulfill all the undertakings, covenants, terms, conditions and agreements of any and all duly authorized modifications of said contract that may hereafter be made, notice of which modifications to the surety being hereby waived, then, this obligation to be void; otherwise to remain in full force and virtue.

In Witness Whereof, the above-bounden parties have executed this instrument under their several seals this 5th day of December, 1940, the name and corporate seal of each corporate party being hereto affixed and these presents duly signed by its undersigned representative, pursuant to authority of its governing body.

[fol. 1505] THE UNITED STATES CARTRIDGE COMPANY,
(Corporate Principal)
Baltimore, Maryland,
(Business address)
By J. M. OLIN, President.
.....
(Affix Corporate Seal)

Attest:

SIDNEY G. DE KAY, New York, N. Y.

WESTERN CARTRIDGE COMPANY,
(Corporate Surety)
East Alton, Illinois,
(Business address)
By J. M. OLIN, Vice-President.
.....
(Affix Corporate Seal)

Attest:

SIDNEY G. DE KAY, New York, N. Y.

Certificate as to Corporate Principal.

I, Spencer T. Olin, certify that I am the Secretary of the corporation named as principal in the within bond; that J. M. Olin, who signed the said bond on behalf of the

principal, was then President of said corporation; that I know his signature, and his signature thereto is genuine; and that said bond was duly signed, sealed, and attested for and in behalf of said corporation by authority of its governing body.

SPENCER T. OLIN. (Corporate Seal)

Certificate as to Corporate Surety.

I, Spencer T. Olin, certify that I am the Secretary of the corporation named as surety in the within bond; that J. M. Olin, who signed the said bond on behalf of the surety, was then Vice-President of said corporation; that I know his signature, and his signature thereto is genuine; and that said bond was duly signed, sealed, and attested for and in behalf of said corporation by authority of its governing body.

SPENCER T. OLIN. (Corporate Seal)

W-ORD-491

[fol. 1506] W-ORD-491

Army and Navy Munitions Board
Munitions Building
Washington, D. C.

August 12, 1940.

To be included as part of all Army and Navy contracts or purchase orders for which a preference rating is necessary.

Preference Rating of This Contract or Order.

1. The Army and Navy Munitions Board preference rating assigned to this contract is "ANMB preference A-1"
(Insert rating here)

2. This rating will be placed conspicuously on all subcontracts issued by you and on all orders for materials, services, machine tools, or other items contributory to this contract.

3. The purpose of the preference system is to insure deliveries on the dates specified in the contracts, subcontracts and purchases. In case of conflicts between or among two or more orders, the preference ratings indicate which one is to receive precedence in performance. This is to be interpreted to mean that the highest preference contract will not necessarily be worked on first, but that the highest preference must be completed at the delivery date specified at the expense of all lower preferences. Advantage will not be taken of a high preference rating to secure deliveries of materials, tools, etc., far in advance of their need or in greater quantities than required for that contract.

4. All contractors, subcontractors and their suppliers are requested to report to the contracting officer or the inspector any abuses of the procedure as outlined herein. It is expected that the individual members of industry will freely cooperate in this matter so that the common objectives can be obtained with the minimum amount of government interference with the internal operations of industry.

5. *When and where there is no shortage* in the available supply, nothing in these instructions should be construed to discourage deliveries earlier than those asked for by the purchaser.

6. a. If the completion of this contract, despite the preference rating assigned herein, is, or threatens to be, delayed due to inability to secure essential materials, supplies, [fol. 1507] services, or production machinery, the contractor will report the facts to, and request assistance of the Priorities Committee, Army and Navy Munitions Board. This report shall contain the following information:

Army or Navy Contract; Number W ORD 491; Preference Rating A-1;

Dated Dec. 5, 1940; Signed by L. H. Campbell, Jr., Brig. Gen., U. S. Army;

Delivery Date Within 25 months from date of contract;

For Manufacture of following quantities of ammunition:

(Items and quantities)

300,000,000	rounds	Cartridges, Ball, Cal. .30 M2	
100,000,000	"	" , Tracer " .30 M1	
280,000,000	"	" , Armor Piercing, Cal. .50 M2	
53,000,000	"	" , Tracer Cal. .50 M1	

Brief comments justifying your request for assistance and indicating the nature, location, and extent of difficulties being experienced.

b. Copies of this report shall be furnished the government inspector and the contracting officer.

c. If the request for assistance is approved by the Priorities Committee, such other assistance will be given as may be appropriate and practicable.

L. H. CAMPBELL, JR.,
Brig. Gen., U. S. Army,
Contracting Officer.

[fol. 1508] Mr. Bond: Now in connection with Mr. McRoberts' summary to you of the general nature of the contract, I desire also to call attention to two provisions on page 19. One paragraph, I am quoting:

> "The contractor", that is the United States Cartridge Company, "is the manufacturer of, or a regular dealer in, materials, supplies, articles or equipment to be manufactured or used in the performance of the contract."

And subparagraph C:

> "No person employed by the contractor in the manufacture or furnishing of materials, supplies, articles or equipment used in the performance of the contract shall be permitted to work in excess of eight hours in any one day, or in excess of 40 hours in any one week, unless such person is paid such applicable overtime rate as has been set by the Secretary of Labor."

Q. (Mr. McRoberts) Now, Mr. Casteel, was that contract, Defendant's Exhibit 20, supplemented from time to time? A. It was.

Q. I believe there were a total of some 37 different supplements to that contract?

A. Thirty-seven supplements and change orders.

Q. And change orders? A. Yes, sir.

Q. Now some of those merely added additional numbers [fol. 1509] of cartridges to be produced or made changes in the fees to be paid, or similar changes?

A. That is correct.

Q. Now have you gone through those particular supplements to determine which ones in your opinion contain any changes in the provisions respecting the operation of the plant, and the relationship of the defendant and the Government to the plant, and to the work being done at the plant? A. Yes, sir, I have been through them.

Q. Will you call my attention to the first supplement which contains such provision, please?

A. It changes the work to be done.

Q. Not the extent of the work to be done, but the first supplement that contains any change is the terms of the contract with respect to the manner of operation?

A. Well, on that supplement 7, would probably be the first one. The other [plants] up to that time were increasing the size of the plant.

Q. Will you explain that, Mr. Casteel, please?

A. It was increased, the size and capacity of the plant was increased as war clouds gathered, and it was increased, I believe it was called "waves", there were three increases, over and above the original plan. The first two increases the size of the plant, and the third one simply increases the machinery by putting more machinery in the space that was already there.

[fol. 1510] Q. The second wave more than doubled the size of the plant as originally contemplated?

A. That is correct. And certain changes were made by the supplements to provide for the extension and for the ammunition to be produced through these additional facilities. And they made supplements to show the increased capacity. But the first one that changed the contract much was Supplement 7, which added negotiation amendment, which became a law as soon as the contract was written, and reduced fees and established a Tool Committee. (A paper is marked "Defendant's Exhibit

23"). But all through the 37 supplements the generally favorable terms of the contract were not changed. Nothing was done to the provision you read about title. The Ordnance Department used two systems of supplementing this contract. One was by change order and the other was by supplement. They never were able to give me a satisfactory explanation as to the difference between the two. Those change orders were easier to execute in that they were executed by the commanding officer in the Philadelphia office, whereas the supplements were more of a formal nature and had usually the Chief of Ordnance and sometimes even underscored "Patterson" on them, and they went to Washington. They couldn't explain the difference to me. I asked them many times because I wanted to be sure. They would go along and maybe have five or six change orders, and then make a supplement, what they call "formalized" change orders, and incorporate in [fol. 1511] this order all they had done in the previous change orders.

Mr. Bond: In order that I may get it clear, the original contract covers manufacture of quantities of ammunition set out on page 5? A. Yes, sir.

Mr. Bond: And upon the manufacture of that ammunition, then, that contract is thereupon completed? Is that it?

A. Well, they had a system as far as ammunition was concerned, the Government for some reason that I never did understand, placed orders with us. For instance, the original contract calls for a certain quantity of ammunition and estimated the amount it is going to cost. And then they would decide they wanted more ammunition, so they would come and increase the amount of ammunition which they wanted us to make, and let all those change orders and supplements cover that very point.

Mr. Bond: But after this ammunition was manufactured and accepted, that terminated this contract?

A. No, sir, they kept adding more to the order.

Mr. Bond: And those additional orders were covered by supplementary contracts? A. Yes, sir, change orders.

Mr. Bond: What quantities of ammunition manufactured in addition to those set out on page 5 would be manufactured by the Cartridge Company either under the terms of a change order or supplementary contract?

[fol. 1512] A. That is correct.

The Court: It was both? A. Yes, sir.

Mr. Bond: Was the United States Cartridge Company operated through officers and personnel of the Western Cartridge Company, now Olin Industries?

A. The president of the company and of the United States Cartridge Company at the beginning was the then vice-president of the Western Cartridge Company, but he is now the president of the Olin Industries.

Mr. Bond: All your general officers were also officers or employees of the Western Cartridge Company, now Olin Industries?

A. All of the corporate officers were East Alton people, yes, sir, and were not on salary or anything at the plant.

Q. (Mr. McRoberts) Mr. Casteel, these change orders and the supplements which added additional ammunition, did they provide for that additional ammunition to be manufactured under the terms and provisions of the original contract? A. That is correct.

Mr. Bond: Would the provisions in the supplements refer to the original contract?

A. Yes, sir, they referred to the original.

Q. Are they there? A. Yes, sir.

[fol. 1513] Mr. Bond: Now I understand that these supplements, I am to have opportunity sometime in the near future to examine them and if I feel that in my opinion, with what you have introduced, further material ought to be considered, I will have an opportunity?

Mr. McRoberts: That is correct. I am going to offer everything I think is material, and if Judge Bond wishes to add anything, he may.

Q. (Mr. McRoberts) Mr. Casteel, I will show you a document which has been identified as Defendant's Ex-

hibit 23 and ask you if that is the supplement No. 7 to Defendant's Exhibit 20, to which you have referred?

A. Yes, sir, it is.

Q. And that is the original signed contract? A. It is.

Q. Now is this typical of the form which these supplement agreements take?

A. That is typical of the form of a supplement, it isn't typical of a change order.

Mr. McRoberts: I think I will offer in evidence Exhibit 23 in its entirety then, and will call Your Honor's attention merely to the fact that in addition to increasing the quantities it adds on page 6, it makes a change in Title No. 3 of the original contract by deleting a particular paragraph and substituting a new paragraph with refer-
[fol. 1514] ence to renegotiation under the Renegotiation Act.

Mr. Bond: I make the same objection to the offer of that document as I did to Exhibits 20 and 22.

The Court: It will be accepted subject to objection.

Defendant's Exhibit 23.

Contr No. W-ORD-491 Supp 4
DA W-ORD-34

SUPPLEMENTAL CONTRACT
to
COST-PLUS-A-FIXED-FEE OPERATION CONTRACT

WAR DEPARTMENT

APPROVAL RECOMMENDED:

_____, 1942

C. WESSON L. H. Campbell, Jr.
Major General
Chief of Ordnance

By _____
KURTZ
Colonel, Ord. Dept.
Chief of Finance

_____, 1942
of the Under Secre-

ROBERT J. BROWNING, U. S.,
Chief of Purchase Br.
Procurement and Distri.
Division

This contract is authorized by the following laws: The act approved December 18, 1941 (Pub. Law 354-77th Cong.) and Executive Order No. 9001 dated December 27, 1941.

Contractor: UNITED STATES CARTRIDGE COMPANY, BALTIMORE, MARYLAND.

Supplemental Contract for: Operation additional to that provided in Contract No. W-ORD-491 and previous supplements thereto.

Estimated Cost of Operating the Plant:

(Original)	$ 87,279,790.00
(Additional Supp. 1)	$123,604,375.00
(Additional Supp 6)	$166,040,215.00
(Additional Supp. 7)	$108,782,183.00

Fixed Fees for Operation unchanged by this Supplement.

Place: St Louis, Missouri.

Payments to be made by the Finance Officer, U. S. Army, at: St. Louis, Missouri.

The supplies and services to be obtained by this instrument are authorized by, are for the purposes set forth in, and are chargeable to the following Procurement Authorities, the available balances of which are sufficient to cover the cost of the same.

ORD 24,694 P94 13 A5910.085-2
ORD 36,204 P11-99 A1005-23
ORD 36,206 P11-99 A1005-23
ORD 7670 P2-99 A0141-03
ORD 7669 P2-99 A0141-03
ORD 7887 P11 99 A1005-23
ORD 27152 P11-99 A1005-23

G. H. DREWRY
Colonel, Ord. Dept.

42-5678

SUPPLEMENTAL CONTRACT

THIS SUPPLEMENTAL CONTRACT, entered into this 30 day of June, 1942, by and between the UNITED STATES OF AMERICA, hereinafter called "the Government", represented by the Contracting Officer executing this agreement and the UNITED STATES CARTRIDGE COMPANY, a corporation organized and existing under the laws of the State of Maryland, with its principal office in Baltimore Maryland, hereinafter called the "Contractor,"

WITNESSETH THAT:

WHEREAS, there is now in force between the parties hereto a certain contract which provides for the operation of a plant for the manufacture of Caliber .30 and Caliber .50 small arms ammunition of certain types, said contract bearing approval date of December 14 1940 being identified by the Government as "Contract No W-ORD 491" and being hereinafter sometimes referred to as the "Contract of December 14", and

WHEREAS, the Government has modified said Contract of December 14 by Supplement No 1 thereto, providing for an option in the Government to order operation of the Plant additional to that provided for in the Contract of December 14, and said option has been exercised by letters dated August 22 and September 27, 1941, and

WHEREAS said Contract of December 14 has been further modified by Letters Contract dated June 17, 1941 June 17, 1941, October 10, 1941, and November 17, 1941, said Letters Contract being referred to respectively as Supplements No 2 3 4 and 5, and

WHEREAS, the Government has further modified said Contract of December 14 by incorporating the aforementioned Letters Contract into a formal supplemental contract and has ordered additional quantities of ammunition, said modification having been accomplished by Supplement No 6, and

WHEREAS the Government now desires further to modify said Contract of December 14 to provide for a Small Arms Ammunition Tool Committee and to order additional quantities of ammunition from the Contractor, and the Contractor has agreed to such modification upon the terms, conditions and provisions hereinafter set forth, and

WHEREAS the accomplishment of such work entered into after negotiations approved by the Secretary of War and without advertising for proposals, is authorized by law, and

WHEREAS, as a result of such negotiations, the Secretary of War has directed that the Government enter into a supplemental contract with the Contractor for the accomplishment of the above described additional work,

NOW, THEREFORE the parties hereto do mutually agree that the said Contract of December 14 shall be and it is hereby modified in the following particulars

A. Change Section 3 of Article I-B, Title I, page 5, as previously changed by Supplements No. 1 and 6, to read:

The Contractor agrees to manufacture, subject to the terms and conditions hereinafter set forth, the following quantities of ammunition, including cups:

a. Cartridges, Ball, Caliber .30, M2, of which a minimum of 50% shall be of Aircraft Grade.

(1) 150,000,000 rounds (Contract of December 14)
(2) 487,500,000 rounds (Supplement No. 1)
(3) 577,171,200 rounds (Supplement No. 6)
(4) 580,000,000 rounds (Additional)
1,794,671,200

b. Cartridges, Armor Piercing, Caliber .30, M2, of which a minimum of 50% shall be of Aircraft Grade.

(1) 150,000,000 rounds (Contract of December 14)
(2) 150,000,000 rounds (Supplement No. 1)
(3) 259,102,000 rounds (Supplement No. 6)
559,102,000

c. Cartridges, Tracer Caliber .30, of which a minimum of 50% shall be of Aircraft Grade.

(1) 100,000,000 rounds (Contract of December 14)
(2) 112,500,000 rounds (Supplement No. 1)
(3) 200,060,000 rounds (Supplement No. 6)
412,560,000

d. Cartridges, Armor Piercing, Caliber .50, M2, of which a minimum of 75% shall be of Aircraft Grade.

(1) 280,000,000 rounds (Contract of December 14)
(2) 360,000,000 rounds (Supplement No. 1)
(3) 408,306,000 rounds (Supplement No. 6)
(4) 337,835,100 rounds (Additional)
1,386,141,100

e. Cartridges, Tracer, Caliber .50, of which a minimum of 75% shall be of Aircraft Grade.

(1) 53,000,000 rounds (Contract of December 14)
(2) 90,000,000 rounds (Supplement No. 1)
(3) 143,160,000 rounds (Supplement No. 6)
(4) 78,685,500 rounds (Additional)
364,845,500

f. Ball Bullet Jacket Cups, Caliber .30
(1) 251,000 pounds

g. Cartridge Case Cups, Caliber .30

(1) 2,144,000 pounds

h. Armor Piercing Bul . Jacket Cups, Caliber .50

(X) 2,467,000 pounds

Said ammunition, cases and cups shall be manufactured in accordance with specifications which shall be furnished promptly to the Contractor by the Contracting Officer and the Contracting Officer shall at all times keep the Contractor informed of any changes which may be made in such specifications.

While the Contractor shall make every reasonable effort to manufacture ammunition conforming to the specifications referred to herein it is recognized that variances therefrom are unavoidable and the Contractor shall, if possible, at the direction of the Contracting Officer, re-work rejected ammunition and shall not be responsible for ammunition finally rejected.

B. Change Article I-B of Title I by adding the following Section 10 at the end thereof on page 7:

10. a. The Contractor shall establish in the City of Chicago, Illinois, or in such other city as it may designate, an office to be known as the Office of the Small Arms Ammunition Tool Committee. Said Office shall consist of a Manager and such assistants, clerks, stenographers, engineers, and specialists as may be deemed necessary to the functions of said Committee, and such p. sons shall be employed by the Contractor.

b. The Committee shall include representatives of Remington Arms Company, Inc., U. S. Rubber Company, The Kelly Springfield Engineering Company, Federal Cartridge Corporation, Chrysler Corporation, and the Simmons Company, all of which are presently engaged in establishing and operating Small Arms Ammunition plants for the Government under contracts with the Government. Such representatives will serve on the Committee in an advisory capacity to the Manager and the Contractor shall not be responsible for payment of the salaries and traveling expenses of such representatives.

c. The functions of the Committee shall be to collect, correlate, and analyze information regarding perishable tools to be used in the manufacture of Small Arms Ammunition and regarding spare parts for the production equipment also to be used in such manufacture. Such information shall specifically include data regarding capacity of tool vendors, tool mortalities, man-hours for the production of perishable tools, a breakdown of machine tool operations in the manufacture of perishable tools, lists of existing and potential tool vendors and data on performance, equipment and capacity of said vendors, analysis of steel requirements, a study of present and possible new processes in the production of tools and any other pertinent information or data concerning perishable tools; provided, however, that the Committee shall not collect information regarding prices nor shall it concern itself in any way with the allocation of vendors among the companies represented. The Committee shall perform the same functions with respect to spare parts for Small Arms Ammunition production equipment and shall make such other factual studies as may be requested from time to time by the Government. The information and data gathered by the Committee shall be presented to the Contracting Officer or his duly authorized representative for such use as he shall see fit.

d. The Contractor shall use all reasonable efforts in carrying out the work under this Section 10, but the Contractor shall not be held responsible for errors in judgment or for the failure on the part of any one or more of the representatives of the above-mentioned companies adequately to perform his or their obligations.

e. It is estimated that the cost of the work under this Section 10 will be approximately Two Hundred Thousand Dollars ($200,000.00). Said estimated cost is exclusive of the cost of the ammunition set forth in Article I-C of Title I.

C. Change Article I-C, Title I, page 8, as previously changed by Supplements No. 1 and 6, to read:

It is estimated that the total cost of the Contractor's performance under this Title I, exclusive of the Contractor's fee will be approximately as follows:

a. Eighty-Seven Million, Two Hundred Seventy-Nine Thousand, Seven Hundred Ninety Dollars ($87,279,790.00) (Contract of December 14)

b. One Hundred Twenty-Three Million, Six Hundred Four Thousand, Three Hundred Seventy-Five Dollars ($123,604,375.00) (Supplement No. 1)

c. One Hundred Sixty Six Million, Forty Thousand, Two Hundred Fifteen Dollars ($166,040,215.00) (Supplement No. 6)

d. One Hundred Eight Million Seven Hundred Eighty Two Thousand One Hundred Eighty Three Dollars ($108,782,183.00) (Additional)

It is further estimated that the total quantity of ammunition, cases and clips manufactured under this Title III will have been delivered to the Government within twenty (20) months from the signing of this Supplemental Contract. It is expressly understood, however, that neither the Government nor the Contractor guarantees the correctness of any of the estimates set forth in this Article I-C-2. The estimates of costs are based upon detailed estimates agreed to by both the Government and the Contractor, copies of which are on file in the office of the Chief of Ordnance.

D. Change Article III-G of Title III by adding the following Section 4 at the end thereof:

4. In order, so far as possible, to avoid duplication in accounting and auditing functions performed by the Contractor and the Government, it is agreed that the following accounting and auditing functions shall be performed by the Government exclusively:

a. Time checking (not timekeeping) in the field or in the plant.

b. Audit of original payrolls of the Contractor (or such portions thereof as are applicable) where such payrolls are prepared by the Contractor.

c. Checking of equipment rentals and the preparation and delivery of approved rental rolls to the Contractor for payment.

d. Such other accounting and auditing functions as may be effectively performed by the Government employees and to which the Contracting Officer and the Contractor may mutually agree in writing.

It is further agreed that if any of the accounting and auditing functions performed exclusively by the Government do not adequately discharge such accounting and auditing functions to the satisfaction of the Contractor, the Contractor, with the approval in writing of the Contracting Officer, may perform such additional checking and auditing as may be so approved. The Contractor shall be reimbursed for the cost of such additional accounting and auditing functions as are so approved.

E. Change Paragraph d. of Section 1 of Article III-B of Title III, page 10, to read:

d. (1) No person under sixteen years of age and no convict labor will be employed by the Contractor in the manufacture or production or furnishing of any of the materials, supplies, articles, or equipment included in the contract.

(2) No girl under eighteen years of age shall be employed for more than eight hours in any one day, or between the hours of 10 p.m. and 6 a.m., or in any way contrary to state laws governing hours of work.

(3) No girl under eighteen years of age shall be employed in any operation or occupation which, under the Fair Labor Standards Act or under any state law or administrative ruling, is determined to be hazardous in nature or dangerous to health.

(4) For every girl under eighteen years of age employed by him the Contractor shall obtain and keep on file a certificate of age showing that such girl is at least sixteen years of age.

(5) A reasonable and definite luncheon period of at least 30 minutes shall be regularly granted any women workers under eighteen years of age.

(6) No girl under eighteen years of age shall be employed at less than the minimum hourly rate set by or under the Fair Labor Standards Act or the Walsh-Healey Public Contracts Act for the industry in which the exemption is granted.

F. Change Title III by deleting Article III-H on page 23 thereof and substituting the following Article:

ARTICLE III-H - RENEGOTIATION PURSUANT TO SECTION 403 OF THE 6th SUPPLEMENTAL NATIONAL DEFENSE APPROPRIATION ACT, 1942.

1. Each subcontract entered into by the Contractor hereof upon a lump-sum or fixed-price basis which is in excess of $100,000 shall include the following provisions:

"a. At such period or periods when, in the judgment of the Secretary of War, profits accruing to the subcontractor under this contract can be determined with reasonable certainty, the Secretary of War or the subcontractor,

upon the written demand of the Secretary of War, will renegotiate the contract price with a view of eliminating such profits as are found as a result of such renegotiation to be excessive.

b. In the event that this renegotiation results in a reduction of the contract price, the amount of such reduction shall, as directed by the Secretary of War, either be deducted by the Contractor from payment to the subcontractor under this contract, or be paid by the subcontractor directly to the Government, or be repaid by the subcontractor to the Contractor, and the subcontract shall be modified in writing accordingly.

c. The subcontractor agrees that the Contractor shall not be liable to the subcontractor for or on account of any amount repaid to the Contractor or paid to the Government by the subcontractor or deducted by the Contractor from payments under this subcontract, pursuant to directions from the Secretary of War in accordance with the provisions of this Article. Under its contract with the Government, the Contractor is obligated to pay or credit to the Government all amounts repaid by or withheld from the subcontractor hereunder.

d. The term 'Secretary of War' as used in this article includes his duly authorized representatives, including the Contracting Officer."

3. Except as herein modified, the terms and conditions of the Contract of December 14, as amended, shall continue in full force and effect and shall apply with equal force to the work added by this Supplemental Contract.

4. This Supplemental Contract shall be subject to the written approval of the Secretary of War or of the Under Secretary of War and shall not be binding until so approved.

5. The following changes were made in this contract before it was signed by the parties hereto:

1. The following Paragraph J was added:

J. Change Article 1-D, Title 1, page 8 as previously changed by Supplement No. 6, such change to become effective with regard to all fees accruing during the month of June, 1942 and thereafter, to read:

In consideration for its undertaking under this Title I the Contractor shall receive the following which shall constitute complete compensation for the Contractor's services under this Title I, including profit:

(over)

W ORD 48?
DA W ORD-34
Supp. ?

IN WITNESS WHEREOF, the parties have executed this contract in triplicate as of the day and year first above written.

THE UNITED STATES OF AMERICA

G. H. DREWRY
Colonel, Ord. Dept.
(Contracting Officer appointed by the Chief of Ordnance)

THE UNITED STATES CARTRIDGE COMPANY

By _____
J. M. OLIN, President

East Alton, Illinois
(Business Address)

Two Witnesses to execution by the Contractor:

_____

_____
(Address)

_____

_____
(Address)

Defendant's Exhibit 23.

I, Spencer T. Olin, certify that I am the Secretary of the Corporation named as Contractor herein; that J. M. Olin who signed this contract on behalf of the Contractor was then President of said corporation; that said contract was duly signed for and in behalf of said corporation by authority of its governing body; and is within the scope of its corporate powers.

(CORPORATE SEAL)

Spencer T. Olin

I hereby certify that, to the best of my knowledge and belief, based upon observation and inquiry, J. M. Olin, who signed this contract for the United States Cartridge Company, had authority to execute the same, and is the individual who signs similar contracts on behalf of this corporation with the public generally.

G H DREWRY
Colonel, Ord. Dept.

W-ORD-491 Supp. 7
DA-W-ORD-34

Defendant's Exhibit 23.

CONSENT OF SURETY

To Supplemental Contract No. 7 dated June 3, 1942, in connection with Contract W-ORD-491 approved December 14, 1940, between the United States of America and The United States Cartridge Company, Baltimore, Maryland, for operation of a Plant for the manufacture of Small Arms Ammunition.

Consent of Surety, is hereby given to the foregoing Supplemental Agreement, and the Surety agrees that its performance bond executed December 5, 1940 in connection with said Contract W-ORD-491 shall apply to and cover the due performance of the Contract as so modified.

IN WITNESS WHEREOF, the undersigned Surety has executed this instrument under its seal this 3rd day of June, 1942.

WESTERN CARTRIDGE COMPANY
East Alton, Illinois

Attested:

Russell R Casteel
Secretary

By J. M. Olin (Corporate Seal
J. M. OLIN
Vice President

CERTIFICATE AS TO CORPORATE SURETY

I, Russell R Casteel, certify that I am the Secretary of the corporation named as surety in the above CONSENT OF SURETY, that J. M. Olin who signed the said CONSENT OF SURETY on behalf of the surety, was then Vice President of said corporation; that I know his signature, and his signature thereto is genuine, and that said bond was duly signed, sealed, and attested for and in behalf of said corporation by authority of its governing body.

Russell R Casteel
Spencer T. Olin (Corporate Seal)

W ORD-491
Supp. 7

[fol. 1525] Q. Now Mr. Casteel will you tell me the next supplemental contract which contains any change in the conditions of the contract and the terms under which the ammunition was to be manufactured?

A. Supplement No. 11, dated August 30, 1943.

(The document is marked "Defendant's Exhibit 24".)

Q. Mr. Casteel, I will show you a document which has been identified as Defendant's Exhibit 24 and ask you if that is a copy of Supplement No. 11? A. It is.

Mr. McRoberts: I offer in evidence, if Your Honor please not the entire document. It in part reduces your fees and compensation, does it not?

[fol. 1536] (Defendant's Exhibit 24.)

* * * * * * *

W-ORD-491
Supp. 11

Article III-D—Walsh-Healey Act.

The representations and stipulations required by Section I of the Act of June 30, 1936 (Walsh-Healey Act, Public No. 846, 74th Congress) to be included in all contracts therein specified are hereby incorporated and made a part of this Contract with the same force and effect as if fully set forth in the Contract. Such representations and stipulations shall be subject to all applicable regulations, determinations, and exemptions of the Secretary of Labor now or hereafter in effect.

M. Change paragraph (a) of Section 4, of Article III-F, Title III, page 21, to read as follows:

(a) Procure and thereafter maintain such bonds and insurance in such forms and in such amounts and for such periods of time as the Contracting Officer may require in writing and shall be reimbursed for the cost thereof as provided in Title II hereof;

In every instance where this contract requires the United States to pay the premium on a bond or insurance policy, the bond or insurance policy shall contain an in-

dorsement or other recital excluding by appropriate language any claim on the part of the insurer or obligor to be subrogated, on payment of a loss or otherwise, to any claim against the United States;

The Contractor shall give the Contracting Officer or his representative immediate notice in writing of any suit or action filed against the Contractor arising out of the performance of this contract and of any claim against the Contractor the cost and expense of which are reimbursable under the provision of Title II hereof, and the risk of which is then uninsured or in which the amount claimed exceeds the amount of insurance coverage. The Contractor shall furnish immediately to the Contracting Officer copies of all pertinent papers received by the Contractor. Insofar as the following shall not conflict with any policy or contract of insurance, and upon request of the Contracting Officer, the Contractor shall do any and all things to effect an assignment and subrogation in favor of the Government of all Contractor's rights and claims, except against the Government, arising from or growing out of such asserted claims, and, if required by the Contracting Officer, shall authorize representatives of the Government to settle and/or defend any such claim and to represent or take charge of any such litigation affecting the Contractor, provided, however, anything to the contrary notwithstanding, to the extent such claim may not be reimbursable [fol. 1537] under Title II hereof, the Contractor shall not be required to make such assignment, and the Contractor may, through its own counsel, at its own cost and expense, participate in the settlement and/or defense and litigation of such claim.

N. Change Title III, Article III-H, page 23, as previously changed by Supplement No. 7, by deleting said Article and inserting the following Article III-H in lieu thereof:

Article III-H—Renegotiation Pursuant to Section 403 of the Sixth Supplemental National Defense Appropriation Act, 1942, as Amended.

(a) Upon the written demand of the Secretary, at such period or periods when, in the judgment of the Secretary,

the profits accruing to the Contractor under this contract can be determined with reasonable certainty, the fixed-fee specified in Article I-D will be renegotiated to eliminate therefrom any amount found as a result of such renegotiation to represent excessive profits. The demand of the Secretary shall fix a place for renegotiation and a time for commencement thereof not later than one year after the close of the fiscal year of the Contractor within which completion or termination of the Contract, as determined by the Secretary, occurs.

(b) The Contractor will furnish to the Secretary such statements of actual costs of production and such other financial statements, at such time and in such form and detail as the Secretary may prescribe, and will permit such audits and inspections of its books and records as the Secretary may request.

(c) The Government shall retain from amounts otherwise due the Contractor, or the Contractor shall repay to the Government if paid to him, any amount of the fixed-fees specified in Article I-D found as a result of such renegotiation to represent excessive profits and not eliminated through reductions in contract price or otherwise, as the Secretary may direct.

(d) The Contractor will include in each subcontract for an amount in excess of $100,000 made under this contract after the date of the supplemental agreement which added this Article, the following provisions:

Article—Renegotiation Pursuant to Section 403 of the Sixth Supplemental National Defense Appropriation Act, 1942, as Amended.

(1) Upon the written demand of the Secretary, at such period or periods when, in the judgment of the Secretary, the profits accruing to ..... under this
(subcontractor)
contract can be determined with reasonable certainty, the Secretary and ..... will renegotiate the con-
(subcontractor)
tract price (or fixed-fee hereunder) to eliminate therefrom [fol. 1538] any amount found as a result of such renegotia-

tion to represent excessive profits. The demand of the Secretary shall fix a place for renegotiation and a time for the commencement thereof not later than one year after the close of the fiscal year of the subcontractor within which completion or termination of the contract, as determined by the Secretary, occurs.

(2) ..... (subcontractor) will furnish to the Secretary such statements of actual costs of production and such other financial statements, at such times and in such form and detail, as the Secretary may prescribe, and will permit such audits and inspections of its books and records as the Secretary may request.

(3) Any amount of the contract price (*or* fixed-fee hereunder) found as a result of such renegotiation to represent excessive profits shall, as directed by the Secretary,—

(A) Be deducted by ..... (contractor) from payments otherwise due to ..... (subcontractor) under this contract; or

(B) Be paid by ..... (subcontractor) directly to the Government, if paid to him; or

(C) Be [eliminate] through reductions in the contract price (or fixed-fee hereunder) or otherwise.

(4) ..... (subcontractor) agrees that ..... (contractor) shall not be liable to ..... (subcontractor) for or on account of any amount paid to the Government by ..... (subcontractor) or deducted by ..... (contractor) from payments otherwise due under this contract, pursuant to directions from the Secretary in accordance with provisions of this Article. Under its contract with the Government ..... (contractor) is obligated to pay or credit to the Government all amounts withheld by it from ..... (subcontractor) hereunder.

[fol. 1539] (5) ..... agrees (a) upon direc-
(subcontractor)
tion of the Secretary, to include in any subcontract hereunder sections (1) to (6) inclusive of the Article, and (b) to make no [subdivions] of any contract or subcontract for the purpose of evading the provisions of this section, and (c) to repay to the Government the amount of any reduction in the contract price of any such subcontract which results from renegotiation thereof by the Secretary, and which the Secretary directs .....
(subcontractor)
to withhold from payments otherwise due under such subcontract and actually unpaid at the time .....
(subcontractor)
received such direction.

(6) As used in this Article,—

(a) The term "Secretary" means the Secretary of War or any duly authorized representative of the Secretary including the Contracting Officer.

(b) The term "subcontract" means any purchase order or agreement to perform all or any part of the work, or to make or furnish any material, part, assembly, machinery, equipment or other personal property, required for the performance of this contract, unless exempt under or exempted pursuant to Section 403 (i) of the Sixth Supplemental National Defense Appropriation Act of 1942 as amended by Section 801 of the Revenue Act of 1942.

(c) The Terms "renegotiate" and "renegotiation" have the same meaning as in Section 403 (b) of the Sixth Supplemental National Defense Appropriation Act, 1942, as amended.

(d) The term "this contract" means this contract as modified from time to time.

(e) (1) The Contractor agrees to make no subdivisions of any contract or subcontract for the purpose of evading the provisions of this Article.

(2) If any renegotiation between the Secretary and any subcontractor pursuant to the provisions required

by section (d) hereof results in a reduction of the contract price or fixed-fee of the subcontract, the Government shall retain from payments otherwise due to the Contractor, [of] the Contractor shall repay to the Government, as the Secretary may direct, the amount [fol. 1540] of such reduction which the Secretary directs the Contractor to withhold from payments otherwise due to the subcontractor under the subcontract and actually unpaid at the time the Contractor received such direction.

(f) As used in this Article,—

(1) The term "Secretary" means the Secretary of War or any duly authorized representative of the Secretary, including the Contracting Officer.

(2) The term "subcontract" means any purchase order or agreement to perform all or any part of the [owrk], or to make or furnish any material, part, assembly, machinery, equipment or other personal property, required for the performance of this contract, unless exempt under or exempted pursuant to Section 403 (i) of the Sixth Supplemental National Defense Appropriation Act of 1942 as amended by Section 801 of the Revenue Act of 1942.

(3) The terms "renegotiate" and "renegotiation" have the same meaning as in section 403 (b) of the Sixth Supplemental National Defense Appropriation Act, 1942 as amended.

(4) The term "this contract" means this contract as modified from time to time.

O. Change Title III, by deleting Article III-I, page 24, and inserting the following Article III-I thereof:

Article III-I—Convict Labor.

The Contractor shall not employ any person undergoing sentence of imprisonment at hard labor. This provision shall not be construed to prevent the Contractor or any subcontractor hereunder from obtaining any of the supplies, or any component parts or ingredients thereof, to be furnished, under this Contract or any materials or supplies to be used in connection with the performance of this

contract, directly or indirectly, from any Federal, State or territorial prison or prison industry, *Provided,* That such articles, materials or supplies are not produced pursuant to any contract or other arrangement under which prison labor is hired by or employed or used by any private person, firm or corporation.

P. Effective as of the date of this Supplement, change Title III by deleting Article III-O, page 25, and inserting the following new Article III-O in lieu thereof:

[fol. 1541] [Articles] III-O—Disputes.

Except as otherwise specifically provided in this contract, all disputes concerning questions of fact which may arise under this contract and which are not disposed of by mutual agreement, shall be decided by the Contracting Officer, who shall reduce his decision to writing and mail a copy thereof to the Contractor at his address shown herein. Within 30 days from said mailing the Contractor may appeal in writing to the Secretary of War, whose written decision or that of his designated representative or representatives thereof shall be final and conclusive upon the parties hereto. The Secretary of War may, in his discretion, designate an individual, or individuals, other than the Contracting Officer, or a board as his authorized representative to determine appeals under this Article. The Contractor shall be afforded an opportunity to be heard and offer evidence in support of his appeal. The president of the board, from time to time, may divide the board into divisions of one or more members and assign members thereto. A majority of the members of the board or of a division thereof shall constitute a quorum for the transaction of the business of the board or of a division, respectively, and the decision of a majority of the members of the board or of a division shall be deemed to be the decision of the board or of a division as the case may be. If a majority of the members of a division are unable to agree on a decision or if within 30 days after a decision by a division, the board or the president thereof directs that the decision of the division be reviewed by the board, the decision shall be so reviewed, otherwise the decision of a majority of the members of a division shall

become the decision of the board. If a majority of the members of the board is unable to agree upon a decision, the president will promptly submit the appeal to the Under Secretary of War for his decision upon the record. A vacancy in the board or in any division thereof shall not impair the powers or affect the duties of the board or division nor of the remaining members of the board or division, respectively. Any member of the board, or any examiner designated by the president of the board for that purpose, may hold hearings, examine witnesses, receive evidence and report the evidence to the board or to the appropriate division, if the case is pending before a division. Pending decision of a dispute hereunder the Contractor shall diligently proceed with the performance of his contract. Any sum or sums allowed to the Contractor under the provisions of this Article shall be paid by the United States as part of the cost of the articles or work herein contracted for and shall be deemed to be within the contemplation of this contract.

Q. Change Title III by the addition of the following new Article III-W:

Article III-W—Modification of Subcontracts or Purchase Orders.

With the approval of the Contracting Officer the Contractor may modify any subcontract or purchase order (whether now or hereafter in effect) under this Contract to increase the price or fee, as the case may be, or to extend more favorable terms to the Subcontractor.

[fol. 1542] R. Change Title III, by the addition of the following new Article III-X:

Article III-X—Notice to Government of Labor Disputes.

Whenever an actual or potential labor dispute is delaying or threatens to delay the timely performance of this contract, the Contractor will immediately give notice thereof to the Contracting Officer at the plant. Such notice shall include all relevant information with respect to such dispute.

S. Change Title III, by the addition of the following Article III-Y:

Article III-Y—Disposition of Certain Government-Owned Property.

It is recognized that property (including without limitation machine tools and processing equipment, manufacturing aids, raw, manufactured scrap and waste materials) title of which is or may be hereafter become vested [ib] the Government, will be used by or will be in the care, custody or possession of the Contractor in connection with his performance of this contract. The Contractor may, with the approval of the Contracting Officer, transfer or otherwise dispose of such Government-owned property to such parties and upon such terms and conditions as the Contracting Officer may approve or ratify. The proceeds of such transfers and dispositions shall be applied in reduction of the cost of the work under his contract.

T. Except as herein modified the terms and conditions of the Contract of December 14 and Supplements Nos. 1, 6 and 7 thereto shall continue in full force and effect and shall apply with equal force to the work added by this Supplemental Contract. All change orders, if any, previously issued in connection with the Contract of December 14 are hereby superseded.

. . . . . .

[fol. 1546] The Witness: It does.

Mr. McRoberts: But only those portions beginning on page 11 which add a new article bearing the caption Article 113d, Walsh-[Sealy] Act. And another new article, 3h, on the subject of renegotiation. Another new article, 3i, Convict Labor. Another article, 3-o, Disputes. Another article 3w, Modification of subcontracts or purchase orders. Another article, 3x, Notice to Government of labor disputes. Another article, 3y, Disposition of Certain Government owned property. And the provision on page 8 adding a sentence to one of the articles of the orig-

inal contract. And I direct the Court's particular attention to this Article 3y, Disposition of certain Government [fol. 1547] owned property which reads in part as follows:

"It is recognized that property (including without limitation machine tool and processing equipment, manufacturing aids, raw manufacturing scrap and waste material) title to which is or may hereafter become vested in the Government, will be used by or will be in care, custody or possession of the contractor in connection with his performance of this contract. The contractor may, with the approval of the Contracting Officer, transfer or otherwise dispose of said Government owned property to such parties and upon such terms and conditions as the Contracting Officer may approve or ratify. The proceeds of such transfers and disposition shall be applied in production to the cost of work under this contract."

Q. (Mr. McRoberts) And in that connection I ask you, Mr. Casteel, was the United States Cartridge Company permitted to dispose of any raw materials, [working] process and finished products or any of the machinery, tools, equipment, supplies or anything in that plant—

Mr. Bond: Objected to as calling for a conclusion. This man was not one of the operating officers of the United States Cartridge Company, and it wouldn't be competent from him.

The Witness: I know the reason for the clause.

Mr. Bond: Same objection.

The Court: Overruled.

Q. Tell us the reason for the clause.

[fol. 1548] Mr. Bond: Same objection.

The Court: Overruled.

A. When we first drafted the contract and negotiated with the Government, no one gave much thought to the fact that we would have to sell anything. We realized there would be some scrap brass, but that is about all. No one thought about any material that we would have to

dispose of. However, when we got into actual operation we found there were other things. They went out and bought heavily of tool steel and things of that nature and we found we had surplus amounts and asked that clause. Sale of Government property is covered by strict regulations, and so forth, and we asked for this clause so as to make it clear the United States Cartridge Company did have the right to sell material as described in that clause without consent of the Contracting Officer.

Q. But before you had this clause, what had you done out there, what had you attempted to do in connection with making any such sales?

A. Those that were necessary to make, such as scrap brass, which has to be sold because it would pile up and fill the plant. We had just been selling, but we asked that our rights be more clearly defined by an amendment. But we always got permission of the Contracting Officer before we sold anything.

Q. Did you undertake to sell or dispose of any kind of property without permission of the Government representative?

[fol. 1549] A. We didn't do anything without his permission.

Mr. Bond: Object, that is too general, and a conclusion, and ask that it be stricken.

Mr. McRoberts: Limit that to the property.

A. Well, it was hiring people or anything.

Mr. Bond: I think that is secondary evidence. It is incompetent as to the disposition of the property.

The Court: It will stand subject to the objection.

Q. Tell me the next supplemental agreement that makes any change—

Mr. Bond: May it be understood my objection I made to the contracts go to all these supplements?

The Court: Yes, sir. Take a 5-minute recess.

Thereupon, at 11:38 A. M., July 12, 1946, a brief recess was taken. The proceedings were then resumed as follows:

Mr. Bond: If you Honor please, in connection with extracts in the contract, which have been read by Mr. McRoberts, some by me, I desire to read into the record at this time the following extract from Defendant's Exhibit 20, being the cost plus, the fixed funds contract, and being Title 3 General Provisions, Article 3a:

"Title, Status of the Contractor: It is expressly understood and agreed by the contractor and Government that in the performance of the work provided for in this contract, the contractor is an independent [fol. 1550] contractor and in no wise an agent of the Government."

Q. (Mr. McRoberts) Mr. Casteel, which is the next supplemental agreement that contains provisions of this special character?

A. The next supplement is Supplement 19, dated June 15, 1944. However, it doesn't cover anything, but changes the ammunition order and reduces our fees again and sets the fees of the new cartridges to be made.

Q. Where is the next change in any of the operating terms and conditions of the contract?

A. Supplement 31, which was the next supplement, dated February 10, 1945, also formalizes a group of change orders and adds some ammunition orders and reduces our fees again, and includes a racial-discrimination clause.

(A paper is marked "Defendant's Exhibit 25.")

Q. Mr. Casteel, I show you a document which has been identified as Defendant's Exhibit 25, and ask you if that is a copy of the Supplement No. 31 to which you refer?

A. It is.

Mr. McRoberts: I offer in evidence, if Your Honor please, that part of this exhibit found on page 18 and at the top of page 19, the article bearing the caption, "Article 3-i, Racial Discrimination.

[fol. 1568] (Defendant's Exhibit 25.)

* * * * * * *

Article III-V—Racial Discrimination.

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1. The Contractor, in performing the work required by this Contract, shall not discriminate against any employee or applicant, for employment because of race, creed, color or national origin.

2. The Contractor agrees that the provisions of paragraph 1, above will also be inserted in all of its subcontracts. For the purpose of this Article, a subcontract is defined as any contract entered into by the Contractor with any individual, partnership, association, corporation, [fol. 1569] estate, or trust, or other business enterprise or other legal entity, for a specific part of the work to be performed in connection with the supplies or services furnished under this Contract; provided, however, that a contract for the furnishing of standard or commercial articles or raw materials shall not be considered as a subcontract.

* * * * * * *

[fol. 1574] Q. What is the next supplement that has one of these special provisions in it, if any?

A. The last supplement is Supplement 37. That is the next supplement which does nothing but formalize five previous change orders. We are now negotiating on Supplement 38 which is the termination supplement.

Q. Now Mr. Casteel, I will ask you whether or not the United States Cartridge Company at any time ever asserted any title to any of the land, buildings, machinery, equipment, tools, supplies, raw material, working processes or finished products constituting part of, or [manufactures] at, the St. Louis Ordnance Plant?

Mr. Bond: I want to object to that question as leading and suggestive, argumentative, calls for conclusions both of law and fact, calling for matters which cannot be in the

knowledge of a mere general officer of the company with the function of a corporate secretary, and calling for evidence either secondary or hearsay. And if those objections do not seem sufficient to the Court I would like to examine him on the qualification.

The Court: He is not asking him the title, he asked him if he made any claim.

Mr. McRoberts: That is all.

Mr. Bond: There is no situation before the Court whereby a claim could be called for or where there would be any occasion to assert claim. I might ask if you ever asserted title to anything. Why it has never been ques- [fol. 1575] tioned. Since he seems to go into other matters than documents, could I ask him questions on his qualifications, because I can see it is going to be followed with other questions? I think you can show the relation of the witness—

Mr. McRoberts: I am only offering it to show the interpretation which the parties themselves put upon the contract and the provisions of the contract which say the title would be in the Government. And it is further for the purpose of showing the contractor recognized that provision as being binding and effective.

Mr. Bond: How can title be determined by the attitude?

The Court: He is not trying to establish title, he is trying to establish whether they made any claim of title.

Mr. Bond: I do not think that he can give competent testimony as to whether they ever claimed title, and I think a few questions would bring it out if I could ask them.

The Court: He is Secretary and Counsel.

Mr. Bond: I was going to ask him what his relation to this company was.

The Court: He testified to that earlier.

Mr. Bond: If Your Honor doesn't think it is necessary to inquire into that fact.

The Court: You may go into that.

Qualifying Questions by Mr. Bond:

Q. Just what position did you hold during the period of [fol. 1576] this operation of the plant with the United States Cartridge Company?

A. I started out as assistant secretary and then was made secretary of the company and also Counsel for the company.

Q. That was the corporate office of Assistant Secretary?

A. Yes, sir.

Q. And the duties you had to perform were such duties as a corporate secretary or his assistant ordinarily perform?

A. No, sir, I can't say that, we were a different setup in our ways of doing business in our company. I worked directly with the Olin's who hold the higher offices, and we have five Board members and three are Olin's. I was very active in all these negotiations from the very time the contract was signed up to—well, up to now. I was in on the discussions about the site of the plant, for example. We looked over different sites.

Q. Did you have any duties to perform in connection with production? A. No, sir, not production.

Q. Did you have any duties to perform in reference to accounting?

A. No, sir, but I have been next to the man who did do that. The company had regular department heads for all corporate duties such as accounting department and operating department and various operating functional units, and the plant was run by what we call a general manager.

[fol. 1577] Q. And you as secretary of the corporation had no duties to perform in connection with the operation of the plant or the keeping of its records?

A. Except the corporate records, I keep all those, the minute book.

Q. But you didn't keep the accounting records?

A. No, sir, I kept the stock-book and minute-book, and things of that nature.

Q. Now how were assets carried on the accounts? How many were carried on the accounts?

A. On the accounts we kept, the inventories were kept and so forth.

Q. You were not in contact with those functions at all?

A. Well, I see all the financial statements, and I am familiar with the earnings of the company and that sort of thing. I don't handle the details of accounting.

Q. They had corporate department heads in charge of those functions?

A. There were not any corporate officers at the St. Louis location. There was no man in St. Louis that was a corporate officer, it was handled by a general manager, and two assistant general managers, and down the line.

Q. You were a corporate officer?

A. Assistant secretary of the United States Cartridge Company and its local counsel.

[fol. 1578] Q. And corporate officer of the Olin Industries?

A. Corporate officer of the United States Cartridge Company.

The Court: What was your office?

(Brief discussion off the record.)

Mr. Bond: That is all.

Continuation of Direct Examination
by Mr. McRoberts:

Q. You testified with reference to a paragraph in one of these supplements about the disposition of Government owned property. You testified as to the occasion for the inclusion of that paragraph. Were you in on the negotiation for that change? A. Yes, sir.

Q. And discussion with reference to the Government, as to how the [Goverment] owned property should be disposed of?

A. I was in on all of the amendments to the contract. I handled all of them, saw to the executions and sat in on any conferences that were necessary in working them out with the Army Ordnance Department.

Q. And in the discussion of that particular provision of these contracts about Government owned property, did you or did anybody on behalf of the United States Cartridge Company assert any claim to any of the property referred to in that paragraph?

Mr. Bond: Object as to the conversation because not in [fol. 1579] the presence of any plaintiff in this case, and nothing therein said would be binding on the rights under this statute. And further, for the reason that any discussion about title, there being no issue of title, is irrelevant to the case and has no probative force as to where title was.

The Court: Answer subject to the objection.

A. We at no time made any claim to any of the property.

Mr. McRoberts: I think that is all, Mr. Counsel.

Mr. Bond: That is all, Mr. Casteel.

Mr. Bond: I would like to finish my cross examination of Mr. Miller. He was excused temporarily while we put on the contracts, and I have some of the men whom he testified about, in court, and I would like to have them here.

Mr. McRoberts: I don't care who we proceed with. We had this witness on and withdrew him, and had Mr. Miller on and withdrew him. Mr. Miller is here.

Mr. Bond: I prefer to finish my cross examination of Mr. Miller.

The Court: You may do so.

HARRY P. MILLER

previously sworn, recalled for cross examination, testified as follows:

Cross Examination by Mr. Bond:

Mr. Bond: Mr. Miller, I wanted in the first place before [fol. 1580] I go into this, there was a matter the other day but I don't think I got that quite clear in the record. Am I correct that the chief engineer was the operating head in charge of the safety department?

A. The chief safety engineer was the head of the [dafety] department.

Q. And that through most of this time was Mr. Strickland? Isn't that correct? A. No, sir.

Q. Who was it?

A. Mr. Strickland was the first man. He was in charge up until I think about the spring of 1944. Then he was followed by Mr. McKittrick who was the chief safety engineer until the shut-down of the plant.

Q. Mr. Strickland during all the period of operation up to a date in 1944? A. Yes, sir.

Q. And then Mr. McKittrick succeeded him until the termination of operations? A. That is right.

Q. And what was your relation to those men? Have I got it right? They reported to you as a superior because you had general jurisdiction over the department? Is that it?

A. They were one of the seven departments under my [fol. 1581] jurisdiction. They reported directly to me.

Q. And am I correct that your contact with that department would be with the head, the chief engineer, whoever he might be? A. It was with the whole department.

Q. Did you have any direct contact, for instance with the safety inspectors? A. What do you mean by "direct?"

Q. Did you issue over your signature any verbal or written directions to them? A. No, sir.

Q. Would you single them out and give them any instructions? A. No, sir.

Q. They would get those directions and instructions from superiors in the organization, would they not?

A. Yes, sir, very definitely.

Q. Now, taking up the—I think the first man you mentioned yesterday was Mr. Hirschberger. He worked in the safety department from the 10th of August 1942, until the 8th of July, 1944. Is that correct?

A. That is right, yes, sir.

Q. And what was his first code classification?

A. His first code classification was safety inspector.

Q. And on what date did that commence and how long did it continue?

A. That commenced August 10, 1942. On July 5, 1943, he was classified as safety engineer.

[fol. 1582] Q. How long did that classification continue?

A. On July 12, 1943, he was promoted to assistant staff supervisor.

Q. So his classification as assistant staff supervisor started August 1, 1943, is that correct?

A. It started July 12, 1943.

Q. I would like to show you Plaintiffs' Exhibit A-42 and ask you if what you stated corresponds with what that summary that your company corporation gave me, indicates.

A. This report you have here shows August 1st. That is incorrect, the proper date is July 12, 1943.

Q. You have on your chart I believe—have you got it before you? A. No, sir.

Q. Is there any classification of assistant staff supervisor on your chart there?

A. There are no classifications on the chart at all. All of the names on the chart do not agree with our code classifications.

Q. You mean you have not placed all the code classifications on the chart?

A. There is not any of them on there. We do not make our charts up that way.

Q. You have chief safety engineer, isn't that the code [fol. 1583] classification? A. Yes, sir.

Q. You have an assistant chief safety engineer, isn't that correct? A. That is what this classification is.

Q. You have a staff safety engineer, you have a classification of Staff safety engineer on this card?

A. That is the same as supervising safety engineer.

Q. You told me yesterday that the supervising safety engineer and the foremen were grouped under this safety engineer, three shifts. A. That is right.

Q. Now then, what would be the functions, who would be the staff supervisor? What would be the function of the staff supervisor? A. He was the head of the department.

Q. Would he be Mr. Strickland?

A. That is right, and then Mr. McKittrick.

Q. And the assistant staff supervisor, who would he be assistant to?

A. He would be the assistant chief of the department.

Q. Who would he report to?

A. He would report to the chief.

Q. And would anybody report to him? A. Everybody.

Q. Would the assistant staff supervisor work a shift?

[fol. 1584] A. Everybody works a shift.

Q. I mean would he inspect, patrol and report?

A. No, sir.

Q. What would be his duties?

A. He would be supervising all of the employees in the department except his boss.

Q. Explain what these supervisory duties were?

A. Those supervisory duties were to run the department.

Q. Now then, you mentioned Mr. O'Meara, will you tell me when he entered the safety department and what his first code classification was?

A. He entered the safety department on May 2, 1942, as a safety engineer.

Q. And didn't he enter as safety inspector? A. Yes.

Q. Safety inspector? A. Yes, sir.

Q. Or I believe you stated you used those names interchangeably? A. Yes, sir.

Q. And he continued to be a safety inspector until July 4, 1943? Isn't that correct?

A. No, on 6/19/43 he was promoted to assistant staff supervisor.

Q. Well, I don't understand.

[fol. 1585] (Brief conference between Counsel)

Q. Where there is a discrepancy between the dates you gave me and the date on my Exhibit A, which was prepared under Mr. Kelley's supervision and given to me, is due to the fact that Mr. Kelley gives the date at expiration of the first period where he got the new pay? Is that it?

A. I think that is right, and you will notice that the discrepancy is of a week or less, usually.

Q. Yes, sir.

Q. Whereas, your record just shows where the change occurred in your records, and this is when it was reflected in the pay roll?

A. My record is effective the date for which the management has approved this promotion.

Q. Now then, would Mr. O'Meara's duties have any similarity to Mr. Hirschberger's from that date on?

A. Yes, sir.

Q. I believe you stated Mr. Hirschberger was a direct assistant to Mr. Strickland. Isn't it a fact Mr. O'Meara was further down the line than that? A. Yes, sir, it is.

Q. Just how far down the line was he?

A. Mr. O'Meara, as I testified yesterday, during most of this period after his promotion was in charge of the safety store, laundry, and so forth. He was in charge of the [fol. 1586] second and third sections as shown on that chart.

Q. Now Mr. Kemp, when did he go into the safety department, and what was his first classification?

A. Kemp first entered the safety department on December 23, 1941, as a safety inspector.

Q. And he remained as either an inspector or engineer until when?

A. On June 15, 1942, he was made a supervising safety inspector.

Q. Do you see any such classification as that on Plaintiffs' Exhibit A-33? A. No, I do not.

Q. According to that exhibit he remained either an inspector or an engineer until some date in 1943?

A. He was made assistant staff supervisor. However, you will notice on this sheet that effective June 21, 1942, he was given a fifty dollar increase. That is the time that my final record signed by the management shows he was made a supervising safety inspector.

Q. Now then, after this date in 1943, July 7, 1943, when he became assistant staff supervisor, would that be the same as O'Meara, or what were his duties after that time? Tell me what were his duties after that time?

A. His duties after that time, he was assistant to the chief safety engineer.

[fol. 1587] Q. You would say he was of the same character as Hirschberger then, is that it? A. That is right, yes, sir.

The Court: It is just exactly 12:30, Judge.

Mr. Bond: That is satisfactory to me, Your Honor.

The Court: Announce a recess until 2 o'clock.

Thereupon, at 12:30 P. M., July 12, 1946, a recess was taken until 2 P. M. The proceedings were then resumed as follows:

Mr. Bond: I believe Mr. Miller was on the stand and I was cross examining him.

Q. Mr. Miller, you mentioned Mr. Stockho yesterday. Will you look at your records on him, please? When did he go to work in the safety department?

A. Stockho went to work in the safety department on May 25, 1942.

Q. Prior to that time he had been what is called production inspector trainee? Is that it?

A. Roving inspection—trainee and roving inspector.

Q. And he was on hourly work, and where he worked over time he was paid at an overtime rate, and where he worked overtime he was paid overtime up to that point? Is that right? A. Yes, sir.

Q. Starting May 31, 1942, he went on a monthly salary of $175 a month, isn't that correct? A. Yes, sir.

Mr. McRoberts: 25th I believe. Let's see.

[fol. 1588] A. May 25th.

Mr. Bond: Well, the pay period ends May 31st. That is when he got his first pay was it, the end of the pay period?

A. At the end of the week, whatever date that might be.

Q. And he went to work as an inspector, didn't he?

A. That is right.

Q. And he continued as an inspector until, according to my record here, is this correct? "Pay period ending November 7, 1943," when he was given the rating, Foreman, General Assistant?

A. Effective October 25, 1943, he was promoted to supervisor.

Q. Now I notice that from the time he started as a safety inspector on the 31st of May, 1942, for the earlier part of his period as an inspector when he was getting $175 a month, which according to my [recor] is down to the 22nd of November, 1942, he was not paid any overtime. Is that correct?

A. No. He was paid overtime from May 25, 1942, to November 14, 1942.

Q. Well, will you please look at Plaintiff's Exhibit 12 which gives his monthly salary and his gross wage each week, that week, which shows he worked over 40 hours a week, but he got the regular [groos] wage of $40.38, not showing any overtime. That is A-12.

A. That is what this shows, yes, sir.

Q. According to Plaintiff's Exhibit A-12 Mr. Stockho did [fol. 1589] not receive any overtime during that period when he was receiving $175 a month?

A. So far as I can tell from looking at this it doesn't show it; that is right.

Q. You mean it is right that it doesn't show he got any overtime? A. No, I didn't mean that.

Q. It is hard to follow, it is double negative. Did he get overtime salary earning $175 a month, or didn't he?

A. I say he did.

Q. Does it appear from Plaintiffs' Exhibit 12 that he did? A. Not that I can see.

Q. The fact of the matter is, it appears from Exhibit 12 that he didn't?

A. No, sir, I don't know whether it does or not.

Q. Your company has reported to me the total amount paid each day period with the deductions in the net.

A. I don't know what this represents here. I say that I can't see on here where he was paid overtime, but my record shows that he was paid overtime.

Q. Well, you know that Mr. Kelley prepared this and it purports to show the hours the man worked and the money that he was paid, doesn't it? A. Yes, sir.

Q. That was the purpose of preparing it?

[fol. 1590] A. That is right.

Q. And no overtime appears on this sheet, too?

A. I don't know whether it does or not.

Q. Well, $175 a month is what is given as his monthly wage, and the gross wage is given $40.38. That is arrived at by multiplying $175 by 12, dividing by 52?

A. That is the way we arrive at the correct figure, yes, sir.

Q. And that gives the gross weekly wage, doesn't it?

A. That is right.

Q. And computed that way it wouldn't include any overtime, would it?

A. Not computed that way it wouldn't, no sir.

Q. Mr. Kemp, he was one of that group that you mentioned who at one time became assistant staff supervisor?

A. Yes, sir.

Q. I see he has just come into court, so I will go back to that group and ask you some questions about him. Mr. Kemp according to the record I have—

Mr. McRoberts: Judge Bond, I think you already have cross examined the witness with regard to Mr. Kemp, this morning.

Mr. Bond: Did I? I didn't have him checked here. All right.

Q. Look at the record for Mr. Niedringhaus, will you please? He became a safety inspector—correct me if I am wrong—on the 26th of April, 1942, and continued either [fol. 1591] an inspector or an engineer until November 11, 1943, or about that. Is that right?

A. He was employed on April 20, 1942, as a safety inspector. He was classified on April 5, 1943, as a safety engineer and continued in that capacity until October 25, 1943, when he was promoted to supervisor.

Q. Does that mean supervisor over the other two engineers in his shift? A. That is right.

Q. And did he continue in that classification?

A. He continued in that classification until May 3, 1944, when he was terminated for military service. He was reinstated on May 15, 1944, as secretary of the Safety Committee.

Q. What was that last date? A. May 15, 1944.

Q. Secretary of the Committee? A. Yes, sir.

Q. Go ahead.

A. And he continued until his termination.

Q. Did the company send him to school at Chicago?

A. Yes, sir.

Q. When?

A. He took a complete explosive training course on the safety and security division of the Ordnance Department.

Q. When? A. I don't know when.

[fol. 1592] Q. Wasn't it towards the end of his employment? A. Yes, sir.

Q. When he came back what did you put him doing?

A. I can't tell you that because I don't know when he came back.

Q. Wasn't he put in the laundry to do some checking routine work in there? A. That is possible.

Q. Mr. Stutz, when did he enter the department? And in what capacity?

A. He was hired on June 7, 1943, as an assistant staff supervisor of the safety department and continued in that capacity until his termination.

Q. To what duty was he assigned?

A. Supervisory duties as an assistant to the chief safety engineer.

Q. Could you tell me where he was doing those duties and what they consisted of?

A. Particularly, he was in charge of the safety educational unit, optometrist's office.

Q. Wasn't he in the laundry?

A. I don't think so. I can clarify that a little, I think. He had supervision over the uniform cribs as well as the Medical Placement Unit, Safety Clerical Unit, Educational Unit, and other miscellaneous work.

[fol. 1593] Q. He wore a uniform? A. Oh, yes, sir.

Q. And he did routine work, did he not?

A. No, he didn't.

Q. He never worked in the production unit, did he?

A. No, he didn't.

Q. Mr. Trimble, according to my record, he went to work on March 23, 1942, as an instructor in First Aid. Was that his first job in the safety department?

A. He was employed on March 25, 1942, as a first aid instructor.

Q. And he continued in that classification until when?

A. He was reclassified as a safety engineer on March 29, 1943, and continued in that classification until his termination.

Q. Prior to the time he became a safety engineer but was an instructor in first aid, what were those duties as instructor first aid?

A. His duties were to teach and to train first aid.

Q. Did he have a class like a school teacher?

A. He had a class in the class-room, and he had all

classes of employees: foremen, supervisors of production and maintenance, and he had guards and firemen.

Q. What subjects did he teach?

A. Principally first aid. He taught some other classes [fol. 1594] but most of his work was first-aid work.

Q. And when he left that work and went back to be a safety engineer, he then performed duties which have been testified to in reference to other safety engineers?

A. No, sir, he didn't leave that work.

Q. I misunderstood you, I thought you said on a certain date he went back to be a safety engineer?

A. No, sir, he was reclassified on the 29th of March, 1943, as a safety engineer and continued as an instructor.

Q. And he continued to do the same work he had before?

A. That is right, and was an instructor during the entire time he was employed.

Q. He never patrolled, inspected or reported then?

A. That is right.

Q. His sole duty consisted in holding classes teaching the subject you mentioned?

A. That is true. There might have been every three or four or six months where he did such work, I don't know, but he was never assigned to that function.

Q. Now Mr. Champion, you mentioned him, I believe. Would you turn to his record? Let me know—well, suppose you tell me what he started out at and how long he continued?

A. He was employed on April 21, 1942, as a safety inspector. He worked principally in the 50 calibre tool and [fol. 1595] gauge building with most of his assignments being in transportation, traffic.

Q. And he continued as an inspector or engineer until he became assistant staff supervisor? Is that it?

A. On 9/11/43 he became assistant staff supervisor.

Q. And he remained there until his termination in 1944?

A. That is right, yes, sir.

Q. Now after he became assistant staff supervisor, what were his duties? Do your records show?

A. Yes, sir, he worked for about one month, a little less than a month, under the chief safety engineer and was then transferred to the production control department, still as

an assistant staff supervisor, and worked for that department until he was terminated.

Q. In what classification? Would he patrol, inspect and report? A. No, he wouldn't.

Q. He would act as a sort of go-between, I suppose, between Mr. Strickland and the subordinates in the department?

A. No, he was working for the production control department as an assistant to the head of the department.

Q. The head of the production control department?

A. That is right, yes, sir.

Q. His duties, though, were in connection with safety, [fol. 1596] were they not? A. Principally, yes, sir.

Q. Mr. Reeves, tell us about Mr. Reeves, will you please?

A. Mr. Reeves was employed as a guard and worked on that job until the 8th of June, 1942, when he was made a safety inspector. On January 25, 1943, he was classified as a safety engineer, and on November 1, 1943, became a supervising safety engineer.

Q. That last date was what?

A. 11/1/'43. Now that continued until he was terminated on March 31, 1944. Then he was rehired on April 17, 1944, and worked in the repair depot as a supervisor.

Q. What was he put to work at after that change, after he was classified as a supervisor?

A. He was made the supervising safety engineer in a 30 calibre production unit, building 102.

Q. Wasn't he put to work doing draftsman's work?

A. No, sir.

Q. Are you sure?

A. I am quite sure. I have no record of it at all.

Q. You have no record of it? A. That is right.

Q. Well, then, you don't know what he was put to doing? [fol. 1597] A. I know that he was not put to work doing draftsman's work for the safety department.

Q. He was made a supervisor?

A. He was made a supervising safety engineer of production, Building 102, a 30 calibre building.

Q. And you don't have a thing on your record to show what he actually did there? A. No, sir.

Q. What?

A. I have a letter signed by the chief safety engineer

dated November 28, 1944, which says: "An audit was made of Building 102 by Mr. Ben Ludwig accompanied by Mr. Joe Reeves, safety supervisor of the building."

Q. Oh, I see, I have been saying "draftsman", that is where I made an error. He was put to work of an auditing nature?

A. No, sir; he was put to work as supervising safety engineer in charge of the building.

Q. He actually got up audits, didn't he?

A. Well, they all do safety audits.

Q. Look at your record on Mr. Yancey. In fact, Mr. Miller, all this testimony you are giving about these men's classifications and their duties is from your records, isn't it? A. That is right, yes, sir.

Q. Mr. Yancey, tell us about him.

A. Mr. Yancey was hired as an adjuster trainee July 3, [fol. 1598] 1942, and went to a training school. On July 17, 1942, he was transferred to a plant in the fire department. On December 11, 1942, he was transferred to safety engineer.

Q. That is the first time he entered the safety department?

A. No, sir, he was in the safety department as a fireman.

Q. Up to that time was he paid on an hourly basis?

A. Yes, sir.

Q. Now then, he started on a monthly basis at this last date you mentioned in 1942? A. December 11, 1942.

Q. As a safety engineer? A. That is right, yes, sir.

Q. Go ahead.

A. Then he was reclassified on October 10th, 1943, as fire inspector, and at that time they made an adjustment in his salary because it was found that he should have been classified as a fire inspector some months previously. So he was paid retroactive wages for the difference.

Q. What did he have to do as fire inspector?

A. He had to investigate and patrol all of the buildings and also attend and be present at fires and make investigations and recommendations for the prevention or recurrence of any fires, fire hazards, and so forth.

Q. Go ahead with the record on him.

A. On November 1, 1943, he was promoted to supervisor, [fol. 1599] supervising safety engineer in a 30 calibre

production building, 202, and was later transferred to Building 103, and when the whole building was transferred. That continued until his termination.

Q. Tell us about Mr. Hargate, will you please?

A. Mr. Hargate was employed on January 13, 1942, as a warehouse man on an hourly rate. He continued on the hourly rate until May 18, 1942, when he was made a safety inspector. He continued on that during the entire time of his employment.

Mr. McRoberts: Mr. Miller, let me call your attention to March 12, 1945. Was there a change at that date?

A. Yes, sir, on March 12, 1945, he was transferred to the production control department as a supervisor.

Q. (Mr. Bond) And he was terminated about six months after that? When was he terminated? A. 9/15/'45.

Q. He only held that position as supervisor for the last six months, or about that?

A. That is right, yes, sir. He also served at Tyson Powder Storage area as a safety engineer from October 1, 1943, until February, 1945.

Mr. Bond: I think that is all.

Redirect Examination by Mr. McRoberts:

Q. Mr. Miller, in the testimony yesterday, I believe you referred to someone being on a certain code No. 843, the code of the safety engineers. They were actually perform-[fol. 1600] ing other duties than an ordinary safety engineer or safety inspector performed? A. Yes, sir.

Q. Will you tell us how that happened?

A. Well there were a number of those. For instance, this man Trimble who was an instructor, Trimble was hired as a first aid instructor and a very short time after he was employed his classification was changed to safety engineer due to the fact that as an instructor Trimble had to keep himself just as well posted on the rules and regulations and requirements as all of the safety engineers. In fact, he was teaching it. For instance, Trimble was given this explosive training course just the same as the safety engineers were. For that reason he was classified as a safety engineer. He didn't have an assigned post in any unit.

Q. Mr. Miller, let me phrase the question this way: These code classification numbers were primarily pay roll numbers, were they not? A. That is what they were.

Q. And each code number carried a certain salary with it? A. That is right.

Q. Sometimes you had jobs or duties which varied a little bit from the job ordinarily under a particular code?

A. Yes, sir.

Q. But had no special code number for those jobs?

A. That is right, yes, sir.

[fol. 1601] Q. So if they were entitled to the salary of code 843, for example, you paid them under that code?

A. We applied the code that came the nearest to the actual function that they were performing.

Q. So that you may find people listed on Defendant's Exhibit A carrying the same code—Plaintiffs' Exhibit A—carrying the same code number, but whose duties varied from person to person? A. That is right, yes, sir.

Q. Now this may be [repititious], but to clarify that, Mr. Miller, Judge Bond yesterday asked you a number of questions regarding the authority which the production people had over safety matters as set forth in certain instructions and asked you if that didn't conflict with your testimony as to the authority of the safety engineers in the department? A. Yes, sir.

Q. Now you testified on direct examination in response to my request that the safety department was set up as a staff advisory department. I believe that is the term.

Mr. Bond: Object. That is a suggestion to the witness and [and] leading form of question.

Mr. McRoberts: It is purely preliminary, Your Honor. I am leading up to a particular thing.

Q. I believe you so testified in substance? A. Yes, sir.

[fol. 1602] Q. Now will you explain the relationship between a staff advisory function and a line or a production function?

Mr. Bond: That has all been over. He took him over it in chief and I took him over it in cross examination. It is just starting over again, if the Court please.

The Court: He may answer.

A. A line function in our organization is the operating function. A line manufacturing or operating department would be controlled by the immediate supervisor of these employees, and we were very strict about this rule that any matter pertaining to that department or these employees, or the machinery, working conditions, material, the product in the department, had to be handled through the supervisor of that department. And it was necessary that we be so strict principally because of the size and magnitude of the operations we were carrying on. The staff function, what we call a staff function, is the function of instructing, teaching, training, recommending. And the staff function requires that whoever is performing that from a staff standpoint must perform it through the line supervision always, except in cases of emergency.

Q. And when you use the term that the safety department was a staff advisory department, you mean by that what you just testified to? A. That is right, yes, sir.

Q. And the exception was in the event of emergency?

[fol. 1603] A. That is true.

Q. When the safety department could act directly upon the operation? A. That is right.

Q. Now Mr. Miller, referring to these assistant staff supervisors. I think I covered this in part, but I want to make certain. Did I understand your statement they spend all or substantially all of their time in supervisory functions, or did they spend any substantial part of their time doing the work, or employees under them?

Mr. Bond: I don't think Counsel ought to continue to use that form of interrogation of his witness. I am sure he knows it is not proper. He could just as easy ask him what functions they perform. And I object to it.

The Court. Go ahead.

A. I would say the assistant staff supervisors and those others.

Q. By "others" will you identify it by exact name?

A. Well, the assistant staff supervisors, the supervising safety engineer, and any supervisor, spent at least 90 or 95 per cent of his time supervising.

Q. As distinguished from?

A. As distinguished from doing any manual work similar to those employees under his supervision. And about the only function they would perform, not of a supervisory [fol. 1604] nature, would be the signing of correspondence, reports, and so forth.

Q. I will ask you whether or not these supervisory officers of the different classes to which you have testified would be required to exercise discretionary powers in the performance of their duties?

Mr. Bond: Just a minute. Object to that, it is calling for a legal conclusion. This is one of the questions we are trying, whether they would be required to exercise discretionary powers.

(Last preceding question was read.)

The Court: Objection sustained.

Mr. McRoberts: Your Honor please, may I suggest this is a witness who is in charge of these employees and knows that that is an ultimate fact.

The Court: He can tell what they did.

Mr. Bond: Yes, sir.

Q. Will you tell us what those supervisors did and were required to do in the performance of their duties, directing your particular attention to any matters involving judgment or discretion, if there were any.

Mr. Bond: We went over all that in chief. That was the main thing he brought out from him yesterday.

The Court: I thought it had been gone over.

A. I think that the assistant staff supervisor supervising the safety engineer, and the safety engineer, were required to use their own judgment and to use their own [fol. 1605] discretion constantly. You cannot at any time lay down a rule, for instance, and say that a half inch of water on the floor was a hazard and you have to stop the operation, but less than a half inch is not a hazard, the safety engineer had to use his own judgment. He had to decide for himself when a hazard existed. He had to decide when to shut down a machine. He had to decide

when to recommend a new type of guard, or whether to recommend a new type of guard. He had to decide when he was going to ask his supervisor to help him get the line supervision to enforce safety regulations and safety requirements. The biggest part of his job was making decisions for himself.

Q. I think I asked you, but I may have asked you the question with reference to only specific jobs. Were the suggestions and recommendations of all of those parties about whom you have testified given weight and consideration, particularly those recommendations with respect to hiring, firing, promotion and demotion; transfers and disciplines, and matters of that kind?

Mr. Bond: Objected to as leading.

The Court: He may answer.

A. They were not only given that, but the records signed by those complainants will show that actual results were achieved as a result of the recommendations by them in discharges, transfers of employees, putting them on lighter work, changing their classification, and all things pertaining to that.

[fol. 1606] Q. And now one question which I hope is final. You directed my attention to some records which you had of a specific instance signed by one of these plaintiffs. Do you have in your possession and as part of the records of your department a report prepared by the plaintiff E. C. Maher, dated June 30, 1943, which illustrates the function and purpose in the conducting of these safety meetings and the authority which the employees were given?

A. Yes, sir.

Q. Will you just read, Mr. Miller, into the record the particular report and show by whom it was made, to whom it was made, and which of these plaintiffs received copies of it?

Mr. Bond: May I see it first, please?

(The paper is passed to plaintiffs' counsel, who inspects and returns it to witness)

Q. Proceed.

A. A letter signed by Mr. E. C. Maher, dated June 30, 1943, addressed to Mr. C. E. Strickland:

"Minutes of semimonthly supervisory meeting held June 25, 1943: Supervisor at Station 763 requested an electric fan. Mr. Lockhart requested first aid training for 22 fireman stationed at the [power] storage area."

Q. Is that one of the plaintiffs in the case, Mr. Lockhart?
A. Yes, sir.

"It was brought to our attention that, although the [fol. 1607] electric fans are properly guarded were still being placed on box which has bandages, and so forth. Supervisors were asked to have the safety engineers check all fans to eliminate any hazardous condition. Mr. Stewart asked what authority a safety engineer had in shutting down a machine. It was explained that all safety engineers had absolute authority to shut down any machine where a hazardous condition existed."

E. C. MAHER."

Copies sent to J. T. McKittrick, Mr. A. Brooks, Mr. Ludwig.

Q. Mr. Ludwig, one of the plaintiffs?
A. Yes, sir. And Mr. Stockho.
Q. One of the plaintiffs?
A. Yes, sir. Mr. Knight, one of the plaintiffs, Mr. J. McDermott, Mr. A. Lockhart, a plaintiff, and Mr. R. Stewart a plaintiff.

Mr. McRoberts: I think that is all.

Cross Examination by Mr. Bond:

Q. The last sentence or two that you read in reference to the right of a safety engineer to shut down a machine comes under those exceptions in the general instructions which I showed you yesterday where it says, an exception to this rule, the rule being that they cannot do that.

"An exception to this rule will be made where an employee is engaged in some operation whereby death or serious injury might result."

That is correct, isn't it?

[fol. 1608] A. I would have to see that.

Q. You have been shown that several times both by your Counsel and by me, "Book of General Instructions," under the heading, "Duties of Safety Engineers shall be as follows," page 6, Item 6, says they shall not have that authority, and what I just read states the exception. That instruction given at that meeting, I am asking you, was under that heading, wasn't it?

A. Item 6 does not say they shall not have that authority. The last paragraph reads, "they shall have that authority."

Q. Item 6 doesn't say that?

A. No, sir, Item 6 doesn't say anything about that.

Q. "The safety engineer will not attempt any correction of these violations by contacting the individual."

A. Yes, sir.

Q. "In all cases he will contact the supervisor of the individual." A. Yes, sir.

Q. "And will leave corrective action"— A. Yes, sir.

Q. "To the supervisor." A. Yes, sir.

Q. Corrective action would include the shutting down of the machinery, wouldn't it? A. Yes, sir.

Q. Now, down here you say, "An exception to this rule [fol. 1609] will be made where an employee is engaged in in some operation whereby death or serious injury may result." A. That is the same as this.

Q. In other words, he would act in emergency?

A. Absolutely.

Q. Clyde Strickland, who was the head of this department most of the time, will be brought here as a witness?

A. I don't know.

Mr. McRoberts: I will answer that question if you wish to direct it to me.

Mr. Bond: Well, are you going to call Mr. Strickland as a witness?

Mr. McRoberts: I am not. Mr. Strickland is not in town and not in this jurisdiction as far as I know.

Mr. Bond: That is all.

WALTER L. SCHULTE,

previously sworn, recalled for further redirect examination on behalf of defendants, testified as follows:

Redirect Examination by Mr. McRoberts:

Q. Mr. Schulte, you have been sworn and been on the witness stand before, have you not? A. Yes, sir.

Q. Mr. Schulte, at my request have you produced in court the original ledger of the United States Cartridge [fol. 1610] Company? A. I have.

Q. And have that in your possession now? A. I do.

Q. That is the original book entry of the company kept in the ordinary course of business, and does that ledger reflect the assets and liabilities of the United States Cartridge Company from the beginning of its operations down to the present time? A. Yes, sir.

Q. Without attempting, if it is necessary, to offer the entire ledger in evidence, can you point out to me any sheets in that ledger which contain any listed assets of the United States Cartridge Company or any fixed assets of any kind or character?

A. Yes, sir, I can show one ledger sheet.

Q. All right.

Mr. Bond: I think it is going pretty far into collateral matters to go into the assets of the United States Cartridge Company in this action for overtime under the Fair Labor Standards Act. I do object to all those matters as being purely extraneous, having no bearing on the issues in this case.

Mr. McRoberts: I hoped it wouldn't be necessary to go into the record. It is to prove the United States Cartridge Company didn't have title and does not claim to have title to this property in question.

[fol. 1611] Mr. Bond: I am submitting to Your Honor whether they have title or not, or what they have title to, is not a subject of inquiry in this case.

Mr. McRoberts: May I suggest—this is subject to your objection that it isn't relevant and material—that the fact is that the title to his property was in the United States Government and wasn't in the United States Cartridge Company.

Mr. Bond: No, I am in no position to make any stipulation about the ownership of any of the defendant's property, or his title.

The Court: It will be admitted, then, subject to the objection.

Q. Now you said you found one sheet in that ledger that shows some type of fixed asset? A. Yes, sir.

Q. What do you mean by "fixed assets?"

A. Items of a tangible nature.

Q. Do you have that ledger sheet before you? A. I do.

Q. That being Account No. 401? A. That is correct.

Q. Bearing the caption "Office Equipment?"

A. That is correct.

Q. And how many entries are there on that sheet?

A. One.

[fol. 1612] Q. And what does that represent?

A. The purchase of a check writer and signer from the War Assets Administration.

Q. When was that purchased? A. June 30, 1946.

Q. Now are you familiar from your control of these records of that company, was this ledger sheet kept under your direction and supervision? A. Yes, sir.

Q. Can you state of your own knowledge as to whether or not the United States Cartridge Company now owns or at any time in its operation owned any fixed assets other than this one item which you have directed to my attention?

Mr. Bond: Objected to as calling for a conclusion, legal and factual.

The Court: He may answer.

A. The United States Cartridge Company didn't own any fixed assets other than I have testified to.

Q. Just one machine?

A. Just one piece of office equipment.

Q. Now your balance sheets of the company were taken off from time to time from this ledger? A. Yes, sir.

Q. Do you have copies of these here? A. I do.

[fol. 1613] Q. Without going into detail on that, do any of them show any fixed assets other than this one item to which you have directed my attention? A. No, sir.

Q. That is true all the way back to the beginning of operations of the company? A. That is true.

Q. Mr. Schulte, when the company ceased actual manufacturing operations at the St. Louis Ordnance Plant, what was done with respect to all physical property on hand? I am referring both to machinery, tools, appliances, raw materials, supplies, working processes, and ammunition, if any?

A. It was turned over to the Ordnance Department.

Q. Did you obtain a receipt and release from the Government for all property on hand? A. We did.

Q. Did the Government pay you for that?

A. The Government paid for all of the property.

Q. I mean when you turned that over to them, did they give you any money for it? A. No, sir.

Q. Why not?

A. Because it had already been paid for by the Government.

Q. When any property was received at that plant, any raw material such as brass, using that as an example, when it was received [it] at the plant, who checked it in? [fol. 1614] A. Our man checked it in along with a Government inspector.

Q. And were records kept of that property all the way through? A. They were.

Q. And whose records were those?

A. The Government's.

Q. Did the United States Cartridge Company ever keep any records of its own of raw materials, or working processes or the finished products? A. No, sir.

Mr. McRoberts: I think that is all, Mr. Schulte.

Mr. Bond: No cross examination.

R. L. JACOBSON,

of lawful age, produced, sworn and examined on behalf of defendant, testified as follows:

Direct Examination by Mr. McRoberts:

Q. Will you state your name, please sir?

A. R. F. Jacobson.

Q. Where do you live?

A. 7125 Edward Terrace, Richmond Heights.

Q. Where are you employed?

A. McQuay-Norris Manufacturing Company.

Q. When did you enter their employment?

A. September 10, 1945.

[fol. 1615] Q. And before that time by whom were you employed? A. By the United States Government.

Q. And in what capacity?

A. As United States Federal Auditor at the St. Louis Ordnance Plant.

Q. And how long were you engaged in that work?

A. From September 2, 1941, to September 7, 1945.

Q. That is the entire period of the operation of the St. Louis Ordnance Plant?

A. It covered the operation before they started and after they finished.

Q. What were your duties?

A. My duties mainly were to determine all costs incurred at the plant or reimbursed at the end of the contract, and to see that the Government property at the plant was properly used and Government materials were not wasted, to set up auditing controls, to see the contractor under the operation performed it according to the contract.

Q. Did you set up controls and records for the keeping of records of physical property, both machinery, tools, equipment, raw materials, working processes and finished processes?

A. Under Government regulations we maintained actual fixed records, of what we call fixed assets. We kept item records.

Q. You checked each machine? Is that true?

A. We checked each machine and listed and saw the serial number and category, and what type, and grouped [fol. 1616] those to show the record of each machine.

Q. That is, the Government did that?

A. The Government did that under my supervision.

Q. Did the Government have its own stamp or tag put on each machine?

A. The Government regulation required the United States Cartridge Company to put a tag on the minute the

property was received at the plant, which read "St. Louis Ordnance Plant Property No."

Q. And the tag said "St. Louis Ordnance Plant," and gave a separate number to each machine?

A. Which identified them as a piece of property.

Q. And those identifying numbers went on to the Government records? A. Yes, sir.

Q. Is that true of every machine in that entire plant?

A. Yes, sir.

Q. Every desk?

A. Every piece of equipment which is known as capital equipment. It would cover almost every item costing $50 or more.

Q. And can you state of your own knowledge and from your knowledge which you gained in keeping those records and supervising those records, and your functions as an employee of the Government, who owned the plant itself and its equipment?

[fol. 1617] Mr. Bond: Object to that as hearsay, and not the best evidence.

The Court: He may answer subject to the objection.

A. The Government went on the principle of a certain program of Government owned and controlled operating plants, and they were referred to as GOCUL.

Q. This was nothing unique, was it?

A. No, sir, it was one of the many that covered all these types of plants that were contractor operated.

Q. Is that also true not only of machinery and equipment, but of raw materials and working processes and finished product?

Mr. Bond: Object as not the best evidence and hearsay. He is asking this field auditor who kept books for the Government as to the title of the raw materials.

Mr. McRoberts: This is the man who kept the books showing the Government ownership of the very property.

The Court: He may answer.

Mr. Bond: We except.

A. Did I understand whether that was Government property or not?

Q. Yes, sir.

A. Yes, sir, we presumed it to be Government property and put a check on it.

Q. All raw materials were checked in either completely or spot checked? A. Yes, sir.

[fol. 1618] Q. How about anything that went out, for example? A. It had to go out with our permission.

Q. If a truckload of brass was to go out of the plant as being unsatisfactory or going some place else?

A. A report had to be given to the Government so we could check it out.

Mr. McRoberts: I think that is all.

Mr. Bond: No cross examination.

JOHN C. McDERMOTT,

of lawful age, produced, sworn and examined, testified on behalf of defendant as follows:

Direct Examination by John L. Donnell:

Q. Will you please state your full name?

A. John Thomas McDermott.

Q. What is your address?

A. 3728 Avondale Avenue, Pine Lawn.

Q. What is your age? A. Thirty-two.

Q. Were you employed by the United States Cartridge Company during the war? A. I was.

Q. When did you enter their employment?

A. July 22, 1941.

[fol. 1619] Q. In what position or positions were you employed by this company?

A. My original employment, my original job title was First Aid Instructor. My title was then changed to safety inspector.

Q. Will you please indicate at what time the changes in your positions occurred?

A. I can't state that definitely. Several months after my employment my title was changed to safety inspector, then to safety engineer, then to supervising safety engineer. And my last job title was assistant general foreman.

Q. In your work as safety engineer did you have the duty of instructing other safety engineers in safety practices? A. I did.

Q. What training did you have in safety practices?

A. I received 96 hours' instruction in industrial safety engineering at Washington University, and 300 hours' instruction in explosive safety engineering at Chicago, Illinois, Institute of Technology. That course was given by the Ordnance Department.

Q. Was that course given before or after your employment at the Cartridge Company? A. During.

Q. Will you please state if you instructed any of the plaintiffs in this case in safety engineering?

[fol. 1620] A. May I see the list?

Q. And may I also ask you if you did instruct any of the plaintiffs in this case, will you state which ones? Or if you didn't instruct them, you could exclude the ones you didn't instruct.

A. Excluding the ones I didn't instruct, Mr. Champion.

Q. These are the ones you didn't instruct?

A. That I didn't. Mr. Kemp, Mr. Maher, Mr. Stutz, Mr. Yancey, Mr. Broad, and Mr. Peters.

Q. Did you instruct all of the remaining plaintiffs in safety engineering?

A. To the best of my knowledge, yes, sir. There may be one or two others that are excepted.

Q. What was the length of the training course which you gave these plaintiffs?

A. The first aid training for most was the regular standard first aid course; that is, the Red Cross standard course, which requires 20 hours instruction. The instructions in Safety would cover approximately 16 hours.

Q. Did you give them these instructions before they started to work or after they had started to work?

A. After.

Q. And would it be early in the period of their work as safety engineers?

A. In some cases it might have been immediately after [fol. 1621] employment, and others some time may have elapsed.

Q. What is the method of instruction in those courses?

A. Regular class-room instruction, the use of visual aid such as slide films, motion pictures, manuals, bulletins and data sheets.

Q. How large were those classes?

A. They would vary, sometimes there might not be more than three or four persons.

Q. At what time in the day would they be given?

A. At different times.

Q. Did you use any text-books in those courses?

A. Manuals were prepared for use in these courses.

Q. Who prepared the manuals? A. I did.

Q. Will you please state which manuals these were?

A. What?

Q. Will you state the manuals you used? A. By name?

Q. Yes, sir.

A. One was the Manual of General Instructions for Safety Engineers.

Q. Mr. McDermott, is Plaintiffs' Exhibit F which I hand you here that manual to which you refer?

A. It is. I might add that this manual was revised, the revision being only that the words safety engineer replaced [fol. 1622] the words safety inspector, which was used in the original publication of this manual.

Q. When did that revision occur?

A. I don't recall the exact date. It was when the title itself was changed, that is, after that time.

Q. Did you prepare any other manuals for use for these training courses?

A. Yes, sir; there were data sheets prepared, there was a manual, Safety Manual for Supervisors, which was issued. This manual which you are holding—

Q. Just a moment. Is Defendant's Exhibit 1 this safety manual for supervisors to which you refer?

A. Yes, sir, but this manual wasn't used in my classes. This manual was published after these classes were held.

Q. You prepared that manual? A. I did.

Q. It wasn't used in your classes? A. No, sir.

Q. Did you, however, in your classes cover the material that is covered in that manual?

A. For the most part, yes, sir.

Q. Did you or didn't you instruct these men explicitly as to their duties as safety engineers?

A. The instructions were given as are explicitly con-
[fol. 1623] tained in the manual.

Q. As to the duties of the safety engineers?

A. That is correct.

Q. Will you give a brief statement as to what instructions you gave to these men as their duties as safety engineers?

A. The instructions as to making routine inspection reports of accidents, the writing of accident reports, and so forth.

Q. Did you or did you not instruct these men that they had authority to stop production?

Mr. Bond: Just a moment. Object to Counsel leading the witness or making suggestions as to his testimony.

The Court: Sustained.

Q. Did you instruct them as to any other duties which they had?

A. The men were instructed that in the ordinary course of events where infractions were noted, or any hazardous physical or mechanical conditions were noted, that the supervisors of the area of the building in which this condition was found should be contacted for corrective action; but where death or serious injury was imminent that the authority was had by the safety engineer to stop the productions himself.

Q. I call your attention, Mr. McDermott, to the general instructions which you say you prepared and which you referred to and identified as Plaintiffs' Exhibit F. And I
[fol. 1624] should like to read into the record two portions of this exhibit. One appears on page 2, at least the second page, it doesn't happen to be numbered, about three-quarters of the way from the bottom:

> "Should not violations exist during the working shift, a report of such conditions will be made in the manner as is outlined above. Consult sample report which is included in this manual. An exception to this rule will be made where an employee is engaged in some operation whereby death or serious injury may result. Should this condition exist the safety

engineer will stop the hazardous operation and will immediately seek the supervisor of the person who was performing such act and will report the incident to him and will explain in detail why he caused such operation to be stopped."

This is the instruction to which you refer in stating that you informed these men that they had authority?

Mr. Bond: Don't lead the witness.

Q. Is this the provision to which you referred one moment ago in explaining what authority you stated to the men they possessed?

Mr. Bond: He didn't refer to any provision, Your Honor.

Q. You did instruct the men in this provision which I just read? A. That is true.

Q. Referring also to this manual further, at the bottom [fol. 1625] of the sixth page thereof, I read into the record this—or at the bottom of the seventh page, this provision:

"When a safety engineer discovers what he considers to be the existence of an extremely hazardous condition, he is authorized to take immediate direct action to eliminate the [the] hazard. An unsafe condition in the restricted areas will also fall under this category. The safety engineer will use discretion in the exercise of this authority so that there will be no unnecessary interruption of production. A report of the circumstances and of the action taken will be promptly made to the foreman or supervisor in charge. Cases of this type will also be reported on Form I. R. S. 25—Revision 243."

Did you call this provision to the attention of your men in those classes? A. I did.

Mr. Donnell: I believe that is all.

Cross Examination by Mr. Bond:

Q. Mr. McDermott, you said your name is John, what is your full name? A. John James McDermott.

Q. Where do you live?

A. 3728 Avondale Avenue, St. Louis, County, Missouri.

Q. How old are you? A. Thirty-two.

[fol. 1626] Q. Married or single? A. I am married.

Q. When did you go to work for the St. Louis Ordnance plant? A. July 22, 1941.

Q. In what capacity?

A. My first job was as First Aid Instructor.

Q. Prior to that time you said something about having attended Washington University one year, didn't you?

Mr. Donnell: I beg your pardon, he didn't say he attended Washington University prior to that time, he said he attended it concurrently with.

Q. Oh, 1941? When did you attend Washington University? A. It was during 1943, sir.

Q. 1943, and what department of the University did you enter?

A. The course that I took was one of those war training courses in industrial safety engineering.

Q. When did you enter Washington University, and who was your instructor out there?

A. There were a number of instructors.

Q. When did you enter the university?

A. I don't remember the exact date.

Q. What class did you sign up for?

A. This Industrial Safety Engineering class.

[fol. 1627] Q. Were you enrolled as a regular student of Washington University? A. No, sir.

Q. You won't appear on the records as a student?

A. The certificate is issued for Washington University.

Q. I asked you if you enrolled as a student in the Registrar's Office like any other student in the university.

A. I filled out a form which was sent in. I don't know whether it was a regular form used by Washington University or not.

Q. Did you go out there yourself and apply?

Mr. Donnell: Object to that line of testimony. He stated he attended this course at Washington University.

Mr. Bond: I want to know when the courses were held. When were those courses held?

A. It was some time during 1943.

Q. Was it in the winter?

A. I don't recollect. I believe that it was, yes, sir.

Q. Fall or spring?

A. I believe it was during the winter months, I don't know.

Q. Who was the instructor?

Mr. Donnell: Maybe that will refresh your recollection (passing a paper to witness).

Mr. Bond: I wish he wouldn't interrupt my cross examination by handing witness papers, Your Honor.

[fol. 1628] Mr. Donnell: All right, I will retain it.

Q. Who was your instructor? Give me his name.

A. There were several instructors. One was Mr. Johnson, who is a representative of, and the safety engineer, for the American Optical Company here in St. Louis; Mr. Ben Cornwell—I can't tell you who Mr. Cornwell is with. I think it is Insurers' Service Company, or something of that sort.

The Court: Why take up this time?

Q. You first went to work as a first aid instructor?

A. Yes, sir.

Q. And you instructed safety engineers in first aid? Is that right? A. I did.

Q. Now this manual of mine that you were handed here, did you prepare that manual? A. I did.

Q. All that writing that is in that manual? A. I did.

Q. You composed it?

A. No, sir, some parts of it were put together by me.

Q. But you are not author of this language in this manual, are you? A. To a certain extent, yes, sir.

Q. These general instructions, did you draft them?

A. Yes. Here is the manner in which the manuals were [fol. 1629] compiled: The manuals would be compiled by me or written by me, and then [sunmitted] to my superior, that is the chief safety engineer. And they would be approved by him and then would be published.

Q. I see.

A. This and my Exhibit F were published by the chief safety engineer. It was compiled by me.

Q. All these forms, did you compose them? A. No, sir.

Q. What do you do now?

A. At the present time I am unemployed.

Q. Ever since last Monday you have been sitting in this court-room, haven't you? A. That is correct.

Q. Were you subpoenaed as a witness by anybody in this case? A. I wasn't.

Q. How did you happen to be a witness in the case?

A. I was called.

Q. Did you make yourself known to Counsel for the defendant? A. I have met Mr. McRoberts and Mr. Donnell.

Q. Before this trial?

A. I made a deposition in regard to this case, I believe about a year ago.

[fol. 1630] Mr. Bond: That is all.

Mr. Donnell: That is all, Mr. McDermott.

Mr. McRoberts: Now Your Honor, I am not sure that I made formal proof of all of my exhibits, and I would like in order to make sure that the record is clear at this time, make an offer of any and all of Defendant's Exhibits 1 to 25, inclusive, with the exception of those which have heretofore been offered and have been rejected by the Court, and the one exhibit, copy of the purchase order which was identified by one of these numbers and subsequently withdrawn. It is the blank form. I believe it was "Defendant's Exhibit 21." It was the blank first copy of the purchase order which was never properly supported and was withdrawn.

Mr. Bond: For the record I will renew the objections that I made to these exhibits at the time they were made. You are offering only those that the Court admitted?

Mr. McRoberts: That have not already been rejected. I am not offering those.

Mr. Bond: All right.

[fol. 1631] Mr. McRoberts: Now if Your Honor please, that is defendant's case with this one qualification to which I wish to direct Your Honor's attention, and that is it comes back to these original time-cards and records and

the inaccuracy in the computations of the alleged overtime hours. I point out to you that the testimony discloses that the figures contained in Plaintiffs' Exhibit A and carried over into the computations Plaintiffs' Exhibit B, will include certain time which we contend is not compensable under any theory and the only way in which an exact computation of that time can be made would be to recompute all of those cards. For example, where these computations include minutes before shift and minutes after [shirt], which was not working time, that is not compensable, and yet that is reflected in some instances in these computations, and there is no regular rule of thumb that you can follow to say how much that amounts to. And I would like to suggest, if I may, that so far as defendant's part of this case upon final submission, that the case may be taken under submission with the understanding that if the final decision of Your Honor should make those exact hours material to the ultimate outcome of the case, that then and in that event Your Honor lay down certain rules to be followed and if the parties cannot agree upon those computations, that the matter could be then referred to a Special Master for the purpose of computation according to the principles which the Court had announced.

[fol. 1632] The Court: I had rather that would be heard.

Mr. Bond: I had thought that from their own testimony, Your Honor, that they make it clear that the men, if they are entitled to recover in this case at all, they are entitled to recover at least the amount reported in my Plaintiffs' Exhibit A, for the reason their own witness testified in making those pencil computations which went into the exhibits they gave me, he excluded all of that tolerance time and applied the One-tenth Rule. I don't know what authority they have for it, but they did it, and we are not complaining of the net figure that they put in. And that figure they put in was the net less a half hour which they assumed to take off from the starting of the plant until 1943, which I don't think they are entitled to take off, and I have it added in a separate column in my computations. Now I think we are entitled to recover either on the basis of the figures in Plaintiffs' Exhibit A, or if we are entitled to that half hour for lunch, then on the figures of the additional—I think we are entitled to recover on the

basis of the figures in Plaintiffs' Exhibit B which are carried over from Plaintiffs' Exhibit A, as counsel states, and in addition thereto a half hour to the date up to October, 1943, which I have shown separately. I do not think there will be any necessity for any Special Master or any accounting. I think if there is a finding in this case for the plaintiff that I can submit a finding of facts and law [fol. 1633] and a form of decree in which the details can be worked out with counsel.

The Court: I think it wouldn't be necessary to appoint a Master.

Mr. McRoberts: In this connection I called Your Honor's attention at the time the plaintiffs' Exhibit B was offered, I asked leave to reserve the objections until I had an opportunity to examine. And may I now at this time object to Exhibit B on the ground that the evidence in the case discloses that the computations reflected therein do not accurately reflect exactly the compensable hours upon plaintiffs' theory or upon any theory even if the plaintiff should be entitled to recover. And for that reason I object to the exhibit.

Mr. Bond: We do not think the facts sustain his objection, but we will discuss that in the briefs, I imagine, along with the other points.

Mr. McRoberts: Defendant rests.

Thereupon, plaintiffs to further sustain the issues in their behalf offered and presented the following evidence in rebuttal:

Mr. Bond: I have a few witnesses, Your Honor, in rebuttal.

LEDRU W. TRIMBLE,

of lawful age, produced, sworn and examined on behalf of plaintiffs, testified as follows:

[fol. 1634] Direct Examination by Mr. Bond:

Q. Mr. Trimble, state your full name, please sir.
A. Ledru W. Trimble.

Q. Where do you live?

A. 7708 Horatio Drive, St. Louis 21.

Q. Are you married? A. Yes, sir.

Q. And what is your age? A. Forty-eight.

Q. Were you formerly employed by the St. Louis Ordnance plant? A. Yes, sir.

Q. You are one of the plaintiffs in this case? A. Yes, sir.

Q. According to our records here you went to work March 23, 1942, in what capacity?

A. I was employed as the First Aid Instructor.

Q. Instructor first aid in the safety department?

A. That is right.

Q. What were your duties?

A. Teaching first aid only, at the beginning.

Q. Tell us in a little more detail what was done by a teacher of first aid?

A. The employees under certain classifications were brought in for instructions in first aid for general relief, [fol. 1635] what to do in case of an accident, instructions in artificial respiration, control of arterial bleeding, venous bleeding, and they were shown pictures on first aid subjects.

Q. Was that your whole duty there in the plant?

A. At the beginning, yes, sir.

Q. How long did you do that?—Oh, I see. Well, go ahead, how long did you do that and what was your next duty?

A. It wasn't more than two or three months at the beginning until I was asked to give instructions in safety as well as first aid.

Q. Did you do that? A. I did.

Q. Some of those plaintiffs were in your classes?

A. Only a very few.

Q. How long did you continue to do that work?

A. Teaching first aid and safety until the employment ceased. That is, they ceased hiring new employees, after which time I was assigned to the clerical office for duties in helping to prepare records. I think they handled the uniforms as they came in and other items of a different nature other than teaching, because there was no teaching to do.

Q. Were they clerical duties?

A. Yes, sir, for the clerical office.

Q. Were you involved in any way in the matter of policy making? A. No, sir.

[fol. 1636] Q. As a teacher did you formulate any of the safety rules that they had out there? A. No, sir.

Q. Were you consulted in policy making? A. I was not.

Q. Or in the making of the safety rules?

A. I wasn't even invited to attend the safety meetings of the supervision.

Q. And likewise in your clerical duties you were not consulted in any matter of policy and rule making?

A. I was told what to do, how to make the reports out, how to make the compilation for information.

Mr. Bond: That is all.

Mr. McRoberts: No questions, Your Honor.

ED L. STOCKHO,

of lawful age, produced, sworn and examined, testified on behalf of Plaintiffs as follows:

Direct Examination by Mr. Bond:

Q. Will you state your name, age and residence, please?

A. Ed L. Stockho, 7641 Wydowne, Clayton, Missouri, 40 years of age.

Q. You are one of the plaintiffs in this case?

A. Yes, sir.

Q. You formerly worked in the safety department of [fol. 1637] the St. Louis Ordnance Plant? A. Yes, sir.

Q. Tell us when you went to work and the changes that occurred.

A. I got transferred in the safety department in May, 1942, from the inspection department, and stayed in the safety department until I was terminated in August, 1945.

Q. What did you do while you were out there?

A. I was a safety inspector, and later on made audits.

Q. When you were safety inspector you patrolled, inspected and reported? A. Yes, sir.

Q. And worked on a shift? A. That is right.

Q. Is that the same work the other inspectors, the safety engineers do? A. Yes, sir.

Q. What did you change over to? A. Auditor.

Q. When was that?

A. I can't recall which month it was when they were made staff safety engineers. And they had four auditors at that time.

Q. What did you do as an auditor?

A. Made the same kind of reports, routine inspection and housekeeping hazards and checked machines and [fol. 1638] conditions in the restricted area due to bad housekeeping that could cause explosion.

Q. Did you have any policy making? A. No, sir.

Q. Rule making? A. No, sir.

Q. In the [formalization] of policies or practices?

A. No, sir.

Q. What you did you would do under instructions?

A. Yes, sir.

Q. And report what you did to your superior?

A. That is right.

Q. Did Mr. Miller ever have any direct contact with you? A. No, sir, he didn't.

Q. I notice here in our report that the company has given us of your pay roll record that from May 31, 1942, to 11/22/42 you were on a monthly salary of $175 a month or gross wages of $40.38 a week. I will show you that and ask you if that refreshes your memory on that?

A. That is correct.

Q. Did you get any ov time during that time?

A. All the while I was employed in the safety department I received no overtime.

Q. No overtime then? A. No, sir.

[fol. 1639] Q. I will ask you whether or not during that period when you were getting less than $200 a month you worked any overtime?

Mr. McRoberts: Just a moment, object. That is asking for an opinion and conclusion of the witness as to overtime. He can state the hours.

Q. Did you work in excess of 40 hours a week?

A. Yes, sir.

Mr. Bond: That is all.

Mr. McRoberts: No questions.

WILLIAM STUTZ,

of lawful age, produced, sworn and examined, testified on behalf of plaintiffs as follows:

Direct Examination by Mr. Bond:

Q. Will you state your full name, age, place of residence and occupation, Mr. Stutz?

A. William Stutz, 2209 Lynch Avenue, Nameoki, Illinois.

Q. You are a plaintiff in this case? A. I am.

Q. When did you go to work for the St. Louis Ordnance Plant? A. The first part of June, 1943.

Q. Tell us in what capacity, and the story of your employment there.

A. I went to work in the safety department and after about a week, approximately a week, that I rode around [fol. 1640] with Mr. Burke, and after that time the safety department took over the laundry and I went down to the laundry and worked in the laundry for—this is approximate, I think it was December of 1944, after which time I was—I had an office or worked in an office in the clerical department.

Q. While you were in the laundry what did you do?

A. Oh, I—what they term the laundry was a central gathering place for clothing that the company furnished the employees. They would gather the soiled clothing. A couple of colored men did that, and it was brought in, badge numbers were put on it and sent to two laundries that contracted for the cleaning of this laundry. It was brought back in and sent out—well, at one time they called them tool process and laundry cribs.

Q. Did you take part in those operations?

A. I would say approximately 95 per cent of the time I was working at maybe gathering up clothes, maybe delivering, maybe standing still—badge numbers—

Q. Did you have any matters of policy to determine in that laundry? A. No, sir.

Q. Were you consulted in rule making or in preventive measures? A. No.

Q. Who did you get your orders from?

[fol. 1641] A. In most cases Mr. Strickland.

Q. And did you ever have any contact with Mr. Henry Miller?

A. You mean when I was in the employ of the company?

Q. In the laundry, yes, sir.

A. No, sir, not in the laundry.

Q. Now then, you went from there where?

A. To the clerical office.

Q. What did you do in the clerical office?

A. I tabulated figures on accidents, and so forth and so on.

Q. It was part of the safety department? A. Yes, sir.

Q. And were you given any authority in there?

A. No, nothing outside of having to work with figures.

Q. Were you ever an instructor out there?

A. Yes, I did instruct in explosive safety training.

Q. In what? A. Explosive safety training.

Q. Now have you told me substantially all that you had to do out there? A. It was with one other exception.

Q. What?

A. Reports from the Medical Placement Department, which was part of the safety department, were sent to me ready to send them to Mr. McKittrick or Mr. Strickland once a week.

[fol. 1642] Mr. Bond: I believe that is all.

Cross Examination by Mr. McRoberts:

Q. Mr. Stutz, which sections did you have under your supervision? A. When did you mean?

Q. Well, at any time? A. The laundry.

Q. When was the laundry under your supervision?

A. Well, I would say about a week after I got there until approximately December of 1944. Now that is approximate on those dates.

Q. In other words, you started to work for the company in June, 1943?

A. Sometime the first part of June. I don't know the exact date.

Q. And you say you were assigned to the laundry to begin with?

A. That is right. Well, after about a week I was put into the laundry.

Q. And you stayed in charge of the laundry until about December, 1944?

A. I don t know—somewhere along in that time.

Q. Were you in charge of the laundry?

A. Well, I did what I was told to do by Mr. Strickland.

[fol. 1643] Q. Was there anyone else in charge of it except Mr. Strickland over you?

A. Sometimes I reported to the assistant.

Q. You reported directly to Mr. Strickland or his assistant? A. Or his assistant.

Q. And you were then in charge of everybody else in the laundry itself, reporting to Mr. Strickland or his assistant? Is that correct?

A. I don't quite follow about "in charge."

Q. How many employees were there in the laundry ordinarily?

A. Oh, I don't know. I would say that it averaged probably forty or fifty.

Q. To whom did those 40 or 50 employees report? Who gave them orders and instructions?

A. I would carry out the orders Mr. Strickland gave me.

Q. And you would pass on those orders to 40 or 50 men under you? A. Yes, sir.

Q. While you were there were there anybody else giving orders and instructions to those 40 or 50 men or employees? A. Not that I know of.

Q. And you say you continued doing that from June sometime of 1943 until around December of 1944?

A. Yes, sir.

[fol. 1644] Q. Were any other departments put under your supervision? A. During that time?

Q. During that time. A. Not that I remember.

Q. Let's see if this will refresh your recollection. I show you a paper dated January 31, 1944. Is that your signature? A. That is my signature.

Q. Take a good look at it, Mr. Stutz. Just the first page, is that your signature?

A. That must mean—yes, sir, that is my signature, but that date doesn't quite jibe. You are sure that is not 1945?

Q. Mr. Stutz, this paper is addressed to Mr. Hirschberger, isn't it? A. That is right.

Q. Who is Mr. Hirschberger?

A. He was the assistant to Mr. Strickland.

Q. This purports to be a report dated January 31, 1944, from you to Mr. Hirschberger, is that correct?

A. Yes, sir. But I think that report should be dated January 31, 1945. I am not certain about that.

Q. Look down here under the caption, in addition to the date. What is the subject to that document? Just read it into the record.

A. "Progressive reports for week January 24th through [fol. 1645] January 29, 1944."

Q. And in this you state, "Attached please find weekly report of the various sections under my supervision, namely, Safety, Educational and Optometrist Office." Is that correct? A. Yes, sir.

Q. Did you have these sections under your supervision at the time that report was written? A: That is right.

Q. Will you glance through these reports? Apparently the first page is the only one which has a complete date on it. Is that also in January, 1944?

A. That is the date that is on the paper, yes, sir.

Q. Now Mr. Stutz, let's see if we can refresh your recollection some more. I will show you another paper bearing the date March 13, 1944. Is that your signature on that paper? A. Yes, sir, it is, regular form.

Q. And this is addressed from you to Mr. Kemp. And who was Mr. Kemp at that time?

A. Mr. Kemp was the assistant chief at that time.

Q. And this also relates to progressive report for the week of March 5th through March 11, 1944, doesn't it?

A. Yes, sir.

Q. That says, "Attached please find weekly report of the various sections under my supervision, namely, Safety, Educational, and Optometrist Office?" Is that correct?

A. Yes, sir.

[fol. 1646] Q. And the date itself on the inside is March, 1944, is it? A. Yes, sir.

Q. Then having had your recollection refreshed, do you wish to correct your testimony which you gave on direct examination?

Mr. Bond: In what respect?

Mr. McRoberts: Witness says he was in charge of laundry and nothing else from June, 1943, to December,

1944, and here now he states he had other sections under him.

A. Could I refresh my memory as to the date I said on that?

Mr. McRoberts: I think the record will show that you were employed June 7, 1943.

Q. Let me refresh your recollection some more. I will show you another paper. Does that have your signature?

A. Yes, sir.

Q. That is dated July, 1944. A. That is right.

Q. And in this case it refers to weekly reports not only of the safety, educational unit but also the safety, clerical, medical, placement, safety, uniforms and miscellaneous?

A. Yes, sir.

Q. Were those under your supervision at that time?

A. Yes.

Q. Now, Mr. Stutz, to what extent would you care to cor- [fol. 1647] rect the testimony which you gave on direct examination?

A. I would like to have a sheet to show when I was employed and when I terminated, then I can tell you the approximate date.

Q. Look at Plaintiffs' Exhibit A and see if that helps you.

A. I guess that was December of 1943 on that laundry, according to this, because it was March of 1945 when I was terminated.

Q. Then the fact is that you were during the period of your employment supervising about 40 or 50 people in the laundry and also part of the time at least supervising employees in the safety, educational, optometrist office, safety clerical, the medical, placement, the safety, uniforms and miscellaneous work. Is that correct?

A. At different times, yes, sir.

Q. How many employees were there in these other sections which were under your supervision? Do they show on the reports there? A. No, sir, but I can tell you.

Q. Can you tell us how many were in these sections referred to in your report that you have in your hand?

A. Safety Educational varied from three to about eight

or nine. The Optometrist's Office, there was a doctor there in charge of that, and optometrist, and from one to two I think it was.

Q. And the safety educational unit?

[fol. 1648] A. Well, I would say at the most in the safety educational was about five or six.

Q. And the safety clerical?

A. That is from three to about eight.

Q. And medical placement? A. I think it was only one.

Q. Safety uniforms? A. That was the laundry.

Q. Is there another section called the Miscellaneous?

A. That was the work that I did myself.

Q. Did you give a course of safety driving?

A. That is right.

Q. Was that in May of 1944? And is that your report of the results of that course, that you have in your hand?

A. That is the test that was given. I haven't read it all over.

Q. Did you conduct safety meetings? A. I didn't.

Q. I call your attention to the minutes of a meeting held August 2, 1943, with the statement the meeting was called to order by Mr. Stutz, and so forth. Is that correct?

A. That is the meeting that was called out there. I will have to read that over to get the dope.

Q. You did call that particular meeting to order?

A. I don't remember whether I did or not. I would have [fol. 1649] to read it over. But it wasn't safety engineers, anyway.

Q. Well, the following were present in charge: Mr. Oberschelp in charge of laundry; Mr. Dobbs, safety engineer; Mr. Lautz, safety engineer, and tool cribs? A. Yes, sir.

Mr. McRoberts: That is all, Mr. Stutz.

Redirect Examination by Mr. Bond:

Q. In these departments which you would at times supervise, did you also do routine work?

A. As I stated, at the beginning I say approximately 95 per cent of the time I was working right with the bunch.

Mr. Bond: That is all.

J. C. REEVES,

of lawful age, produced, sworn and examined on behalf of plaintiffs, testified as follows:

Direct Examination by Mr. Bond:

Q. Mr. Reeves, state your name, age, place of residence, and occupation.

A. J. C. Reeves, age 48, 4955½ Arsenal, St. Louis 9, Missouri.

Q. Married? A. Yes.

Q. You are the plaintiff in this case? A. That is right.

[fol. 1650] Q. You were employed by the United States Cartridge Company at the St. Louis Ordnance Plant?

A. I was.

Q. According to the record, I think your employment commenced on the 30th of January, 1942, and you were there three years or more, until March 10, 1945. Tell us about your employment.

A. There was an intervening time in there that I was to have—the building I was assigned to discontinued—I was out seventeen days approximately in that length of time that you have there.

Q. Tell us in what capacity you went to work there and what you did, what if any changes occurred in your rating of duties?

A. I went to work for the United States Cartridge Company as a guard and was transferred over to the safety department sometime around June 1st—that is approximate—1942, and assigned to Production Unit 102 as a safety inspector.

Q. And you did the same work as these other safety inspectors out there?

A. We did, we patrolled the building and wrote up accident reports, 39's, 5's—39 is known as first aid report; 5 is a hospital report.

Mr. McRoberts: That is hardly responsive to the question. You didn't want that, did you?

[fol. 1651] Mr. Bond: No, sir. I think we have gone pretty thoroughly on both sides into what the duties of the safety engineers and inspectors are.

A. I continued in that capacity in Building 102 until some time in the fall or the winter of 1942 or 1943, at which time I was called in by Mr. Strickland and his assistant Mr. McKittrick and was put in charge of what they termed the work order division. My duties there were to make sketches, prints of safeguards, and so forth, that would be recommended by the safety inspectors, submit them to them, and they would direct me to write a request for a working order, which I would do. And after I had written this request for a work order, I would take it back to them for their signature. And from there I would take it to the building superintendent in which this improvement was to be made, and he would initial it, and from there I would take it to Mr. Gilbertson, superintendent of production, and he would either kick it down or O. K. it. From there it would go back to the plant engineer, Jack Stewart's office, who would write the work order for it requiring working print to be made, his draftsmen to make it.

Q. Is that a full statement of your duties in your classification? A. That is right.

Q. What happened thereafter? Any change?

[fol. 1652] A. I continued in that capacity for approximately I would say, approximately a year. Now there might be a discrepancy there, but I would say approximately a year. Thereafter I was transferred over to production. When I say "production" I was still in safety work, nevertheless, I was working under the production department in Building 102 under the jurisdiction of Mr. Smith, who was superintendent of the building, or his assistant chief, it may be; when he wasn't on duty, then the assistant superintendent of the building was my superior.

Q. What did you do over there?

A. I patrolled the building, made inspections and wrote the reports as I outlined.

Q. As you had done when you were safety inspector?

A. And had safety meetings and discussed safety matters.

Q. That continued until your termination?

A. That continued until that building was shut down and went out of production, at which time I was laid off. And after I was out 17 days then the Cartridge Company took a contract to repair war equipment for the army, that

is for the service which is known as Army Repair Depot. And they brought me back in as safety inspector, at which time, aside from a very few weeks, I had the responsibility, total responsibility, for the safety in the building.

Q. That was for how long? That you had that responsibility?

[fol. 1653] A. Approximately April 17, 1944, until March 1st or April 1, 1945.

Q. Have you given us a complete description?

A. That is a complete description.

Q. Of your employment out there and the duties you performed? A. I think so.

Mr. Bond: That is all.

Mr. McRoberts: No questions.

The Court: Announce a 5-minute recess.

Thereupon, at 4:10 P. M., July 12, 1946, a brief recess was taken. The proceedings were then resumed as follows:

ALFRED C. KEMP,

of lawful age, produced, sworn and examined, testified on behalf of plaintiffs as follows:

Direct Examination by Mr. Bond:

Q. Mr. Kemp, state your full name, address, place of residence, age and occupation.

A. Alfred C. Kemp, I am 35 years of age, live 5463 Delmar, and I am a safety engineer.

Q. Are you one of the plaintiffs in this case? A. Yes, sir.

Q. When did you go to work for the St. Louis Ordnance [fol. 1654] plant? A. December 2, 1941.

Q. Tell your duties in the safety department, what you started at?

A. I started as a safety inspector and went from safety inspector to chief safety inspector, from chief safety inspector to assistant general safety inspector, and assistant general safety inspector to general safety inspector, and from general safety inspector to assistant chief safety engineer.

Q. When you got to be assistant chief safety engineer, you were then assistant to the head of the department?

A. Yes, sir.

Q. So in that way you started at the bottom and followed every gradation to next to the department head?

A. Yes, sir.

Q. So you are familiar with the department and its workings? A. Yes, sir.

Q. Tell us what the duties of the safety inspector engineers were in a brief way.

Mr. McRoberts: I think we have had that before, and this is rebuttal, Your Honor please. I don't think that is proper rebuttal.

Mr. Bond: Well, it isn't going to be alone.

The Court: But this is in rebuttal.

Mr. Bond: I will pass that, then; it has been gone into pretty thoroughly.

[fol. 1655] Q. I will take the matter of the department: how did the gradation function, to whom did the safety engineers take their problems?

A. They took them to the supervisor.

Q. To whom did he take his problems?

A. To one of the assistant chief safety engineers.

Q. Who did he take his problems to?

A. To the chief safety engineer.

Q. Now then, you were a safety inspector from, according to the report I have, from the 28th day of December, 1941. Do you remember the dates, or would it refresh your recollection if I showed you the report the company gave me. (A paper is handed to the witness)

A. The report doesn't show the actual titles we had in the safety department, it shows the safety inspector and senior engineer, and assistant staff supervisor, it doesn't show the actual titles we had out there in the safety department.

Q. Well, now, where was the policy made in that department? A. By the chief safety engineer.

Q. Was the assistant chief engineer involved in policy making? A. No, sir.

Q. When you were assistant chief engineer, assistant to Mr. Strickland, what did your duties consist of?

A. I was rather a go-between, between Mr. Strickland and the supervisors. In other words, if the supervisor had [fol. 1656] problems they would take them up with one of us. There happened to be two assistant chiefs they would take them up with one of them. We would take them up with Mr. Strickland.

Q. Who would be the man to exercise his judgment on the problem?

A. In most cases when the problem came to you from the supervisor you wouldn't exercise any judgment on it.

Mr. McRoberts: I think the witness should be asked to tell what he did, Your Honor.

The Court: Sustained.

Mr. Bond: He said he was a go-between between the men below him and the man above him.

Mr. McRoberts: That is obviously a conclusion or opinion.

Q. Just what did these go-between duties consist of?

A. Mostly handling of the reports from the supervisors, between the supervisors and Mr. Strickland.

Q. Would the supervisor's report come to you, or would it go direct to Strickland?

A. No, sir, it would pass through us first.

Q. Where did the supervisor get the report?

A. From the safety engineers in the units.

Q. Then they would include the reports they got from the safety engineers, in their reports to you, and you would relay it to Strickland? A. Yes, sir.

[fol. 1657] Q. If those problems arose in the report while you were safety engineer, did you have any authority to decide them in any way?

Mr. McRoberts: Object to that. Let him [described] what he did.

The Court: Yes, sir.

Q. As safety engineer and inspector, just what did you do when you were at the bottom of the list?

Mr. McRoberts: We are in rebuttal.

Mr. Bond: I beg your pardon, Mr. Miller in this case—we are under no obligation to rebut the affirmative defense, we are presumed to be covered by the Act. Now Mr. Miller comes to the stand and gives testimony as to what this man did, what his responsibilities were. Now in rebuttal we have opportunity to rebut that. I put no case on in chief for Mr. Kemp any further than the fact he was engaged in the production of goods for commerce at this plant.

Mr. McRoberts: You didn't put that on, there was no evidence at all as to what Mr. Kemp's duties were in plaintiff's case.

Mr. Bond: When Your Honor comes to examine the decision you will find the plaintiff is not required to go into his duties in the matter of whether or not they constitute exemptions or not, in his main case, that is a matter that must be pleaded and proven in defense, and he may rebut [fol. 1658] it. The Act is presumed to cover every employee engaged in the production of goods for commerce. The man that pleads exemption must plead and prove it. Mr. Miller got on the stand and gave testimony to try to sustain the exemption. I want to rebut it.

The Court: Proceed.

Q. What did you do as safety engineer or inspector?

A. When I first started I made inspection in the units. After I became chief safety inspector I was made one of the supervisors over the men in the units to handle the reports between them and the assistant safety director, I think he was called.

Q. While you were down in those two brackets as safety inspector or safety engineer, when you included those problems in your report did you have any authority to decide those problems?

Mr. McRoberts: I think that is too general, the question should be confined to a particular problem and witness should be asked as to what he did with respect to that problem.

The Court: Sustained.

Q. In making your routine inspection as safety inspector, when you noted violations of safety practices or rules, to whom would you report for correction?

A. To my supervisor, the same as the rest of them.

Q. Would you take any corrective action yourself?

A. It depended upon the nature of the infraction.

[fol. 1659] Q. In what cases would you take any corrective action?

A. It depended, like life and death depended on the infraction.

Q. You mean emergency? A. An emergency situation.

Q. When you became a supervisor and those were reported to you, did you take any corrective action yourself?

A. It was practically the same then as it was when I was in the unit. The only time you took any definite action is when it was an emergency problem, and then it depended entirely upon the man who was in supervision of the unit as to whether you would then get it done.

Q. How did it depend on the man?

A. If he wanted to do it, he would do it. If it was going to slow down production or probably stop production, you probably wouldn't get it done.

Q. By "the man", you mean production foreman?

A. Production foreman or superintendent.

Q. Were you in a position either as inspector or supervisor to give him any orders? A. No, sir.

Q. Now, then, when the problem came from the supervising inspector up to the assistant chief engineer, what action did or could he take in the matter?

A. The only action he could take would be to go to the chief safety engineer.

[fol. 1660] Q. That is the top?

A. That is top, and even the top would probably cry on the management's shoulder to try to get the infraction corrected.

Q. Now these policies that obtained in the safety department, who formulated them?

A. The chief safety engineer.

Q. Did anybody below the grade of Chief Safety Engineer have any part in them?

A. They might have been discussed in some meeting, but he approved them.

Q. Now I believe this top title which you finally held as assistant chief engineer—do you know how long before you left it was that you held that?

A. No, sir, I was out of the safety department for some time. I was in the engineering department plant, engineering department.

Q. I see here according to this report that I have, it was from July 17, 1943, to termination. Prior to that you held the subordinate positions that you have told me about?

A. That might have been true. I don't believe, we had so many different titles out there it was hard to keep track of them.

Mr. Bond: I believe that is all.

[fol. 1661] Cross Examination by Mr. McRoberts:

Q. Mr. Kemp, let me ask you if this is a correct statement as to the duties of a safety engineer or a safety inspector: "(1) That he would regularly inspect the entire property in his area for the purpose of eliminating safety hazards of all kinds. Inspect machinery, lighting, floors, exits and storage materials." Is that part of the duties of a safety engineer? A. That is right.

Q. Can you give me any idea how much of his time he would be spending in that particular part of his duties? What is your best judgment approximately?

A. He would be spending all of his time inspecting.

Q. Let me go down and ask you some more questions, and then perhaps we can clarify it. "Recommend changes such as additional machine guards, additional safety services, new storing methods, and new types of equipment." Is that part of the duties of the safety unit? A. Yes, sir.

Q. "Check manual movements of employees, pointing out unsafe practices to supervisor." That is, to the employee's supervisor? A. That is right.

Q. Is that part of the duties? A. Yes, sir.

[fol. 1662] Q. "Using his knowledge of safe practices, recommends changes calculated to decrease work hazards." Is that part of his duties? A. Yes, sir.

Q. "Make reports recommending general safety procedure not connected with a particular accident."

A. Not connected?

Q. Not connected with a particular accident. In other words, would the safety engineer on occasions, would it be his duty to make a report or recommendation of some safety procedure that he thought should be instituted, even though no accident had occurred on that particular operation? A. No, sir, I don't think it would.

Q. Do you know whether that was ever done?

A. If it was, it wasn't a common occurrence.

Q. Next, "Hold meetings of the unit and safety committees promoting the adherence to safety regulations through employee cooperation."

A. We held very few safety meetings.

Q. Would you say that is part of it, holding meetings of the unit and safety committees? Would that be part of the duties?

A. I would say 90 per cent of the safety engineers of the plant never attended a safety meeting.

Q. "And see that injured employees receive immediate attention and care." Would that be part of his duties? [fol. 1663] A. In a way it would, if he happened to be there when the accident occurred.

Q. And if necessary to give them first aid?

A. That is right.

Q. "Submit a written report of every accident, suggesting preventive measures." Would that be part of his duties? A. That is right.

Q. Would a safety engineer on occasions instruct groups of employees, with approval of departments concerned, in proper use of safety equipment?

A. That should be the case, but it wasn't out there.

Q. Wasn't that the duty of some of these safety engineers? A. It was our instructions.

Q. They were classed as safety engineers?

A. They hold the titles of safety engineers.

Q. Such as Mr. Trimble? A. Yes, sir.

Q. And he held the title of safety engineer, but spent his time instructing? A. Yes, sir.

Q. The duties of the safety engineers were not to make safety policies but to carry them out?

A. Not to carry them out, but see they were.

Q. And by that you mean, do you not, Mr. Kemp, that

if the safety engineer observed the hazardous condition or [fol. 1664] hazardous method of operation by an employee, it was his duty to call it to the attention of that employee's superior and recommend to that superior whatever he thought was the proper corrective measure?

A. That is right.

Q. Now he had no power to compel that supervisor to take that corrective measure. All he could do was to see, advise and make recommendations? A. That is right.

Q. And if these recommendations were not carried out, if his advice was not followed, all the safety engineer could do would be to report it to those higher up, who would undertake to try to have that advice carried out, if they thought it proper to do so? A. That is right.

Q. I am reading now from the general instructions given to safety engineers. The statement is made—well, it is his duty to observe and correct unsafe methods, and to observe and correct any unsanitary or unhealthful conditions. How could a safety engineer determine whether or not a particular condition was unsafe?

A. From previous experience.

Q. He would look at it and see and use his best judgment based on his experience and training? A. Yes, sir.

Q. And is the same true with respect to unsafe methods of operation or unsafe courses of procedure by an em- [fol. 1665] ployee of safety engineer to merely observe that employee and based upon his experience and training decide whether or not that was an unsafe or hazardous operation? A. That is right.

Q. And make his recommendation or not accordingly?

A. Yes, sir.

Q. Mr. Kemp, I believe you testified on direct examination that in case of extreme or immediate hazard, or danger, that the safety engineer did have authority to stop the operation or to stop machinery? A. Yes, sir.

Q. And those instructions were contained not only in the general instructions, but from time to time were repeated, were they not? A. Yes, sir.

Q. Orally and in writing to the safety engineers?

A. Yes, sir.

Q. Mr. Kemp, what was your highest title?

A. Assistant Chief Safety Engineer.

Q. Assistant chief safety engineer. You were over all of the employees of the safety department except your boss Mr. McKittriek? A. One assistant.

Q. And one or two assistants on the same level with you? A. That is right.

[fol. 1666] Q. When you held whatever title it was just under that, you were in charge of all employees in certain departments under you, or safety engineering department employees? I have gotten that all "balled" up.

A. Just the supervisors.

Q. Just the supervisors. You dealt with the supervisors, and the supervisors dealt with the safety engineers? A. That is right.

Mr. McRoberts: That is all.

Redirect Examination by Mr. Bond:

Q. The supervisors worked a shift the same as the engineers did did they not?

A. We all worked shifts for a long time.

Q. I mean they inspected and patrolled and reported?

A. That is right.

Q. Everybody inspected, patrolled and reported up to the top title you got to?

Mr. McRoberts: Wait a minute, it is leading and suggestive.

Q. The inspectors or engineers did the routine inspecting and patrolling and reporting.

A. The same as we did that, or the same thing, even though we were assistant chief safety engineers.

Mr. McRoberts: Let the witness testify.

A. We made regular inspection and had to go back at night to make regular inspections and check on the super-[fol. 1667] visors. We checked on the supervisors and on the inspectors in the building, and we had to make reports to Mr. Strickland the same as we made reports to the supervisor.

Mr. Bond: I see. That is all.

Mr. McRoberts: That is all, Mr. Kemp.

WILLIAM F. O'MEARA,

of lawful age, produced, sworn and examined, testified on behalf of plaintiffs as follows:

Direct Examination by Mr. Bond:

Q. State your full name. A. William F. O'Meara.

Q. And your residence. A. 3930a Chippewa, St. Louis.

Q. You were formerly employed at the St. Louis Ordnance Plant? A. Yes, sir.

Q. And you were like Mr. Kemp got up to the top of the department next to the director, before you left?

A. Not quite. I was never in the capacity of assistant chief safety engineer, I was merely an assistant staff supervisor.

Q. When you quit.

A. That is the title they have on there, but they called me a supervising safety engineer.

[fol. 1668] Q. When did you go to work there, and in what capacity, and what was your duty, and tell us any changes that occurred.

A. I don't know the exact date but I think I started May, 1942.

Q. Do you want this to help? (A paper is [pasted] to witness.)

A. Sometime the first part of May, 1942, I went to work as safety inspector in Building 102. The first week I was there I was assigned to another man that had worked in that building, and he took me around and introduced me to the superintendent and showed me what I had to do insofar as making inspection of employees to see if they had their safety glasses and shoes, and certain fixed guards on all machines I had to see if they were in place, and visit the first-aid room periodically over the day and see any reports of accidents.

Q. Was any other training given you before you took the job?

A. I think I got out there on Saturday and they gave me eight hours, or whatever it was. I worked the first day for Mr. McDermott. Then I think I reported back Monday and went right into the unit with these men, and then they held some periodical safety lectures that we

were allowed to attend, either at the end or beginning of the shift, for about an hour, and then go on with your duties until later on.

Q. What did you do in your first capacity as an inspector?

A. Patrolling, and inspecting all safety glasses and hair nets and accident reports on safe practices.

[fol. 1669] Q. Along the line of those general instructions which you heard me read in evidence?

A. We were given one of those books immediately, to look over.

Q. Plaintiffs' Exhibit F? A. Yes, sir.

Q. And you undertook to perform the duties as stated in that book for safety engineers?

A. Yes, sir, they gave us one of those pamphlets showing how a fellow would be stooping when he would lift, and we were supposed to observe from the illustration and try to find out the best method to lift.

Q. How long did you remain a safety engineer? What was your next change?

A. I remained a safety—I was safety inspector first, and they later changed that to safety engineer. I am referring to my own records.

The Court: Safety inspector and engineer.

A. Do you want me to tell, Your Honor, why the distinction was made?

The Court: Some other witness said there was none.

Mr. Bond: We have been using them as interchangeable.

The Court: That is what I thought. What was the difference?

A. No difference between safety inspector and safety engineer, but a regulation to change the title.

[fol. 1670] Q. Regulation to change the title but no change in the duties? A. That is correct.

Q. So far as the duties were concerned the terms were interchangeable? You did the same thing as inspector as you did as engineer? A. Yes, sir.

Q. How long did you continue there as inspector or engineer? A. Until June—

Mr. McRoberts: May I ask, you are now referring to some record or memorandum.

A. Just my dates when my titles changed.

Mr. McRoberts: May I ask if this is a memorandum or record which you made at the time while you were [en] employee of the company? A. No, it isn't.

Mr. Bond: Every witness had papers on his lap. It is some pencil figures and notes for his testimony, that is all.

Mr. McRoberts: He is a graduate lawyer, he was an administrator of a law school, he is capable of testifying without referring to prepared notes.

Mr. McRoberts: What is the source of that information?

A. I don't remember when my title changed, Mr. McRoberts, and I referred to, I think it is Plaintiffs' Ex- [fol. 1671] hibit A, as to the dates my salary changed, and that is the date that my code was changed giving me a different title.

Mr. Bond: I insist that it will save time, and I insist—

The Court: He has a right to use any paper that he might have. It depends on what it is.

Mr. Bond: Can you get along without it?

The Witness: Yes, sir, I can get along without it. My title was changed in June of 1943 to what I was informed was supervising safety engineer on special assignment.

Q. (Mr. Bond) What did you do after that change in title? Was there any difference from what you did before? If so, what was it?

A. I was in the office at that time and we had progress reports made each week from the safety department direct to Mr. Miller's office, Mr. Miller being in direct charge of the safety department over the chief safety engineer, and it was my duty to fill in the field reports of the various engineers from the different manufacturing units in restricted areas from the information they turned in on their reports, to make up what was called a Progress Report, and it would be what is consolidating the reports into one report that would go from the safety department to Mr. Miller's department under the heading of Progress Report. But

I think it is a safety engineering unit. I can't recall the exact words. It is more of a clerical statistic.

[fol. 1672] Q. Those duties you describe as clerical?

A. Yes, sir.

Q. Did they involve the exercise of any judgment?

A. Not those duties, no, sir.

Q. Go ahead.

A. Well, that was the import of my work at that time, unless there would be—in some instances there might be absenteeism, I would have to sit at the other supervising safety engineer's desk. Our office was in what was called the fire house general office on the second floor, and the supervising safety engineer's office was on the first floor. And they had a telephone where the men had to call in every hour and would report any unusual condition. And if we wanted them we had a call whereby we could contact them if something special happened that we didn't know, but we had to get them in a hurry. I operated in that position. And if I had them and they brought in a report on some condition, say a man wasn't wearing safety shoes in the restricted area and the foreman wouldn't put them out, he would make the report and they passed that up the line to the assistant chief safety engineer, and he would pass it to Mr. McKittrick. And if the information came back from Mr. Strickland to the assistant chief, he would give it to me. Sometimes I would have to have it typed and make eight or nine copies, depending on how many safety engineers there were. I might have to make the [fol. 1673] ninth copy of Mr. Strickland and circulate them to the men. We tried to give each man the benefit of each investigation, or each decision.

Q. How long did you continue to do that work that you have just described?

A. I did that until December of—well, a short time after that they put me in what is called the clerical office where they made a computation of all the actual statistics for the purpose of trying to find out who in the plant was accident prone. And those reports would go on to Mr. Strickland's office, and he would maybe make recommendations. That was reported. Also there were about eight girls in that office taking off what we call Form 39. It was an accident

form that was required from first aid cases. It was a standard form copied I think from the National Accident Prevention Organization. And there were check marks of the different types of accidents, and the girls would classify them, so many accidents from falling objects, so many cuts on the hand, so many toe accidents. And we would compile them into various reports and find out which accidents were becoming more frequent, what employees were having the greater number of accidents. I functioned in that capacity under special assignment until December, 1943, when I relieved Mr. Stutz in the laundry. And then I went in charge of the safety uniform department in our plant. We furnished uniforms to all the employees in restricted areas. We handled powder or anything like that. [Of] if they worked in any kind of opera-
[fol. 1674] tion that was detrimental to their clothes, or other than their clothes. Men came and changed every day, and so did women, and they were distributed by badge number. I think at one time they probably had 80 employees in that department. I operated in that department from December practically until the time I left. I don't remember the date I left the plant, with the exception that when Mr. Kemp left the department they also told me I would be in charge of the safety stores where the employees could buy safety shoes and get goggles exchanged, and all different things as that. In between from time to time, like I told you, I might be at the supervising safety engineer's desk in charge of men, and anything else.

Q. This is a complete story, then, of your employment at the plant?

A. I think it is. I don't think I left anything out.

Q. And shows the different duties you performed at the different times in the department? A. Yes, sir.

Mr. Bond: May I have that letter that bears Mr. O'Meara's signature? Wasn't there one here in reference to a report on a fire which occurred at the fire-house?

Q. I show you Defendant's Exhibit 17 and ask you to tell us briefly the circumstances under which that was signed.

A. This is a letter that was prepared by Mr. Jack

Sewell for myself and Mr. Maher, and I don't know whether there was one prepared for another man in the [fol. 1675] department or not, to relieve the department of embarrassment due to the fact that a fire occurred in our department where the fire apparatus was housed. And I was given the letter and I was told to sign it.

Q. Is the language in that letter your composition?

A. No, sir, this letter was handed to me to be signed. It was typed up by Jack Sewell himself, because the department didn't want any embarrassment on the management due to the fact we allowed a fire to occur in our own office. And I was requested in a sort of mandate to sign that letter.

Q. What routine work did you do in the laundry and safety stores, and how much time did you spend on it?

A. You mean insofar as—I didn't get you exactly right.

Q. During the period where you had supervision over the laundry. Didn't you at one time?

A. Yes, sir, I was there.

Q. When you had supervision did you do routine and manual work, too?

A. Yes, sir, I would have to go into a crib in the morning and pass out uniforms when there was nobody there. And I assorted clothes when they came back from the laundry the same as employees. I had to take reports of new employees that came in, and had to make up a special form we had for badge numbering those clothes and see that the cribs were properly filled with plenty of uniforms where there wouldn't be any labor trouble due to a shortage of uniforms. We had employees, if you didn't [fol. 1676] give them clean garments they wouldn't go to work.

Mr. Bond: That is all.

Cross Examination by Mr. McRoberts:

Q Mr. O'Meara, this Defendant's Exhibit 17 to which Judge Bond referred and which bears your signature?

A. Yes, sir.

Q. And which you say you had a mandate to sign?

A. I did absolutely.

Q. You are a graduate lawyer, I believe? A. Yes, sir.

Q. And were administrative director of a law school, City College of Law and Finance, from 1934 to 1941, were you not? A. Absolutely correct.

Q. I will ask you if there is any false statement in that document that you have in your hand, Defendant's Exhibit 17.

A. I wasn't a supervising safety engineer at that particular time. I wasn't made that until June of 1943.

Q. Your title is written there? A. Yes, sir.

Q. Is there anything else written?

A. May I read the letter? To tell the truth, I haven't exactly read it.

Mr. McRoberts: Sure (Witness reads the letter, inaudibly.)

A. The only thing wrong I didn't pass judgment, Mr. McRoberts. I didn't pass judgment on the problems. I [fol. 1677] didn't have the authority.

Q. Is there anything in here that says you passed judgment? Oh, excuse me, I see it. You state "it is my duty to keep in constant contact with the safety engineers, pass judgment on any problems which come up."

A. It never was my duty to do that.

Q. That was not your duty when you signed the letter?

A. That is true. I admit I signed it even though it wasn't my duty.

Q. What were you supposed to do with any problems that came up?

A. If any problems came up when I was in a supervisory capacity I would pass them on to the assistant chief safety engineer, who in turn would pass them on to Mr. Strickland for a conclusive report on what was to be done. If he gave me a written order I would write the order and number all copies that were necessary to go to the number of men I would be supervising. But I didn't, I couldn't make the decision. I didn't have the authority.

Q. Maybe we are using terms in different ways. While you were a plain ordinary safety engineer you were passing judgment every day on a question whether this is or is not a hazardous occasion or hazardous way of doing the

operation, or unsafe place to work. You were doing that every day?

A. I had been according to what I construed it. We had [fol. 1678] definite fixed rules as far as safety was concerned. When I was working in Building 102 the first thing I did was to check every employee to see if he had his safety shoes and glasses.

Mr. McRoberts: You are getting away from the question. This document speaks for itself. It carries the man's signature. He testified as to the circumstances under which it was [it was] written, and I think the Court can weigh and consider the witness' testimony in the effect of the document. I will withdraw the question.

Mr. McRoberts: That is all.

WILLIAM B. NIEDRINGHAUS,

of lawful age, produced, sworn and examined, testified on behalf of plaintiffs as follows:

Direct Examination by Mr. Bond:

Q. State your full name. A. William B. Niedringhaus.

Q. Age and place of residence.

A. 2212 Lynch Avenue, age 33.

Q. Are you a plaintiff in this case? A. Yes, sir.

Q. When did you go to work for the St. Louis Cartridge Company? A. I believe it was April 20, 1942.

[fol. 1679] Q. In what department and what capacity?

A. I went into the safety department as safety inspector.

Q. Do you remember how long you stayed as a safety inspector, or did you want to see Exhibit A-13 to refresh your recollection?

A. No, sir, I couldn't give definite dates, my duties were so numerous. I don't believe this reflects different things.

Q. How long did you perform the duties of a safety engineer as you heard them described here?

A. Well, I worked with the safety engineer in one of the unit buildings for approximately a year. I was then

transferred to roving inspector which duties were very similar.

Q. What do you mean by "roving inspector?"

A. I went to various buildings. I covered practically all of the buildings.

Q. In those buildings you performed the duties of safety engineer? A. Yes, sir.

Q. But roved around from one to the other instead of being permanently assigned to one. A. Yes, sir.

Q. Go on from there.

A. After serving for a period of time as a roving inspector I was sent to Chicago to go to school.

Q. Who sent you there?

[fol. 1680] A. Why, Mr. Strickland sent me there. I don't know why they sent me. They thought you needed it, I guess.

Q. Go ahead. A. After I returned from school—

Q. What did you study when you were up there?

A. I studied various different things, psychology and chemistry and industrial safety, and fire hazard conditions.

Q. How long did you stay there? A. Six weeks.

Q. What did you do after you came back?

A. I was assigned to the laundry.

Q. What did you do in the laundry?

A. I worked in the laundry, the majority of the time was spent putting up cribs and stapling numbers on cribs. And it also included, after the majority of the cribs were fixed up, I was going around checking the different ones to see how everything was functioning.

Q. Where did you go from the laundry?

A. From the laundry I went back into the safety engineering department.

Q. As an inspector again?

A. Apparently their records show I went back as a supervising engineer.

Q. What did you actually do?

A. I actually did the same job I did before, a safety engineer. In fact, I never checked the dates on that. [fol. 1681] There were not any safety engineers left to supervise.

Q. What classification did you have when you were terminated. Wait, I won't go to that yet. Go along with the

story when you went back and had the title of supervisor but did the same work as inspector? How long did that continue and what did you do thereafter?

A. I don't know how long I remained as supervising engineer. The record shows it was until the end of my employment, and about the last year I was assigned as an auditor, and I was also secretary for the Employees' Safety Committee.

Q. As an auditor, what did you do?

A. I went through different buildings. I went through all of the buildings and made a general inspection writing down my recommendation. At the end of the inspection I went to the superintendent's office and read him off what the recommendations were. In some cases he said what I could do and what I couldn't do. I returned to my office, wrote up the recommendations, gave them to my supervisor who in turn passed them to the assistant chief safety engineer, and he in turn passed it on to the director. And they were sent to the superintendent and a copy to Mr. Gilbertson who was in charge of all production.

Q. Were there any further duties you performed there before you left? A. There might have been.

Q. That is all you remember?

A. I changed around so much.

[fol. 1682] Q. During all the time you were there, did you have any problems in which you had to make decisions yourself?

Mr. McRoberts: Just a moment. I think he had better describe what he did.

The Court: You had better complete it.

Mr. Bond: All right, go ahead.

Mr. McRoberts: Objection is sustained, I take it?

The Court: Yes, sir.

Q. Were you consulted in policy making? A. No, sir.

Q. In rule making?

A. None, other than I would submit a recommendation.

Q. Where the safety rules prescribed, it had to be followed in the departments? A. You mean in booklet form?

Q. I don't know what form. Were there any prescribed set of safety rules that the inspectors checked violations of?

A. There were some, yes, sir. In some cases they were even posted on the walls as to explosive limits.

Q. And the equipment the employees had to wear, that was prescribed?

A. I believe that was prescribed in the form. It showed every department what they were required to wear: uniform, safety shoes and safety glasses, and no jewelry, and so forth.

Q. And those prescriptions all come down from the head [fol. 1683] of the department? A. Yes, sir.

Mr. Bond: That is all.

Mr. McRoberts: No questions.

BURCKHARDT H. HARGATE,

of lawful age, produced, sworn and examined, testified on behalf of plaintiffs as follows:

Direct Examination by Mr. Bond:

Q. Tell us briefly, give us your name.

A. Burckhardt H. Hargate.

Q. Where do you live?

A. 7037 Holly Hills, St. Louis County, Missouri.

Q. What is your occupation?

A. I am with the St. Louis Administration Center.

Q. Did you work for the United States Cartridge Company in the safety department? A. Yes, sir.

Q. When did you go to work? Tell us when and what you did. Give us the story of your duties.

Mr. McRoberts: Is there any controversy?

Mr. Bond: I haven't my notes here now. We can save time. Mr. Miller said he was a supervisor, I understand.

Mr. McRoberts: Mr. Miller tells me he was never supervisor.

[fol. 1684] Q. You never were? A. No, sir.

Q. You were an inspector?

A. I was an inspector the full time, or safety engineer.

Q. The whole time? A. Yes, sir.

Q. Never were a supervisor and never performed any duties except those of inspector or supervisor?

A. I mean no titles.

Q. Inspector or engineer? A. Yes, sir.

Mr. Bond: I don't think then I need him since he was not a supervisor. We had it in our notes he was said to be a supervisor, and I wanted him to say that he was not.

Mr. McRoberts: He was transferred to the safety traffic department where he was called a supervising safety engineer in the traffic department for a while.

Q. During all the time you were there you were safety inspector or safety engineer? Is that it?

A. Yes, sir, I was in the safety department, and after I was transferred out of it they called me a foreman.

Q. Was your work any different before they called you that than afterwards?

A. I wasn't in the safety department any more. That is when I was transferred to production control, February, 1945.

Q. February, 1945?

[fol. 1685] A. I believe that was the date.

Mr. McRoberts: Was it March 12, 1945?

A. That might be, I don't know. I know it was quite late.

Q. The only difference, you did the same thing, safety inspector, right up to March, 1945. And then you left the safety department and went in the production department as a foreman? A. Yes, sir.

Mr. Bond: That is all.

Mr. McRoberts: No questions.

Mr. Bond: That, Your Honor, is the case.

Thereupon, defendant to further sustain the issues in its behalf, offered and presented the following additional evidence:

RUSSELL R. CASTEEL,

previously sworn, was recalled for further examination as follows:

Direct Examination by Mr. McRoberts:

(A paper is marked "Defendant's Exhibit 26".)

Q. Mr. Casteel, I show you Defendant's Exhibit 26 and ask you if that is another one of the supplements to the contract, Defendant's Exhibit 20, being designated as "Change Order No. 17"? A. It is.

[fol. 1686] Mr. McRoberts: Now I am offering the document itself in evidence, but to save time will you state to the Court what the subject of this change order was?

A. Early in March—

Mr. Bond: The record shows my objection to that as part of the contract?

The Court: If it doesn't, it may.

[fol. 1687] Defendant's Exhibit 26.

Duplicate

All communications should be accompanied by carbon copy and addressed to

Markus/cs

To insure prompt attention in replying refer to SPOIA

18 March 1944

Attention of

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War Department
Office of the Chief of Ordnance
Small Arms Ammunition Sub-Office
N. W. Ayer Building, West Washington Square
Philadelphia, Pa.

The United States Cartridge Company
c/o Western Cartridge Company
East Alton, Illinois

Attention: Mr. John Olin

Gentlemen:

Subject: Change Order No. 17 to Contract W-ORD-491, as amended—(St. Louis Ordnance Plant)

In consideration of the work undertaken by your company (hereinafter designated the "Contractor") under its Contract No. W-ORD-491, as amended, and by virtue of Article III-Q, Title III, of said Contract, the terms of said Contract are hereby amended in the following respects:

A. Whereas the Government has requested that certain space in the St. Louis Ordnance Plant be made available to it for the purpose of reconditioning, rebuilding, repairing, etc. certain Government-owned equipment under the con-

trol of the Office, Chief of Ordnance, Field Service Division; and

Whereas the Government has requested the Contractor to assume such additional work under this Contract, and the Contractor is agreeable to assuming such additional work but only upon the terms and conditions herein contained;

Now, Therefore, in consideration of the premises:

Article I-B, Title I, page 7, is changed by the addition of the following paragraph:

11. In addition to all other work to be performed by the Contractor under this Title I, the Contractor is authorized to do, and shall do, as may be directed or approved by the Contracting Officer, during the six months period from March 15, 1944 to September 15, 1944 or during the period that small arms ammunition manufacturing operations continue by the Contractor in the plant under this Title I, whichever period is the lesser, all things (including the establishment of facilities therefore at the plant) necessary, convenient or incidental to recondition, rebuild, reclaim, repair, inspect, salvage and/or deal with, handle or dispose of such Ordnance equipment and/or parts (including, with- [fol. 1688] out limitation, tools, shovels, picks, pumps, lathes, motors, automobile and truck equipment and accessories and other machinery, tools or the like which are used to repair or maintain other machinery or equipment) as are sent in to the plant for that purpose by the Office, Chief of Ordnance, Field Service Division; provided, however, anything to the contrary contained herein notwithstanding, that the work relating to the small arms portion of the plant shall take precedence and have priority over the work herein above in this paragraph provided for; provided, however, in case there is any conflict in that regard, final determination of what work takes precedence and has priority over the other, shall rest with the Contracting Officer. The establishment of the necessary facilities for this work shall be accomplished, to the extent reasonably and practicably possible, by the conversion of presently existing plant facilities, to the extent available for that

purpose, and no additional machinery or equipment shall be purchased by the Contractor without the prior approval of the Contracting Officer. It is contemplated that the plant space to be made available to the Contractor for that purpose will be the 102 Building presently comprising a part of the plant and/or such other additional and/or lesser space as may hereafter from time to time be assigned or approved by the Contracting Officer to the Contractor for such purpose. All costs and expenses, without limitation, incurred by the Contractor in connection with or incidental to the accomplishment of the work provided hereby, shall be reimbursed to the Contractor under the provisions of Title II and other applicable provisions of this Contract.

Said work shall be performed in accordance with the directions and specifications to be promptly furnished from time to time to the Contractor by the Contracting Officer.

The Property Officer of the Office, Chief of Ordnance, St. Louis Ordnance Depot shall be the accountable officer for the additional work added hereby, and the Contractor shall not assume any accountability for any property received by it at the plant pursuant to the terms of this Change Order which is related to the work contemplated or provided to be performed hereby; provided, however, the Contractor shall assume and exercise the same degree of care (as limited by Article III-F, Title III of this Contract) with respect to such property as it is required to assume with respect to any other property under the the terms of this Contract.

The Contractor under the terms of this Contract, has the right, with the approval of the Contracting Officer, to subcontract, without in any way affecting the fixed fee to be paid to the Contractor for its work under this Contract. Nevertheless, in order that there may be no question in that regard with respect to the Contractor's right to subcontract any portion of the work provided by this Change Order, it is agreed that when, in the opinion of the Contracting Officer, it is to the best interests of the Government, the Contractor shall, when so ordered or authorized, subcontract any or all items or classifica-

tions of work required under this Change Order or sub-
[fol. 1689] sequently added thereto. Such subcontracting of work, or the performance thereof by the Contractor, regardless of the amount and/or extent of work performed or subcontracted, all with the prior written approval or order of the Contracting Officer, shall entail no adjustment in the fixed fee to be paid the Contractor for its work under this Change Order. That fixed fee as and when agreed upon, will be determined in the light of the fact that all such work may be subcontracted pursuant to the foregoing provision, and such fee shall be deemed to include compensation for the services which may be rendered by the Contractor in the negotiation, supervision and coordination of any such work subcontracted, and the responsibility assumed by the Contractor in connection therewith, and such fee shall be deemed to be reasonable regardless of the amount or extent of work performed or subcontracted.

It is presently impossible to ascertain with any degree of accuracy the estimated cost for the additional work provided by this Change Order. However, as soon as said estimated costs are available, they will be made a part of the Contract by Change Order or Supplement.

It is understood and agreed that the Contractor will be paid a fixed fee for the additional work provided by this Change Order, which fee is in the process of negotiation and will be agreed upon shortly. As soon as the fee is negotiated and agreed upon, it will be made a part of this Contract by Change Order or Supplement.

It is further understood and agreed that the work added hereby is part of the work agreed upon under this Contract and (except as otherwise herein expressly provided) shall be done under and in accordance with, all applicable terms and conditions of the Contract, as amended.

The supplies, equipment and services to be obtained by this Change Order are authorized by, are for the purpose set forth in, and are chargeable to the following procurement authority (and such other procurement authority as may hereafter be added by amendment), the available bal-

ances of which are sufficient to cover the cost of same: 5-60510 P120 A212/41005.

If the foregoing is acceptable to you, will you kindly so indicate by executing the original and the two inclosed copies of this Change Order, retaining the copy marked "duplicate" for your files, and returning the original and triplicate to this office within five days of the receipt of [fol. 1690] this Change Order by you, thereby constituting this Change Order a contract for the purposes herein stated:

For the Chief of Ordnance:

Very truly yours,

M. B. CHATFIELD,
Lt. Col., Ord. Dept.,
Contracting Officer.

Accepted Mar. 24, 1944.

THE UNITED STATES CARTRIDGE COMPANY,

By J. M. OLIN,
Authorized Officer.

[fol. 1691] A. Early in March the St. Louis Ordnance Depot they had here found themselves very crowded with various war material that had been sent in here. And they came to the United States Cartridge Company and asked if we couldn't help them out. So we made this Supplement 17 that is dated in March, and in a six months period, about March 15th to September 15th, we set aside some space in Building 101 to rehabilitate many carloads of various kinds of automotive equipment, and picks and shovels. And it seemed when they would vacate premises they would leave the equipment, and the Ordnance Department came in and picked that up and threw it in a box car and sent it in. And they would open a car and the officers would decide what was salvageable and what was junk. And the junk they would set aside and the rest of it used possibly to try to repair and put it back in order.

Q. So, briefly, this Contract Change Order No. 17 provided for you to do certain work on miscellaneous used equipment of the army which the army had and had been using? A. That is correct.

Q. And you did that at the St. Louis Ordnance plant?

A. Yes, sir. Really some of that they told me wasn't even used. They would sometimes get—

Mr. Bond: Object to what they told him.

The Court: Sustained.

Q. It was material and equipment which was in the possession of the army and turned over to you to work on? [fol. 1692] A. That is right.

Mr. McRoberts: That is all.

Mr. Bond: That is all. No cross examination.

HARRY P. MILLER,

previously sworn, was recalled for further examination on behalf of defendant, as follows:

Direct Examination by Mr. McRoberts:

Q. Mr. Miller, will you testify from your records which of the plaintiffs spent any part of their time while they were working for the United States Cartridge Company on or in connection with the work mentioned by Defendant's Exhibit 26, about which Mr. Casteel has just testified, giving the period during which these plaintiffs were assigned to that particular work? I think there were only a couple of them.

Mr. Bond: Object, it is incompetent, irrelevant and immaterial.

The Court: Admitted subject to the objection.

A. Two of the plaintiffs; J. C. Reeves worked in this building on this repair work. Reeves worked from 4/17/'44, to 3/10/'45 in this building.

Q. Doing safety work in connection with this repair?

A. Yes, sir, in connection with the repair. The other man, J. S. Schneider, worked in this building from 8/21/'44 to 2/26/'45 doing safety work in connection with this repair, in the repair depot.

[fol. 1693] Mr. McRoberts: That is all.

Mr. Bond: That is all.

Mr. Bond: That is the case, Your Honor.

Mr. McChesney: How much time are you going to give to file a brief?

The Court: Anybody going to file a brief?

Judge Bond: I would like to.

Mr. McChesney: Maybe Your Honor is ready to decide without a brief.

The Court: Have you intervened?

Mr. McChesney: No, I haven't intervened. I want to ask leave to file a brief on the interpretations that may affect the public interest, that is all, as amicus curiae, if Your Honor wants to make an order giving me so much time.

Judge Bond: No objection.

The Court: What time do you want?

Judge Bond: I need a little more than the ordinary time. How about giving me until August 20th?

The Court: That is all right as far as I am concerned.

Mr. McRoberts: Could we have time to reply to his brief?

Judge Bond: I think both briefs should come in at the same time.

The Court: Whatever time is given, he will be given the same time. What time do you want?

Mr. McRoberts: If you will give me—

[fol. 1694] Judge Bond: How much time after you get mine do you want? I asked until August 20th. I probably will get it in a little before that time.

Mr. McRoberts: Two weeks after.

The Court: Judge Bond will be given to the 20th of August to file his brief, and you may have fifteen days after you received his brief.

Judge Bond: And may I have ten days to reply?

The Court: Yes, sir.

The Court: What time do you want, Mr. McChesney?

Mr. McChesney: About thirty days.

The Court: That is August 11th, that is Sunday. It will be August 13th.

The Court: Taken as submitted. Announce an indefinite recess.

Conclusion of Testimony and Proceedings in This Cause.

Certificate of Court Reporter:

I, Albert O. Phelan, do hereby certify that beginning July 8, 1946, I reported in shorthand accurately as possible the proceedings in this cause, and the above and foregoing is a true and complete transcript thereof.

ALBERT O. PHELAN,
Court Reporter.

[fol. 1695] Findings of Fact and Conclusions of Law.

(Filed May 19, 1947.)

In the United States District Court for the Eastern Division of the Eastern Judicial District of Missouri.

R. M. Powell, et al., Plaintiffs,

v.

The United States Cartridge Company, a corporation, Defendant.

Court Room No. 1.
Civil Action No. 3597.

This cause came on for trial and the Court having heard the evidence and considered the briefs and arguments of counsel finds the facts and states its conclusions of law as follows:

Findings of Fact.

1. That defendant, the United States Cartridge Company, is a corporation duly organized and existing and licensed to do business in the State of Missouri.

2. That at all the times referred to in the first amended complaint said defendant was engaged in the operation of a munitions plant in the City of St. Louis, State of Missouri in the Eastern Judicial District of Missouri, known as the St. Louis Ordnance Plant, wherein it manufactured small arms ammunition suitable for rifles and machine guns for the United States of America; that it manfactured said ammunition as an independent contractor under a so-called cost-plus-fixed fee contract intended for the use of the military forces of the United States and its allies, and intended for transportation in interstate commerce to points outside the State of Missouri, and that said ammunition and by-products thereof were transported in interstate commerce and that said defendant was engaged in commerce and in the production of goods [fol. 1696] for commerce within the meaning of the Fair Labor Standards Act of 1938, and that defendant was subject to the provisions of said Act and that said defendant was an employer within the meaning of said Act.

3. That the plaintiffs and each of them were employed by said defendant in the Safety Department of said plant and were while so employed engaged in the production of goods for interstate commerce within the meaning of the Fair Labor Standards Act of 1938.

4. That plaintiffs and each of them were so employed by defendant for the respective periods of time and at the base rates of pay alleged in the paragraphs numbered 1 to 59 inclusive of the first amended complaint herein, and that they all performed similar duties and were similarly situated within the meaning of Section 16 (b) of said Act.

5. That the services and duties performed by the plaintiffs and each of them were necessary to and interwoven with the interstate commerce business of the defendant, and were necessary and contributed to and were interwoven with the production of goods for interstate commerce by the defendant and tended to and did prevent work stoppages and loss of man hours in production and were an essential and necessary part of the manufacturing operations carried on by defendant, and were essential to the production of the ammunition produced by defendant.

6. That defendant failed to prove as to any of the plaintiffs that any substantial exercise of discretion and independent judgment was required of them in the performance of their duties, and failed to prove that any of the plaintiffs were employed in an administrative capacity, as that term is defined and delimited by the Regulations of the Administrator, and giving due weight to the interpretations of said regulations by the Administrator the Court finds that none of the plaintiffs were exempted as administrative employees.

[fol. 1697] 7. That those plaintiffs who were employed as Assistant Chief Safety Engineers and Assistant Staff Supervisors were not exempted as executive employees because no such exemption was pleaded as to them in the defendant's answer, and also because defendant failed to prove that they or any of them customarily and regularly exercised discretionary powers in the performance of their duties, or that they had authority to hire or fire other employees, or that their suggestions and recommendations as to the hiring or firing and as to the advancement and

promotion or other change of status of other employees were given particular weight, as specified in the Administrator's Regulations, and defendant failed to prove that these plaintiffs or any of them were employed in a bona fide executive capacity, as defined and delimited in the Administrator's Regulations, and the Court therefore finds that none of the plaintiffs were exempted as executive employees.

8. That plaintiffs and each of them worked total actual hours, as shown on summaries prepared and furnished by defendant and received in evidence as plaintiffs' Exhibits A-1 to A-59 respectively, in each pay period there shown, and to the extent said hours exceeded forty hours in each or any week same were in excess of the applicable maximum prescribed by Section 7 of the Act, and plaintiffs and each of them are entitled to be compensated therefor at the rate of one and one-half times the regular rate at which they were respectively employed, and said exhibits constitute a sufficient basis for the computation of overtime pay due to each of the plaintiffs.

9. That the lunch period of one-half hour each day was compensable time, and that defendant improperly and unlawfully deducted this one-half hour on the summaries prepared by it as aforesaid, and which were received in evidence as aforesaid as plaintiffs' Exhibits A-1 to A-59, commencing with the first pay period and including the pay period ending October 10, 1943, and the Court finds that plaintiffs' Exhibits B-1 to B-59 wherein this one-half [fol. 1698] hour is added to the actual hours reported in defendant's summaries, correctly reflect the actual hours worked by plaintiffs and each of them, and correctly compute the claim of each plaintiff.

10. That the salaries paid to plaintiffs were base pay for a forty hour week, and plaintiffs are entitled to be compensated for all hours worked in excess thereof at one and one-half times the regular hourly rate, and that the proper method of computing the regular hourly rate is to divide the weekly wage by 40, and the proper method of computing the overtime is to multiply the hours worked in each pay period in excess of forty by one and one-half times the regular hourly rate computed as above stated, and the

Court further finds that the computations made in plaintiffs' Exhibits B-1 to B-59, received in evidence, are correctly computed, and that the sum of columns 6 and 7 of said exhibits correctly state the total overtime compensation lawfully due to each plaintiff.

11. That the defendant has failed to pay to plaintiffs, or to any of them, the overtime as above computed, or any overtime compensation whatsoever.

Conclusions of Law.

1. That at all times referred to in the evidence herein defendant was engaged in commerce and in the production of goods for commerce and was an employer within the meaning of the Fair Labor Standards Act of 1938.

2. That during their respective periods of employment plaintiffs and each of them were engaged in the production of goods for commerce within the meaning of said Act.

3. That none of the plaintiffs are exempted from the benefits of the Act under any provision of the Act or under any Regulation of the Administrator, either on the ground that they were employed in an administrative capacity or on the ground that they were employed in an executive capacity, or for any other reason.

[fol. 1699] 4. The salaries received by plaintiffs were payment for a forty hour week, and all hours worked in excess thereof are compensable overtime to be computed by the following method, to-wit: multiply the monthly pay by twelve and divide the result by fifty-two, thus obtaining the weekly wage; divide this weekly wage by forty, thus obtaining the regular hourly rate; multiply the hours worked in excess of forty by one and one-half times this regular hourly rate and the result is the overtime compensation due. Add to this result an equal amount as liquidated damages and the result is the total amount of the judgment which each plaintiff is entitled to recover.

5. That the provision of the Fair Labor [Standard] Act for the payment of liquidated damages and attorney's fee is compensatory in character and not penal, and that in the absence of holdings to the contrary by the Missouri courts, the Court concludes that the Five Year Statute of Limita-

tions of the State of Missouri applies to the causes of action at bar, and that the cause of action of none of the plaintiffs is barred by any Statute of Limitations.

6. That there shall also be assessed against defendant an attorney's fee in the sum of Twenty Four Thousand Six Hundred Twenty-Five Dollars ($24,625.00) to be paid by defendant to Thomas Bond, plaintiffs' attorney of record.

7. That the attorney for plaintiffs prepare and submit the judgment order for entry.

GEO. H. MOORE,
United States District Judge.

Entered at St. Louis, Missouri, this 19th day of May, 1947.

[fol. 1700] Judgment.

(Filed May 19, 1947.)

In the United States District Court
For the Eastern Division of the Eastern
Judicial District of Missouri.

R. M. Powell, et al.,
Plaintiffs,
v.
The United States Cartridge Company, a corporation,
Defendant.

Court Room No. 1.
Civil Action No. 3597.

Pursuant to the findings of fact and the conclusions of law filed herein,

It is Ordered, Adjudged and Decreed that judgment be entered herein in favor of each plaintiff and against defendant in the following amounts and that to each amount an equal amount be added as liquidated damages, to-wit:

Plaintiff	Unpaid Over-time Compensation	Liquidated Damages	Total Judgment
R. M. Powell	$1232.46	$1232.46	$2464.92
Arthur C. Kropp	3296.51	3296.51	6593.02
F. N. Harris	2550.70	2550.70	5101.40
J. M. Tyler	1419.37	1419.37	2838.74
J. C. Marshall	279.86	279.86	559.72
A. M. McCluing	878.33	878.33	1756.66
G. H. Bentine	2064.87	2064.87	4129.74
J. Reeves	3078.05	3078.05	6156.10
H. Hahn	2207.64	2207.64	4415.28
N. W. Myers	687.39	687.39	1374.78
B. J. Ludwig	4506.97	4506.97	9013.94
E. L. Stockho	3874.19	3874.19	7748.38
W. B. Niedringhaus	4163.69	4163.69	8327.38
W. Stutz	3321.97	3321.97	6643.94
S. P. Coley	2407.42	2407.42	4814.84
[fol. 1701]			
L. W. Trimble	3423.95	3423.95	6847.90
Robert M. Stewart	3082.48	3082.48	6164.96
B. H. Hargate	3873.17	3873.17	7746.34
J. S. Schneider	1700.70	1700.70	3401.40
W. Gorg, Jr.	871.67	871.67	1743.34
B. M. Casey	544.01	544.01	1088.02
A. H. Erickson	1027.74	1027.74	2055.48
E. Maher	2673.95	2673.95	5347.90
E. Hoskins	2088.29	2088.29	4176.58
F. P. Knight	1952.03	1952.03	3904.06
R. A. Westra	1138.59	1138.59	2277.18
D. F. Bateman	926.40	926.40	1852.80
A. Herman	659.36	659.36	1318.72
G. Burmeister	1690.10	1690.10	3380.20
G. B. Darby	2572.05	2572.05	5144.10
R. E. Jenniches	703.93	703.93	1407.86
J. J. Schwartz	1595.14	1595.14	3190.28
A. C. Kemp	3713.28	3713.28	7426.56
B. Yancey	2082.05	2082.05	4164.10
J. D. Cavanaugh	2629.64	2629.64	5259.28
W. F. O'Mara	5084.61	5084.61	10169.22
R. Carbone	651.83	651.83	1303.66

Plaintiff	Unpaid Over-time Compensation	Liquidated Damages	Total Judgment
W. A. Broad	466.94	466.94	933.88
C. L. Valci	3230.80	3230.80	6461.60
M. Malloy	640.47	640.47	1280.94
R. Barnett	3385.72	3385.72	6771.44
W. Hirschberger	2075.75	2075.75	4151.50
F. Connell	1644.28	1644.28	3288.56
Floy L. Jennings	2246.11	2246.11	4492.22
S. Cook	2603.49	2603.49	5206.98
C. Champion	3102.61	3102.61	6205.22
[fol. 1702]			
D. Burke	731.59	731.59	1463.18
W. C. Viehmann	1482.62	1482.62	2965.24
F. M. Kercheval	3147.78	3147.78	6295.56
G. Cruce	792.55	792.55	1585.10
R. Baxter	579.18	579.18	1158.36
N. C. Walther	2218.31	2218.31	4436.62
G. Gillen	1346.58	1346.58	2693.16
J. Vollbrecht	1104.53	1104.53	2209.06
R. J. Peterson	3977.92	3977.92	7955.84
J. DeLargy	2006.87	2006.87	4013.74
C. C. Brace	1393.17	1393.17	2786.34
S. F. Peters	689.24	689.24	1378.48
A. Lockhart	3604.82	3604.82	7209.64

It is further Ordered, Adjudged and Decreed that in addition to the above amounts plaintiffs have judgment against defendant for their attorney's fee in the sum of Twenty Four Thousand Six Hundred Twenty-five Dollars ($24,625.00), and that said sum be paid by defendant to Thomas Bond, plaintiffs' attorney of record, and that plaintiffs recover their costs.

GEO. H. MOORE,
United States District Judge.

Entered at St. Louis, Missouri, this 19th day of May, 1947.

[fol. 1703] (Motion of Defendant for New Trial.)

(Filed May 29, 1947.)

Now comes The United States Cartridge Company, defendant in the above entitled cause, and moves this Court for a new trial on all of the issues in the said cause, and for a rehearing of the said issues, and for an order opening the judgment heretofore, on May 19, 1947, entered in the said cause, and that the Court shall thereupon take additional testimony in the said cause, amend the Findings of Fact and Conclusions of Law entered herein on May 19, 1947, or make new findings and conclusions, and for an order directing the entry of a new judgment herein, for the following reasons, viz.:

1. On Wednesday, May 14, 1947, the Portal-to-Portal Act of 1947, having been theretofore duly enacted by the Congress of the United States, was approved and signed by the President of the United States, and upon said day became a law of the United States, only five days prior to the signing and entry herein, on May 19, 1947, of the Findings of Fact and Conclusions of Law and Judgment. The said Portal-to-Portal Act of 1947, by its terms and provisions, expressly modified and amended the Fair Labor Standards Act of 1938, as amended, upon which the [fol. 1704] alleged causes of action described in plaintiffs' First Amended Complaint are based, limiting, modifying and restricting certain of the rights granted to plaintiffs by said Fair Labor Standards Act of 1938, as amended, authorizing the defendant to plead and prove as a defense and bar to the alleged causes of action described in the said First Amended Complaint certain facts which did not constitute a defense or bar thereto prior to the said Portal-to-Portal Act of 1947, defining and limiting the jurisdiction of this Court with respect to the alleged causes of action described in said First Amended Complaint, and granting to this Court certain discretion with respect to the awarding of liquidated damages which this Court did not possess prior thereto. Although the defendant did not have time nor opportunity between May 14, 1947, when said Portal-to-Portal Act of 1947 became a law, and May

19, 1947, the date of the entry of the Findings of Fact and Conclusions of Law and Judgment herein, to call said Act and its effect upon the present proceedings to the attention of the Court, and to plead and to prove certain facts which in and by said Act are made a complete defense and bar to this proceeding, nevertheless said Act became and was binding upon this Court, and all of the parties to this proceeding, and the Findings of Fact and Conclusions of Law and the Judgment made and entered herein violate and are contrary to the provisions of said Act.

2. Plaintiffs failed to plead and prove that (a) during the one-half hour lunch periods and (b) during the time prior to the beginning of and following the ending of plaintiffs' regular working shifts, plaintiffs, or any of them, engaged in any activity which was compensable by either

(1) an express provision of a written or non-written contract in effect, at the time of such activity, between plaintiffs, or any of them, their or his agent, or collective bargaining representative and the defendant; or

[fol. 1705] (2) a custom or practice in effect, at the time of such activity, at the establishment or other place where such plaintiffs were employed, covering such activity, not inconsistent with a written or non-written contract, in effect at the time of such activity, between such plaintiffs, or any of them, their or his agent, or collective bargaining representative and the defendant,

and that such activity was engaged in during the portion of the day with respect to which it was so made compensable; all as provided in Section 2, Subsections (a) and (b) of said Portal-to-Portal Act of 1947, and hence the Court erred in making and entering said Findings of Fact Nos. 8, 9 and 10, which are erroneous and contrary to the evidence, the weight of the evidence, and the law, and the said Judgment, which is, *pro tanto*, excessive, with respect to each of the plaintiffs, and contrary to law.

3. The Court erred in including in the said Judgment, with respect to each of the plaintiffs, an allowance of over-

time compensation, plus liquidated damages, for (a) the one-half hour lunch periods and (b) the time prior to the beginning of and following the ending of plaintiffs' regular working shifts, contrary to the provisions of Section 2, Subsections (a) and (b) of the Portal-to-Portal Act of 1947, because there was no "activity", within the meaning of said Act, on the part of any plaintiff during such lunch periods or during the time prior to the beginning of and following the ending of plaintiffs' regular working shifts, and, if there was any such activity on the part of plaintiffs, or any of them, during such lunch periods or time before and after shifts it was not an activity which was compensable by either—

[fol. 1706] (1) an express provision of a written or non-written contract in effect, at the time of such activity, between such plaintiffs, or any of them, their or his agent, or collective-bargaining representative and the defendant, or

(2) a custom or practice in effect, at the time of such activity, at the establishment or other place where such plaintiffs were employed, covering such activity, not inconsistent with a written or non-written contract, in effect at the time of such activity, between such plaintiffs, or any of them, their or his agent, or collective-bargaining representative and the defendant,

and it was not an activity which was engaged in during the portion of the day with respect to which it was so made compensable. (See affidavit of Harry P. Miller in support hereof.)

4. The Court erred in making and entering said Findings of Fact and Conclusions of Law and Judgment, in the application of the overtime compensation provisions of the Fair Labor Standards Act of 1938, as amended, and in determining the time for which the defendant employed the plaintiffs, and each of them, by counting more time than that during which the plaintiffs engaged in activities which were compensable within the meaning of Subsections (a) and (b) of Section 2 of the Portal-to-Portal Act, contrary to and in violation of the provisions of Subsec-

tion (c) of Section 2 of said Act, in that the Court allowed overtime compensation, plus liquidated damages, for (a) the one-half hour lunch periods and (b) the time prior to the beginning of and following the ending of plaintiffs' regular working shifts. (See affidavit of Harry P. Miller, in support hereof.)

5. The Court erred in making and entering the said Judgment, in that under the provisions of Subsection (d) of Section 2 of the Portal-to-Portal Act of 1947 the Court [fol. 1707] had no jurisdiction to allow overtime compensation, plus liquidated damages, for (a) the one-half hour lunch periods or (b) the time prior to the beginning and following the ending of plaintiffs' regular shifts, because, to the extent that the action or proceeding seeks to enforce such liability or impose such punishment, it does so with respect to an activity which was not compensable under Subsections (a) and (b) of Section 2 of the said Act. (See affidavit of Harry P. Miller in support hereof.)

6. The Court erred in making and entering said Findings of Fact and Conclusions of Law and Judgment, in that each and every act or omission complained of in the First Amended Complaint was done or omitted to be done in good faith in conformity with and in reliance on administrative regulations, orders, rulings, approvals or interpretations, of one or more agencies of the United States, and, under the provisions of Section 9 of the Portal-to-Portal Act of 1947, such facts, if established, constitute a bar to this action or proceeding. During the five day interval between May 14, 1947, the date when said Portal-to-Portal Act of 1947, became a law, and May 19, 1947, the date of entry of said Findings of Fact and Conclusions of Law and Judgment, defendant did not have time or opportunity to plead or to prove the foregoing facts which defendant now offers and requests leave of Court so to do. (See affidavit of Harry P. Miller in support hereof.)

7. The Court erred in making and entering said Findings of Fact and Conclusions of Law and Judgment, in that each and every act or omission complained of in the

First Amended Complaint was done or omitted to be done in good faith in conformity with and in reliance on administrative practices or enforcement policies of one or more agencies of the United States with respect to the class of employers to which defendant belongs, and, under the provisions of Section 9 of the Portal-to-Portal Act of [fol. 1708] 1947, such facts, if established, constitute a bar to this action or proceeding. During the five day interval between May 14, 1947, the date when said Portal-to-Portal Act of 1947, became a law, and May 19, 1947, the date of entry of said Findings of Fact and Conclusions of Law and Judgment, defendant did not have time or opportunity to plead or to prove the foregoing facts which defendant now offers and requests leave of court so to do. (See affidavit of Harry P. Miller in support hereof.)

8. The Court erred in making and entering said Findings of Fact and Conclusions of Law and Judgment, in that each and every act or omission giving rise to the present action was done or omitted to be done in good faith, and defendant had reasonable grounds for believing that such acts or omissions were not a violation of the Fair Labor Standards Act of 1938, as amended, and, under the provisions of Section 11 of the Portal-to-Portal Act of 1947, if the defendant shows such facts to the satisfaction of the Court, the Court may, in its sound discretion, award no liquidated damages or award any amount thereof not to exceed the amount specified in Section 16 (b) of such Fair Labor Standards Act of 1938, as amended. During the five day interval between May 14, 1947, the date when said Portal-to-Portal Act of 1947, became a law, and May 19, 1947, the date of entry of said Findings of Fact and Conclusions of Law and Judgment, defendant did not have time or opportunity to show such facts to the satisfaction of the Court, but is now prepared and offers and requests leave of Court so to do. (See affidavit of Harry P. Miller in support hereof.)

9. The Court erred in finding (Finding of Fact No. 2) that the ammunition manufactured at the St. Louis Ordnance Plant was intended for transportation in interstate commerce to points outside of the State of Missouri, and

that said ammunition and by-products thereof were trans-
[fol. 1709] ported in interstate commerce and that said defendant was engaged in commerce and in the production of goods for commerce within the meaning of the Fair Labor Standards Act of 1938, and that defendant was subject to the provisions of such Act.

10. The Court erred in finding (Finding of Fact No. 3) that the plaintiffs, and each of them, were engaged in the production of goods for interstate commerce within the meaning of the Fair Labor Standards Act of 1938.

11. The Court erred in finding (Finding of Fact No. 4) that the plaintiffs, and each of them, were employed by defendant at the base rates of pay alleged in Paragraphs Numbered 1 to 59, inclusive, of the First Amended Complaint herein.

12. The Court erred in finding (Finding of Fact No. 4) that plaintiffs, and each of them, all performed similar duties and were similarly situated within the meaning of Section 16 (b) of the Fair Labor Standards Act of 1938.

13. The Court erred in finding (Finding of Fact No. 5) that the services and duties performed by the plaintiffs, and each of them, were necessary to and interwoven with the interstate commerce business of the defendant, and were necessary to and contributed to and were interwoven with the production of goods for interstate commerce by the defendant.

14. The Court erred in finding (Finding of Fact No. 6) that defendant failed to prove as to any of the plaintiffs that any substantial exercise of discretion and independent judgment was required of them in the performance of their duties, and failed to prove that any of the plaintiffs were employed in an administrative capacity, as that term is defined and delimited by the Regulations of the Administrator, and that none of the plaintiffs were exempted as administrative employees.

[fol. 1710] 15. The Court erred in finding (Finding of Fact No. 7) that those plaintiffs who were employed as

Assistant Chief Safety Engineers and Assistant Staff Supervisors were not exempted as executive employees because no such exemption was pleaded as to them in the defendant's answer, and also because defendant failed to prove that they, or any of them, customarily and regularly exercised discretionary powers in the performance of their duties, or that they had authority to hire or fire other employees, or that their suggestions and recommendations as to the hiring or firing, and as to the advancement or promotion or other change of status of other employees were given particular weight, as specified in the Administrator's Regulations, and that defendant failed to prove that these plaintiffs, or any of them, were employed in a bona fide executive capacity, as defined and delimited in the Administrator's Regulations, and that none of the plaintiffs were exempted as executive employees.

16. The Court erred in finding (Finding of Fact No. 8) that plaintiffs, and each of them, worked total actual hours, as shown on summaries prepared and furnished by defendant and received in evidence as Plaintiffs' Exhibits A-1 to A-59, respectively, in each pay period there shown, and to the extent said hours exceeded forty hours in each week or any week same were in excess of the applicable maximum prescribed by Section 7 of the Act; and that plaintiffs, and each of them, are entitled to be compensated therefor at the rate of one and one-half times the regular rate at which they were, respectively, employed, and that said Exhibits constitute a sufficient basis for the computation of overtime pay due to each of the plaintiffs.

17. The Court erred in finding (Finding of Fact No. 9) that the lunch period of one-half hour each day was compensable time, and that defendant improperly and un- [fol. 1711] lawfully deducted this one-half hour on the summaries prepared by it, as aforesaid, and received in evidence as Plaintiffs' Exhibits A-1 to A-59, commencing with the first pay period and including the pay period ending October 10, 1943, and that Plaintiffs' Exhibits B-1 to B-59, wherein this one-half hour is added to the actual

hours reported in defendant's summaries, correctly reflects the actual hours worked by plaintiffs, and each of them, and correctly compute the claim of each plaintiff.

18. The Court erred in finding (Finding of Fact No. 10) that the salaries paid the plaintiffs were base pay for a forty-hour week, and that plaintiffs are entitled to be compensated for all hours worked in excess thereof at one and one-half times the regular hourly rate, and that the proper method of computing the regular hourly rate is to divide the weekly wage by 40, and the proper method of computing the overtime is to multiply the hours worked in each pay period in excess of forty by one and one-half times the regular hourly rate computed as above stated, and that the computations made in Plaintiffs' Exhibits B-1 to B-59, received in evidence, are correctly computed, and that the sum of columns 6 and 7 of said exhibits correctly state the total overtime compensation lawfully due to each plaintiff.

19. The Court erred in concluding (Conclusions of Law No. 1) that at all times referred to in the evidence herein defendant was engaged in commerce and in the production of goods for commerce, and was an employer within the meaning of the Fair Labor Standards Act of 1938.

20. The Court erred in concluding (Conclusions of Law No. 2) that during their respective periods of employment plaintiffs and each of them were engaged in the production of goods for commerce within the meaning of said Act.

[fol. 1712] 21. The Court erred in concluding (Conclusions of Law No. 3) that none of the plaintiffs are exempted from the benefits of the Act under any provisions of the Act or under any Regulations of the Administrator, either on the ground that they were employed in an administrative capacity or on the ground that they were employed in an executive capacity, or for any other reason.

22. The Court erred in concluding (Conclusions of Law No. 4) that the salaries received by plaintiffs were payment for a forty-hour week, and all hours worked in excess thereof are compensable overtime to be computed

by the following method, to-wit: multiply the monthly pay by twelve and divide result by fifty-two, thus obtaining the weekly wage; divide this weekly wage by forty, thus obtaining the regular hourly rate; multiply the hours worked in excess of forty by one and one-half times this regular hourly rate and the result is the overtime compensation due; add to this result an equal amount as liquidated damages and the result is the total amount which each plaintiff is entitled to recover.

23. The Court erred in concluding (Conclusions of Law No. 5) that the provision of the Fair Labor Standards Act for the payment of liquidated damages and attorney's fee is compensatory in character and not penal, and that in the absence of holdings to the contrary by the Missouri courts, the Five Year Statute of Limitations of the State of Missouri applies to the causes of action at bar, and that the cause of action of none of the plaintiffs is barred by any Statute of Limitations.

24. The Court erred in concluding (Conclusions of Law No. 6) that there shall also be assessed against defendant an attorney's fee in the sum of Twenty Four Thousand [fol. 1713] Six Hundred Twenty-Five Dollars ($24,625.00) to be paid by defendant to Thomas Bond, plaintiffs' attorney of record.

25. The Court erred in ordering, adjudging and decreeing that judgment be entered herein in favor of each plaintiff and against defendant, instead of in favor of the defendant and against each plaintiff.

26. The Court erred in ordering, adjudging and decreeing that judgment be entered herein in favor of each plaintiff and against defendant in the respective amounts set forth for each plaintiff under the caption "Unpaid Over-time Compensation", and in ordering, adjudging and decreeing that to each such amount an equal amount be added as liquidated damages, as set forth opposite the name of each plaintiff under the caption "Liquidated Damages", and in ordering, adjudging and decreeing that judgment be entered herein in favor of each plaintiff and against defendant in the respective amounts set forth op-

posite the name of each plaintiff under the caption "Total Judgment", and in ordering, adjudging and decreeing that in addition to the above amounts plaintiffs have judgment against defendant for their attorney's fee in the sum of Twenty Four Thousand Six Hundred Twenty-five Dollars ($24,625.00), and that said sum be paid by defendant to Thomas Bond, plaintiffs' attorney of record, and that plaintiffs recover their costs.

27. The Court erred in the trial of said cause in admitting and receiving in evidence, over the objection of defendant, incompetent, irrelevant and immaterial evidence offered by the plaintiffs.

28. The Court erred in the trial of said cause in failing and refusing to admit and receive in evidence competent, relevant and material evidence offered by defendant.

[fol. 1714] 29. The said judgment is contrary to law, the evidence and the weight of the evidence.

30. The said judgment is for the wrong party, being in favor of the plaintiffs and against the defendant, when it should have been in favor of the defendant and against the plaintiffs.

Wherefore, the defendant prays for an order granting to the defendant a new trial on all of the issues in the aforesaid cause, and for a rehearing of the issues, and for an order opening the judgment heretofore on May 19, 1947, entered in the said cause, and that the Court shall thereupon retry or rehear all of the issues in said cause, or said portion of the said issues as it may be necessary and proper to retry or rehear, and that the Court shall thereupon take additional testimony in the said cause, withdraw, cancel and vacate the Findings of Fact and Conclusions of Law entered herein on May 19, 1947, or amend the same, or make new findings and conclusions, and for an order directing the entry of a new judgment herein.

Oral argument of this motion is hereby requested pursuant to Rule VIII c. (1) of the General Rules of this Court.

MICRO

TRADE

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Plaintiffs are now advised by the filing of this motion, affidavit in support thereof and brief in support thereof on this 29th day of May, 1947.

RHODES E. CAVE,
R. H. McROBERTS,
W. C. CONNETT IV,
1630 Boatmen's Bank Building,
St. Louis 2, Missouri,
Attorneys for Defendant The United States Cartridge Company.

BRYAN, CAVE, McPHEETERS & McROBERTS,
1630 Boatmen's Bank Building,
St. Louis 2, Missouri,
Of Counsel.

[fol. 1715] Receipt of a copy of the foregoing Defendant's Motion for a New Trial, and Affidavit in Support Thereof, and Brief in Support Thereof, is hereby acknowledged this 29th day of May, 1947.

THOMAS BOND,
Attorney for Plaintiffs.

I hereby certify that service of the foregoing Defendant's Motion for a New Trial, and Affidavit in Support Thereof, and Brief in Support Thereof, was made upon L. Metcalfe Walling, Amicus Curiae, by mailing a copy thereof to his attorney Reid Williams, Regional Attorney, Department of Labor, at his last known address, 3000 Fidelity Building, Kansas City 6, Missouri, on the 29th day of May, 1947.

W. C. CONNETT IV.

[fol. 1716] Affidavit of Harry P. Miller
In Support of Defendant's Motion
for a New Trial.

United States of America
State of Missouri } ss.
City of St. Louis

HARRY P. MILLER, being duly sworn, on his oath states as follows:

1. My name is Harry P. Miller and I live in the City of St. Louis, Missouri. I am now and have been since July 17, 1944, Director of Personnel of The United States Cartridge Company, defendant in the above entitled cause; from July 15, 1942, to July 17, 1944, I was Assistant Personnel Director of the said defendant, and from February 2, 1942, to July 15, 1942, I was Personnel Supervisor, acting as Assistant Director of Personnel, of the said defendant.

2. It was a part of the duties of my employment with the defendant in the various capacities as aforesaid to be familiar with and participate in the fixing of wage and salary schedules and ranges, making amendments and changes therein, getting requisite approvals and reimbursement therefor, and, in general, to be thoroughly familiar with the practices and policies of the defendant company in connection with wage and salary matters, including the salaries paid to the plaintiffs, and each of them, in the present case, and to be familiar with and participate [fol. 1717] in dealings between the defendant and various agencies of the United States Government in connection with such wage and salary matters, the authorization and approval thereof and compliance by the defendant with the various administrative regulations, orders, rulings, approvals and interpretations of various agencies of the United States and the administrative practices and enforcement policies of such agencies with respect to the class of employers to which the defendant belonged.

3. It was also a part of my duties to know and be familiar with the activities of the plaintiffs, and each of them, while they were employed by the defendant, and the writ-

ten or non-written contracts in effect, at the time of such activities, between such plaintiffs, their agents or collective-bargaining representative and the defendant, and the customs or practices in effect, at the time of such activities, at the establishment where each plaintiff was employed, with respect to such activities.

Re Grounds 3, 4 and 5 of Defendant's Motion for New Trial.

4. On information and belief, during the entire time that plaintiffs, and each of them, were employed by the defendant, with the possible exception of two occasions involving not more than three or four of the plaintiffs, the plaintiffs, and each of them, were not ordered, directed, instructed or required to engage in any of the duties incident to their employment, nor to perform any other work, labor or services for the defendant, and none of the plaintiffs did or performed any such work, labor or services, during the one-half hour lunch periods allowed to each of said plaintiffs, nor during the time prior to the beginning of and following the ending of plaintiffs' regular working shifts. The said lunch periods were "free" time when the plaintiffs, and each of them, were free from the direction, supervision and control of the defendant, and which plaintiffs, and each of them, were privileged to use for such purposes [fol. 1718] as they might see fit, including leaving the buildings and grounds of the St. Louis Ordnance Plant, if they so desired. The time prior to the beginning of and following the ending of plaintiffs' regular working shifts represented time after punching in on their time cards before their shifts and before punching out on their time cards after their shifts, when plaintiffs, and each of them, were in, on or about the premises of the St. Louis Ordnance Plant by their own choice, for their own convenience and not for the convenience of or pursuant to any orders, directions or instructions of the defendant. No activity in which plaintiffs, or any of them, engaged during such lunch periods or during the time prior to the beginning of and following the ending of plaintiffs' regular working shifts was compensable under either (1) an express provision of a written or non-written contract in effect, at the time of such activity, between such plaintiffs, or any

of them, their or his agent, or collective-bargaining representative and the defendant, or (2) a custom or practice in effect, at the time of such activity, at the establishment or other place where such plaintiffs were employed, covering such activity, not inconsistent with a written or non-written contract, in effect at the time of such activity, between such plaintiffs, or any of them, their or his agent, or collective-bargaining representative and the defendant, and no such activity was engaged in by plaintiffs, or any of them, during the portion of the day with respect to which any such activity was so made compensable.

5. Plaintiffs' Exhibits A-1 to A-59, both inclusive, do not purport to reflect and do not correctly reflect the actual hours worked by plaintiffs, or any of them, but only the elapsed-time between the punching in and the punching out of plaintiffs' time cards, computed in the manner described on the witness stand by defendant's witness John [fol. 1719] L. Kelly. Such elapsed time shown on Plaintiffs' Exhibits A-1 to A-59, both inclusive, includes free time prior to the beginning of and following the ending of plaintiffs' regular working shifts, and also includes one-half hour lunch periods subsequent to October 11, 1943, during which free time and lunch periods plaintiffs performed no work, labor or services for the defendant, and engaged in no compensable activity for defendant. Plaintiffs' Exhibits B-1 to B-59, both inclusive, likewise do not correctly reflect the actual hours worked by plaintiffs, or any of them, but only the elapsed time between the punching in and the punching out of plaintiffs' time cards, computed as described by Mr. Kelly, plus the one-half hour lunch period prior to October 11, 1943. They also include free time prior to the beginning of and following the ending of plaintiffs' regular working shifts, and also include one-half hour lunch periods during the entire time of the employment of plaintiffs, and each of them, during which free time and lunch periods plaintiffs performed no work, labor or services for the defendant, and engaged in no compensable activity for defendant. Accordingly, in the application of the overtime compensation provisions of the Fair Labor Standards Act of 1938, as amended, and in determining the time for which the defendant employed the plaintiffs, and each of them, on the basis of said Exhibits,

and in making and entering the judgment herein, the Court has counted more time than that during which the plaintiffs engaged in activities which were compensable, within the meaning of subsections (a) and (b) of Section 2 of the Portal-to-Portal Act.

Re Grounds 6, 7 and 8 of Defendant's Motion for a New Trial.

6. Each and every act of the defendant in classifying and treating the plaintiffs, and each of them, as exempt [fol. 1720] employees under the provisions of the Fair Labor Standards Act of 1938, as amended, and of the Regulations of the Administrator issued thereunder, and in requiring plaintiffs, and each of them, to work in excess of forty hours per week, and in failing to pay to the plaintiffs, and each of them, any overtime compensation for hours worked in excess of forty hours per week, was done or omitted to be done in good faith, in conformity with and in reliance on administrative regulations, orders, rulings, approvals or interpretations of one or more agencies of the United States, and in conformity with and in reliance on administrative practices or enforcement policies of one or more agencies of the United States with respect to the class of employers to which defendant belonged, in this, to-wit:

(a) Under the terms and provisions of the Contract No. W-ORD-491 between the defendant and the United States of America, defendant was entitled to reimbursement of the costs and expenses incurred in the operation of the St. Louis Ordnance Plant only "when approved in advance or subsequently ratified by the Contracting Officer", and the defendant was required to submit to the Contracting Officer detailed information with respect to the defendant's organization and methods, its executive and administrative personnel, together with a written statement of the duties of each person, and the administrative procedure to be followed by the defendant for the control and direction of the work, such data to be supplemented from time to time.

[fol. 1721] (b) Pursuant to said provisions of the contract defendant, prior to commencing manufacturing operations

at the St. Louis Ordnance Plant, furnished to the Contracting Officer, the duly and legally designated and authorized agent of the United States of America, and to the Ordnance Department, a department or division of the War Department of the United States of America, and to the said War Department, full and complete information with respect to the defendant's organization and methods, the costs and expenses of every character and description incurred and to be incurred in connection with the performance of said contract, charts showing the executive and administrative personnel of the defendant, and written statements of the duties of each person and the administrative procedure to be followed by the defendant for the control and direction of the work, copies of all wage scales, schedules, rates of pay, rate ranges and salaries for all employees of the defendant, including both hourly paid and salaried workers, and a statement of the policies to be followed by the defendant with respect to the payments for overtime and for lunch periods, and from time to time during the years while defendant operated said St. Louis Ordnance Plant, and while plaintiffs were employed by defendant, as changes, additions and modifications were made in said information, charts, written statements, wage scales, schedules, rates of pay, rate ranges, salaries and management policies, defendant furnished to said Contracting Officer, Ordnance Department, War Department, and other agencies of the United States of America, full, complete and detailed information with respect thereto, and defendant was required to obtain and receive, and did in fact obtain and receive, from said Contracting Officer, said Ordnance Department, said War Department, and said other agencies of the United States of America, approvals thereof. In addition, during the entire [fol. 1722] period of defendant's operations of the St. Louis Ordnance Plant, and the entire period of plaintiffs' employment, auditors, inspectors, agents and representatives of the Contracting Officer, of the said Ordnance Department, and of the said War Department, had full and complete access to all of the books, records and accounts of the defendant, and all of the defendant's operations in, on and about the St. Louis Ordnance Plant, and did in

fact constantly audit, inspect and examine such books and records, and inspect, test, examine and verify defendant's operations, including the complete records and accounts with respect to the plaintiffs, and each of them, their hours worked, the nature and character of the work performed, and the nature, method and amount of salaries paid to them for such services, and were at all times fully informed and advised with respect to all of defendant's activities in connection with the performance of said contract, and approved the same, with certain minor and insignificant exceptions, none of which related to the plaintiffs, their hours worked, or their compensation therefor, all of which exceptions were, in due course, subsequently approved.

(c) In spite of such full and complete information furnished by the defendant to and the actual inspection, check, verification and knowledge of, such Contracting Officer, Ordnance Department and War Department, of the hours worked by the plaintiffs, the nature and extent of the services performed, the method and amount of compensation paid them therefor, and the fact that defendant treated and classified plaintiffs, and each of them, as being exempt employees under the Fair Labor Standards Act of 1938, as amended, and paid them no overtime for any hours worked in excess of forty hours per week, [fol. 1723] neither said Contracting Officer, said Ordnance Department, nor said War Department, nor any other agency of the United States of America ever at any time questioned, objected to or indicated, directly or indirectly that the plaintiffs, or any of them, were not exempt employees under the provisions of the Fair Labor Standards Act of 1938, as amended, or that they were entitled to overtime compensation for hours worked in excess of forty hours per week, and by such silence acquiesced, approved, ratified and confirmed the acts and policies of the defendant with respect to these plaintiffs, and the defendant, in good faith, conformed with and relied upon such administrative approval.

7. More specifically, and without limiting the generality of the foregoing—

(a) Defendant, under date of October 7, 1941, sought and obtained the express written approval of the Ordnance Department of its proposed management policies with respect to payments for overtime and lunch periods, which policies provided that no payment for overtime should be made for salaried employees, classified as Executive, Administrative and Professional employees, who received more than $200.00 salary per month, nor should payment at straight time or overtime rates be made for any lunch periods, except for hourly rated employees.

(b) Prior to making each salary payment to the plaintiffs, and each of them, for each pay period, the salary-payroll, setting forth detailed and specific information with respect to each such payment, including the amount of such payment, the basis upon which such payment was computed, i. e., the number of hours worked or other proper basis, all deductions therefrom and a specific indication with respect to each employee as to whether or [fol. 1724] not each such employee was classified as exempt or non-exempt under the Fair Labor Standards Act, was submitted to the Ordnance Department for approval, whereupon each such salary payroll was examined and verified by representatives of the Ordnance Department, and each such payroll was specifically approved in writing by the duly authorized representative of the Ordnance Department, in accordance with a procedure established by an express order of the Secretary of War. In each case such salary payrolls for the periods involved in this litigation specifically indicated that the plaintiffs, and each of them, were classified, treated and being compensated as exempt employees under the provisions of the Fair Labor Standards Act.

(c) After said wage scales, schedules, rates of pay, rate ranges and salaries had been initially adopted by defendant and approved by the various agencies of the United States, there was made out for each employee, including plaintiffs, and each of them, when employed, a slip or "Employment Notice," furnishing certain information with respect to the terms of employment, and salary or other basis of payment, which slips or memorandum indicated

whether or not such employee was classified by defendant as exempt or non-exempt under the Fair Labor Standards Act. A copy of each such slip or memorandum was forthwith furnished to the Ordnance Department, and if the Ordnance Department approved of such employment, and the terms thereof, said slip or memorandum was retained in its files without further action. In the event the said Ordnance Department disapproved of such employment, or the terms thereof, such slip or memorandum would be returned to the defendant with an explanation as to the reasons for such disapproval. Following such initial employment each change in the salary rate or other basis of [fol. 1725] compensation for each employee, including plaintiffs, and each of them, was set forth on another slip or memorandum, giving detailed information with respect thereto, including a specific statement as to whether or not the employee was classified by defendant as exempt or non-exempt under the Fair Labor Standards Act, copies of which slip were likewise forthwith furnished to the Ordnance Department and a like procedure followed with respect to approval or disapproval thereof. The procedure above outlined was followed with respect to plaintiffs, and each of them, and the respective slips or memoranda indicated that plaintiffs, and each of them, were classified and treated by defendant as exempt employees under the provisions of the Fair Labor Standards Act, and in each case the said Ordnance Department approved such classification in the manner indicated above.

(d) Following the passage of the Economic Stabilization Act of October 2, 1942, and the promulgation of Executive Order No. 9250 on October 3, 1942, the wage and salary stabilization policy of the United States became effective as of October 3, 1942, which policy provided that individual increases were prohibited on and after October 3, 1942, for salaries in excess of $5,000.00 per annum, and on and after October 27, 1942, for all salaries less than $5000.00 per annum, without specific approval from the properly authorized Government agencies. In compliance with the requirements, regulations and instructions set forth in Ordnance Procurement Circular No. 94, dated

March 20, 1943, issued by the Office of the Chief of Ordnance, and covering employees of contractors at new ordnance facilities, including the St. Louis Ordnance Plant, the defendant submitted to the War Department, Wage Administration Agency, being the agency to which the said War Department, the National Labor Relations Board, and the Commissioner of Internal Revenue had duly delegated [fol. 1726] authority to rule upon all applications for wage and salary adjustments requiring prior approval, a list of all reimbursable jobs at the St. Louis Ordnance Plant, including each job held by the plaintiffs, and each of them, together with the actual rate or rate range for each such job, and the number of employees in such job, and a job description of each such job. In order to obtain the necessary approval for making individual salary increases the defendant, acting pursuant to specific instructions contained in Ordnance Procurement Circular No. 188, dated June 16, 1943, prepared and submitted to the Ordnance Department a written statement of the existing Plan of the company for the making of individual wage adjustments for three separate groups—exempt, non-exempt and hourly paid employees, as such Plan was in effect prior to October 27, 1942. Such Plan specifically set forth, under the general classification "Exempt Salary Jobs", and following the statement "The schedule of salary ranges for exempt job classifications in effect prior to October 27, 1942 is listed below:" the following information:

"Code	Name	Salary Ranges Min. — Max.
843	Engineer Safety—Sr.	$200 — $250"

In addition, said Plan set forth other code numbers, all of the job classifications and salary ranges of various supervisory positions under which certain of the plaintiffs were from time to time classified, when not classified as safety engineers. Furthermore, said Plan made the specific statement that "exempt salary rated employees are not paid for overtime." This Plan was approved in writing, under date of September 17, 1943, by the said War Department, Wage Administration Agency. Thereafter

said Plan was also duly approved, in writing, by the Ordnance Department through its duly authorized Contracting Officer.

[fol. 1727] (e) Following the approval of said Plan, and continuing until the operations at said St. Louis Ordnance Plant ceased, every change in rates of pay, whether of hourly paid or salaried employees, and every promotion or transfer from one job to another, including every salary change for the plaintiffs, and each of them, and every promotion and transfer for the plaintiffs, and each of them, was first submitted by the defendant to the Ordnance Department of the United States by means of a slip or memorandum setting forth certain information with respect to the employee, his present job, rate and method of compensation, and the proposed change in job and/or in rate or method of compensation, each of said slips indicating whether or not the employee in question was exempt or non-exempt under the provisions of the Fair Labor Standards Act, and in the case of each of the plaintiffs affected by any such salary change, promotion or transfer, indicating that he was classified as an exempt employee under said Fair Labor Standards Act, and no such change in salary, promotion or transfer was put into effect until the Ordnance Department, after receipt of such slip, had approved the same and determined that such proposed change was in compliance with the various rules and regulations applicable thereto and with the aforesaid Plan.

(f) In addition, under date of August 19, 1943, the company, pursuant to the applicable rules and regulations, submitted through the Ordnance Department to said War Department, Wage Administration Agency, and also to the Small Arms Sub-office, Office of Chief of Ordnance, of the War Department, an agency created by the War Department to control and coordinate production, materials, policies, salaries and wages within and between the various employers engaged in the production of small arms ammunition for the War Department, a request for increases in the rate changes of various jobs, including an increase in the rate ranges for each of the jobs then

[fol. 1728] or thereafter held by each of the plaintiffs, describing each such job by the same code number and job description as had been previously used in the list of exempt jobs set forth in the aforesaid Plan; and pursuant to said request certain changes in the rate ranges for said jobs held by plaintiffs were approved by said War Department, Wage Administration Agency, under date of October 1, 1943, effective for exempt salaried employees on October 11, 1943.

(g) The above and foregoing are certain examples of administrative regulations, orders, rulings, approvals or interpretations of various agencies of the United States and of administrative practices of enforcement policies of such agencies with respect to the class of employers to which defendant belonged which affiant has been able to select from the files and records of defendant company in the short time available. It is believed that given reasonable opportunity to more closely examine such books and records, affiant will be able to produce and testify to or produce witnesses to testify to other instances in which specific regulations, orders, rulings, approvals, interpretations, practices or enforcement policies of such agencies have been obtained and followed.

8. Defendant acted in good faith and in conformity with and in reliance on the aforesaid administrative regulations, orders, rulings, approvals or interpretations of the said agencies of the United States and on the administrative practices or enforcement policies of such agencies with respect to the class of employers to which defendant belonged, and, upon a new trial of the foregoing cause, defendant will be able to plead and to prove such facts by competent, relevant, material and credible evidence.

[fol. 1729] 9. Defendant is prepared to show to the satisfaction of the Court that its act in classifying the plaintiffs, and each of them, as exempt under the Fair Labor Standards Act of 1938, as amended, and in failing to pay plaintiffs, and each of them, overtime compensation for hours worked in excess of forty hours per week, was in good faith, and that defendant had reasonable grounds for

believing that its said act or omission was not a violation of the Fair Labor Standards Act of 1938, as amended.

And further affiant saith not.

HARRY P. MILLER.

Subscribed and sworn to before me this 29th day of May, 1947.

My commission expires July 4, 1949.

RUTH F. WEAKLY,
Notary Public.

[fol. 1730] Affidavits on Behalf of Plaintiffs Opposing Defendant's Motion for a New Trial.

(Filed June 11, 1947.)

State of Missouri } ss.
City of St. Louis }

F. N. HARRIS, A. C. KEMP, W. F. O'MARA, ARTHUR C. KROPP and F. P. KNIGHT, being duly sworn on their oath state that they are plaintiffs in the above entitled case and were employed by defendant in the Safety Department of the St. Louis Ordnance Plant as follows:

F. N. Harris from February 13, 1942 to March 10, 1945.

A. C. Kemp from December 23, 1941 to September 16, 1944.

W. F. O'Mara from May 2, 1942 to October 5, 1945.

Arthur C. Kropp from December 2, 1941 to April 7, 1945.

F. P. Knight from January 23, 1942 to June 1, 1944.

That they know the organization methods and the customs and practices that obtained at said plant, and they severally depose as follows:

1. That it is not true, as stated on information and belief in the affidavit of Harry P. Miller, heretofore filed herein, that the time before and after shift was not com-
[fol. 1731] pensable, but, on the contrary, the facts are that it was the universal custom and invariable practice prevailing at said plant to compensate non-exempt employees for such time, and that the defendant corporation maintained a settled management policy for such payment to all non-exempt employees, including non-exempt salaried employees working on shifts, and the defendant corporation set up and maintained a formula for computing such time, said formula being as follows, to-wit: a tolerance period of 15 minutes before shifts was disregarded; periods in excess of this 15 minutes were counted: in computing the compensable portion of this time it was the practice to base the computation on one-tenth hour units and to disregard the odd minutes. For example, if an employee clocked in 16 minutes before shift he would be credited with 2/10ths of an hour and the odd 4 minutes disregarded. This practice and this formula was followed by the defendant in computing the actual hours of work of each of these plaintiffs. Plaintiffs' Exhibits A-1 to A-59, prepared by defendant, include this time and only this time before and after shifts. The judgment entered in this case includes only such time before and after shift as was credited to the plaintiffs by defendant corporation in preparing the aforesaid exhibits compensable according to practice at the plant and computed according to formula prescribed by defendant corporation.

Affiants further state that the aforesaid practice, custom and formula for computation followed by defendant in computing the plaintiffs' compensable time fully appears [fol. 1732] in the evidence already heard in this case, and particularly in the testimony of John L. Kelly, pay roll supervisor, and a witness for defendant.

Affiants further state that under the ruling of this Court all the plaintiffs are non-exempt employees and are entitled to be compensated for the time before and after shift credited to them by defendant in accordance with the policy of defendant, and the customs and practices that obtained at the plant.

2. Affiants further state that it is not true, as stated in the affidavit of said Harry P. Miller, that plaintiffs were on the premises before and after shift by their own choice and for their own convenience, and that they engaged in no activity during the period before and after shifts, but on the contrary these affiants depose and state that the duties performed by plaintiffs and required to be performed by them during said period were as follows:

Before Shift.

All Safety Inspectors were required to report one-half hour before shift and to punch the time clock 15 minutes before that time. Defendant corporation issued a directive to that effect, which was introduced in evidence as Plaintiffs' Exhibit G, and read as follows:

"June 3, 1942.

All Safety Inspectors,
Mr. S. L. Hertling.

Effective Friday, June 5, 1942, the working hours for Inspectors shall be as follows:

'A' Shift ..... 7:30 to 4:00 P. M.

'B' Shift ..... 3:30 — 12:00 P. M.

'C' Shift ..... 11:30 — 8:00 A. M.

[fol. 1733] "The time clock shall be punched within fifteen minutes before the hour. In order that we may take advantage of the half hour lap-over in shift time, the following procedure for inspectors shall be used:

1. Punch Clock

2. Report to Chief Inspector's office

3. Check files

4. Obtain note book and necessary material

5. Report to unit and contact Inspector from preceding shift.

(Signed) S. L. HERTLING

SLH:mw (Typed) S. L. HERTLING."

Affiants further state that as the above quoted directive sets out, these were "working hours" and they began one-half hour before shift, to-wit, 7:30 for the 8:00 o'clock shift, 3:30 for the 4:00 o'clock shift, and 11:30 for the 12:00 o'clock shift, and that the clock had to be punched 15 minutes beforehand, this 15 minutes being the tolerance period. Affiants state that the foregoing exhibit states the important duties that plaintiffs were required to perform and that said duties as actually performed and stated more in detail were as follows:

Punch the time clock, report to Chief Inspector's office, check files, obtain notebook and necessary material, report to unit and contact Inspector from preceding shift, and discuss with him any matters that had arisen in the preceding shift that required attention from the new shift.

After Shift.

Put away notebook and material, turn in reports and complete them if incomplete, change from working clothes, punch the clock.

In addition to the foregoing plaintiffs were often re- [fol. 1734] quired to remain for instruction, and were required to stay before Sunday or any shut down period to check and see if the unit was cleaned up according to clean up procedures prescribed by Management. The following directive, dated September 24, 1942, makes it clear what was expected of the Safety Inspectors in this respect:

" 'Date: September 24, 1942

From: G. A. Gilbertson Address: Administration Building

Messrs: E. J. Strong
H. S. L. Wheat
V. P. Birtley
J. M. Baker
E. H. Ebert
E. F. Flynn
J. K. McDermott

We have had instances in the past where on the last shift before the plant shut down proper cleaning in

the primer inserting and loading rooms was not done, leaving these buildings in a hazardous condition during the shut down.

We have found in the tracer charging buildings that if the people concerned are not allowed to leave these buildings until the Safety Inspector has approved their condition that we are able to eliminate dirty and hazardous conditions entirely. Therefore, please set it up in the areas under your control, so that the General Foremen, Foremen, etc., of the primer inserting and loading rooms are required to obtain an O. K. on the condition of these buildings from the Safety Inspector in your unit before they can consider the buildings clean. We are sure this will eliminate considerable anxiety as to the condition of these buildings during shut down periods.

GAG:ES G. A. GILBERTSON

CC: Messrs: D. C. Storms
B. E. Rogers
M. O. Thompson
C. E. Strickland

Safety Engineers will please be guided by Mr. Gilbertson's above instructions to his supervisory people. This places the responsibility for strict adherence to the clean-up procedure entirely with the Safety Engineer because he is not to approve the condition of a building until it meets requirements.

JACK SEWELL."

[fol. 1735] Affiants further state that Safety Engineers were also often required to stay after shift and take a position at an exit and count people leaving the plant, the purpose being to see what exits had the greatest use.

Lunch Period.

Affiants further state that during the lunch period Safety Engineers were expected to stay on the plant premises, and were always subject to call in case of acci-

dent or emergency, and that accidents requiring their attention during the lunch period did occur. They were also often required at such time to take a count of the number of people using the plant canteens and to perform other miscellaneous duties; and affiants further state that it was at all times the policy of the Company, as set out in its booklet (Plaintiffs' Exhibits C-1 to C-4), and was the custom and practice at the plant to compensate all except exempt employees for the lunch period. This policy was admitted by pay roll Supervisor Kelly in his testimony, and in accordance with that testimony affiants state it was the policy of the Company to allow a lunch period to all hourly workers and to all salaried workers working on shifts and not exempted. And affiants state that the statements of Harry P. Miller on information and belief in his affidavit to the effect that the lunch period was not compensable in respect to the class of employees to which plaintiffs belonged is incorrect and in conflict with the policy of the Company, as stated in its booklets, and the practice that prevailed at the plant and as followed by its pay roll Supervisor in making up pay rolls.

[fol. 1736] 4. That it is not true, as stated in said affidavit of Harry P. Miller, that in classifying these plaintiffs, defendant corporation in good faith conformed to and relied upon administrative regulations, orders, rulings, approvals and interpretations of any agency of the United States, or that defendant in good faith conformed to and relied upon any administrative practice or enforcement policy of any agency of the United States with respect to the class of employers to which defendant belonged, but on the contrary, affiants state that defendant made, conformed to and relied upon its own classifications; that the facts are that no agency of the United States made any classifications of plaintiffs, and affiants are informed and believe that their classification was arrived at in the following manner: Harry P. Miller, Director of Personnel, and Clyde E. Strickland, Chief Safety Engineer, shortly after the start of operations made a tour of all units of the department. They spent about three hours making these rounds, checking the activities of the personnel and the department records; they then conferred with an analyst in the employ of

defendant corporation on a salary, and between them they decided to classify plaintiffs as being employed in an administrative capacity, and therefore exempt from the Fair Labor Standards Act of 1938. It was a policy formulated entirely by defendant corporation, based on its own investigations, and was not the policy of any agency of the United States.

Affiants are further informed and believe that the data referred to in the affidavit of Harry P. Miller as having [fol. 1737] been submitted to the Contracting Officer of the Ordnance Department was submitted to said Officer only that he might approve the labor costs for purposes of reimbursement, and was not submitted to him for purposes of classification, and any acquiescence or approval on his part was solely with reference to the reimbursability of the pay rolls submitted.

Affiants further state that during the entire periods of their employment at the plant they never saw or heard anything to indicate that any representative of the Contracting Officer, the Ordnance Department or the War Department took any part or had any voice in the matter of their classification, and affiants state on information and belief that neither said Contracting Officer or the Ordnance Department, or the War Department ever issued any regulation, order, rules, approval or interpretation with respect to their classification, and that neither said party nor said agencies ever promulgated any administrative practice or enforcement policy with respect to defendant or any class of employers in regard to classifications of Safety Inspectors or Engineers.

[Affiant] deny that the classification of plaintiffs, or any of them, was made to conform to any regulations or policies of the aforesaid parties or agencies, and deny that defendant relied on any such in making plaintiffs' classification, and aver the facts to be that the classification of these plaintiffs was a policy entirely initiated, established and conformed to by defendant corporation, and in doing so it relied entirely upon its own investigations and records.

[fol. 1738] Affiants further state that applications to increase wages or salaries referred to in the affidavit of said Harry P. Miller were customarily made, both as to exempt and non-exempt employees, and said application involved approval only of the amount of the raise and did not involve any question of classification.

5. Affiants further state that defendant's action in classifying plaintiffs as employed in an administrative capacity, and its action in exempting plaintiffs from the overtime provisions of the Fair Labor Standards Act of 1938 was not in good faith, and that the defendant did not have reasonable grounds to believe that in so classifying plaintiffs they were not violating the Fair Labor Standards Act.

Affiants further state the facts to be that shortly after defendant adopted its classification policy the plaintiffs objected thereto and made both individual and organized protest to the Management; that the objections and protest became so general in the Safety Department that Clyde E. Strickland, then Chief Safety Engineer, called a meeting of all three shifts for a discussion of the matter, and at said meeting plaintiff, F. N. Harris, made a talk, setting out the objections that the men had to their classification, stating the reasons for those objections, and pointed out why the plaintiffs were not included within the Administrator's Regulation defining administratives. Mr. Strickland made no attempt to answer the facts or the argument presented by Mr. Harris on behalf of the Safety Inspectors, [fol. 1739] and simply stated that it was Management's policy and nothing could be done about it; and the suggestion was then made on behalf of plaintiffs that a suit be brought to test the matter, but this suggestion received no cooperation either from Strickland or from the Management.

Most of the foregoing facts already appear in the record in this case. Further evidence would merely confirm what is already in the record, and what is here stated, and affiants state that the evidence already taken in this case covering all the circumstances involved in this classification show clearly that the action of defendant corporation

was wilful and without any extenuating circumstances, and does not warrant any reduction in the liquidated damages.

And further affiants saith not.

F. N. HARRIS,
A. C. KEMP,
W. F. O'MARA,
ARTHUR C. KROPP,
F. P. KNIGHT.

Subscribed and sworn to before me, a Notary Public within and for the City of St. Louis, State of Missouri, this the 11th day of June, 1947.

My commission expires April 23, 1949.

(Seal)

MAY C. MECKFESSEL,
Notary Public.

[fol. 1740] I hereby certify that service of the foregoing affidavits was had upon defendant by mailing a copy thereof to Bryan, Cave, McPheeters and McRoberts, for the attention of Mr. R. H. McRoberts, its attorneys of record, at their last known address, 1630 Boatmen's Bank Building, St. Louis 2, Missouri, and service was made and had upon L. Metcalfe Walling, amicus curiae, by mailing a copy thereof to his attorney of record, Mr. Reid Williams, Regional Attorney, Department of Labor, at his last known address, 3000 Fidelity Building, Kansas City 6, Missouri, both of said copies having been mailed on the 11th day of June, 1947.

THOMAS BOND,
Attorney for Plaintiffs,
408 Olive Street,
St. Louis 2, Missouri,
Chestnut 6824.

[fol. 1741] (Motion of Plaintiffs for Substitution of LaVerne J. Ludwig, Administratrix, etc., in the Place of B. J. Ludwig, Deceased, and Gladys Connell, Administratrix, etc., in the Place of E. Connell.)

(Filed August 4, 1947.)

Now come plaintiffs and also come LaVerne J. Ludwig, administratrix, and Gladys Connell, administratrix, by their attorney, and respectfully show to the Court that plaintiff, B. J. Ludwig, died a resident of the City of St. Louis, Missouri, June 27, 1946, and that LaVerne J. Ludwig, his widow, was duly appointed administratrix of his estate by the Probate Court of the City of St. Louis, Missouri, on the 21st day of May, 1947, and that she has duly qualified as such, and a certified copy of her letters of administration is herewith attached and made part hereof. Plaintiffs and movants further state that plaintiff, F. Connell, whose full name was Frank J. Connell, died a resident of Queens County, State of New York, on May 16, 1946, and that on the 26th day of May, 1947 movant, Gladys Connell, his widow, was duly appointed administratrix of his estate by the Surrogate Court of the County of Queens, State of New York, and that she has duly qualified as such, and a certified copy of her letters of administration is herewith attached and made a part hereof.

Plaintiffs and movants further state that the claims of the said deceased plaintiffs, B. J. Ludwig and F. Connell, as set out in the first amended complaint herein, are not extinguished by death, but survive to their respective personal representatives, and that this motion is made within [fol. 1742] two years after the death of said [claimtiffs]: that said Laverne J. Ludwig, administratrix, and Gladys Connell, administratrix, are the representatives of said deceased plaintiffs, and that they and each of them desire and hereby request that they be substituted respectively as plaintiffs herein.

Wherefore, the premises considered, and pursuant to Rule 25 of the New Rules of Federal Practice, plaintiffs and movants pray that said LaVerne J. Ludwig, administratrix of the Estate of B. J. Ludwig, deceased, be substi-

tuted as a plaintiff herein for and instead of B. J. Ludwig, deceased, and that said Gladys Connell, administratrix of the Estate of F. Connell, be substituted as a party plaintiff herein for and instead of F. Connell, deceased. And plaintiffs and movants pray for such other and further orders in the premises as to the Court may seem reasonable and just.

THOMAS BOND,
Attorney for Plaintiffs, and Attorney for
LaVerne J. Ludwig, Administratrix,
and Gladys Connell, Administratrix, Movants.

I hereby certify that service of the foregoing Motion for Substitution of Parties and Notice of Hearing was had upon defendant by mailing a copy thereof to Bryan, Cave, McPheeters & McRoberts, for the attention of R. H. McRoberts, its attorneys of record, at their last known address, 1630 Boatmen's Bank Building, St. Louis 2, Missouri; and like service was made and had upon L. Metcalfe Walling, amicus curiae, by mailing copy thereof to his attorney of record, Mr. Reid Williams, Regional Attorney, Department of Labor, at his last known address, 3000 Fidelity Building, Kansas City 6, Missouri. All of same having been mailed on this 4th day of August, 1947.

THOMAS BOND,
Attorney for Plaintiffs and Movants,
408 Olive Street, St. Louis, Mo.,
Chestnut 6824.

[fol. 1743] The State of Missouri.

To all Persons to whom these Presents shall Come—Greeting:

Know Ye, That whereas Ben Ludwig also known as Bennett J. Ludwig [also known as,] also known as B. J. Ludwig late of the City of St. Louis, died intestate as it is

said, having at the time of his death, property in this State, which may be lost, destroyed or diminished in value if speedy care be not taken of the same; to the end, therefore, that the said property may be collected, preserved and disposed of according to law, we do hereby appoint LaVerne J. Ludwig administratrix of all and singular the goods, and chattels, rights and credits which were of the said Ben Ludwig also known as Bennett J. Ludwig also known as B. J. Ludwig at the time of his death with full power and authority to secure and dispose of said property according to law, and collect all moneys due said deceased, and in general to do and perform all other acts and things which are or hereafter may be required of her by law.

In Testimony Whereof, I, F. Leland Carpenter, Clerk of the Probate Court, in and for the City of St. Louis, hereto sign my name and affix the seal of said Court, at office, this 21st day of May, A. D. 1947.

(Seal) F. LELAND CARPENTER, Clerk.

State of Missouri, } ss.
City of St. Louis. }

I, F. Leland Carpenter, Clerk of the Probate Court of the City of St. Louis, do hereby certify that the above is a true copy of the original Letters of Administration in the matter of the estate of Ben Ludwig also known as Bennett J. Ludwig also known as B. J. Ludwig deceased, as fully as the same appear of record in my office. I further certify said appointment remains in full force and effect on this date.

In Testimony Whereof, I hereto set my hand and affix the seal of said Court, at office, in City of St. Louis this 27th day of May, 1947.

F. LELAND CARPENTER, Clerk,

(Seal) By V. J. McCAFFERY, Deputy Clerk.

[fol. 1744] No. 42844.

These Letters so far as they affect a certain cause of action are subject to the limitations, restrictions and restraint specified in Section S. C. A. 122.

The People of the State of New York.

To All To Whom These Presents Shall Come or May Concern, Send Greeting:

Know Ye, That we, having inspected the records of our Surrogate's Court in and for the County of Queens, do find that on the 26th day of May in the year one thousand nine hundred forty-seven by said Court, Letters of Administration of the goods, chattels, and credits of

Frank J. Connell

late of the County of Queens, deceased, were granted and committed unto

Gladys Connell

and that it does not appear by said records that said letters have been revoked.

In Testimony Whereof, we have caused the seal of the Surrogate's Court of the County of Queens to be hereunto affixed.

Witness, Hon. Anthony P. Savarese, Surrogate of our said County of Queens, the 27th day of May, 1947.

F. C. HARRIS,
Clerk of the Surrogate's Court.

(Seal)

[fol. 1745] At a Surrogate's Court held in and for the County of Queen's, at Jamaica, in said County, on the 26th day of May one thousand nine hundred and forty-seven.

Present:

Hon. Anthony P. Savarese, Surrogate

In the Matter of the Application for Letters of Administration of the Goods, Chattels and Credits which were of Frank J. Connell, Deceased } File 2702-47 Decree

On reading and filing the petition of Gladys Connell duly verified the 21st day of May, 1947, praying for a decree awarding Letters of Administration of the goods, chattels and credits of the said deceased to, her or to such other person or persons, who have an equal or prior right thereto, and proving also to the Surrogate the existence of all jurisdictional facts.

And this Court being satisfied that said petitioner is entitled to such Letters of Administration, and is in all respects competent to act as such Administratrix, does hereby decree that Letters of Administration of the goods, chattels and credits of the said deceased be awarded to the said petitioner on her filing the oath of office and executing and filing a bond, as prescribed by statute, in the sum of Thirty-five hundred ($3500.00) Dollars, and it is further

Ordered that said letters shall be limited as to a cause of action, to the prosecution thereof and said Administratrix is hereby restrained from compromising said action or enforcing any judgment recovered therein, until the further order of the Surrogate.

A. P. SAVARESE,
Surrogate.

No. 22566

State of New York
County of Queens } ss.
Surrogate's Court

I, Frederick C. Harris, Clerk of the Surrogate's Court of the County of Queens, Do Certify, that I have compared the preceding with the original Order, In the Matter of the Application for Letters of Administration of the Goods, Chattels and Credits which were of Frank J. Connell, deceased, as the same is filed in my office under date of May 26, 1947 and that the same is a true and correct copy thereof and of the whole of such original.

In Testimony Whereof, I have hereunto subscribed my name and affixed the seal of the Surrogate's Court of the said County of Queens, at Jamaica, in said County, this 27th day of May, 1947.

F. C. HARRIS,
(Seal) Clerk of the Surrogate's Court.

[fol. 1746] (Order of District Court Overruling Motion of Defendant for New Trial.)

(Filed September 2, 1947.)

The motion of the defendant for a new trial in the above entitled cause having been filed, the Court having considered said motion, arguments of counsel, and briefs of the parties submitted in connection therewith, and being fully advised in the premises, doth Order that said motion be, and is hereby denied.

GEO. H. MOORE,
Judge.

Filed: September 2, 1947.

[fol. 1747] (Order of District Court Substituting LaVerne J. Ludwig, Administratrix, as Plaintiff in the place of B. J. Ludwig, Deceased, and Gladys Connell, Administratrix, as Plaintiff in the Place of F. Connell, Deceased.)

(Filed September 22, 1947.)

Now again come the parties in the above entitled cause by their respective attorneys, and it appearing to the Court that the death of plaintiff B. J. Ludwig on June 27, 1946, and the death of plaintiff F. Connell on May 16, 1946, have been duly suggested, and that their respective representatives and the plaintiffs have duly filed their motion praying that LaVerne J. Ludwig, Administratrix of the Estate of B. J. Ludwig, deceased, be substituted as a plaintiff herein for and instead of B. J. Ludwig, deceased, and that Gladys Connell, Administratrix of the Estate of F. Connell, deceased, be substituted as a plaintiff herein for and instead of F. Connell, deceased, and it further appearing that said motion, together with due notice of the hearing thereof, has been duly served on the parties hereto, and said motion now coming on to be heard, on the motion and the evidence attached thereto, same was argued and submitted to the Court and having been duly considered was by the Court sustained.

It is therefore ordered and adjudged that ~~movant~~ LaVerne J. Ludwig, Administratrix of the Estate of B. J. Ludwig, deceased, be substituted as a plaintiff herein for and instead of B. J. Ludwig, deceased, and it is further ordered and adjudged that movant Gladys Connell, Administratrix of the Estate of F. Connell, deceased, be substituted as a plaintiff herein for and instead of F. Connell, deceased.

Dated at St. Louis, Missouri, this 22nd day of Sept. 1947.

GEO. H. MOORE,
United States District Judge.

[fol. 1748] (Order of District Court Extending Time to File Record on Appeal.)

(Filed October 16, 1947.)

On motion of the defendant, by its attorneys, and for cause shown, the time of the defendant as appellant for filing and docketing its record on its appeal to the United States Circuit Court of Appeals is hereby ordered extended to and including November 20, 1947.

Dated October 16, 1947.

GEORGE H. MOORE,
Judge.

[fol. 1749] (Order of District Court that Defendant may Deposit Cash Money into Registry of Court in Lieu of Supersedeas Bond on Appeal.)

(Filed October 22, 1947.)

Now again come the parties in the above entitled cause, by their respective attorneys, and it appearing to the Court that defendant has heretofore filed notice of appeal from the final judgment heretofore entered herein to the United States Circuit Court of Appeals for the Eighth Circuit, and that defendant desires to deposit into the registry of this Court the sum of $300,000 in cash in order to stay proceedings to enforce said judgment pending said appeal, said deposit to be in lieu of the usual supersedeas bond; and desires to release and set aside the execution, attachment and garnishment heretofore issued to enforce said judgment.

Now, therefore, on application of defendant and by consent of the plaintiffs, it is ordered and adjudged that defendant deposit forthwith with the Clerk of this Court the sum of $300,000 in cash and that when so deposited, same is to be in lieu of a supersedeas bond and is to be condi-

tioned for the satisfaction of the judgment, interest, damages and costs in all respects and to the same extent as the usual supersedeas bond, and same shall thereupon stay execution upon said judgment pending said appeal, and it is further ordered and adjudged that the execution issued herein on October 1, 1947, and any attachment, garnishment or other proceeding in aid thereof, be [fol. 1750] quashed, released and for naught held at the cost of appellant.

It is further ordered and adjudged that if, for any reason, said appeal is dismissed or if said judgment be affirmed, or if said judgment be in any respect modified, or judgment in any amount be directed in favor of all or any of the plaintiffs, and defendant shall fail to pay and satisfy same in full with interest, damages and costs, then and in either of said events the Clerk of this Court is hereby ordered and directed upon receipt of final mandate of the appellate courts to forthwith and without any further order to apply and pay out said moneys in satisfaction thereof.

It is further ordered and adjudged that if, after full payment and satisfaction of said judgment or judgments, interest, damages and costs, either by defendant or by the Clerk of this Court, as directed herein, any of the aforesaid deposit remains, said remainder shall be returned and paid over to the defendant, and if said judgment be finally reversed outright by any appellate court, and no recovery allowed to any plaintiff, then said deposit shall be returned and paid over to the defendant.

Dated at St. Louis, Missouri, this 22nd day of October, 1947.

GEO. H. MOORE,
United States District Judge.

[fol. 1751] Docket entry showing the deposit of $300,000.00 in cash in the registry of the Court in lieu of supersedeas bond.

(October 22, 1947.)

On oral application of defendant and by consent of plaintiffs, order filed and entered directing defendant to forthwith deposit with the Clerk of the Court the sum of $300,000.00 in cash to act as a supersedeas bond in accordance with the terms of said order pending determination of defendant's appeal from judgment heretofore entered herein, and quashing and releasing execution issued herein October 1, 1947 upon said judgment, as well as all attachments, garnishments, or other proceeding in aid of said execution, and providing for disposition of aforesaid fund upon receipt of trial Court of mandate of Appellate Court on final determination of aforesaid appeal. Whereupon defendant deposits in the registry the aforesaid sum of $300,000.00 pursuant to said order.

[fol. 1752] Statement of Points Upon Which Appellant Intends to Rely Upon Its Appeal.

(Filed October 29, 1947.)

Defendant hereby makes the following statement of the points upon which it intends to rely upon its appeal from the judgment rendered against it by the District Court:

1. On Wednesday, May 14, 1947, the Portal-to-Portal Act of 1947, having been theretofore duly enacted by the Congress of the United States, was approved and signed by the President of the United States, and upon said day became a law of the United States, only five days prior to the signing and entry herein, on May 19, 1947, of the Findings of Fact and Conclusions of Law and Judgment. The said Portal-to-Portal Act of 1947, by its terms and provisions, expressly modified and amended the Fair Labor Standards Act of 1938, as amended, upon which the

alleged causes of action described in plaintiffs' First Amended Complaint are based, limiting, modifying and restricting certain of the rights granted to plaintiffs by said Fair Labor Standards Act of 1938, as amended, authorizing the defendant to plead and prove as a defense and bar to the alleged causes of action described in the said First Amended Complaint certain facts which did not constitute a defense or bar thereto prior to the said Portal-to-Portal Act of 1947, defining and limiting the jurisdiction [fol. 1753] of the Courts with respect to the alleged causes of action described in said First Amended Complaint, and granting to the Courts certain discretion with respect to the awarding of liquidated damages which the Courts did not possess prior thereto. Although the defendant did not have time nor opportunity between May 14, 1947, when said Portal-to-Portal Act of 1947 became a law, and May 19, 1947, the date of the entry of the Findings of Fact and Conclusions of Law and Judgment herein, to call said Act and its effect upon the present proceedings to the attention of the District Court, and to plead and to prove certain facts which in and by said Act are made a complete defense and bar to this proceeding, nevertheless said Act became and was binding upon the Court, and all of the parties to this proceeding, and the Findings of Fact and Conclusions of Law and the Judgment made and entered herein violate and are contrary to the provisions of said Act.

2. Plaintiffs failed to plead and to prove that (a) during the one-half hour lunch periods and (b) during the time prior to the beginning of and following the ending of plaintiffs' regular working shifts, plaintiffs, or any of them, engaged in any activity which was compensable by either:

(1) an express provision of a written or non-written contract in effect, at the time of such activity, between plaintiffs, or any of them, their or his agent, or collective bargaining representative and the defendant; or

(2) a custom or practice in effect, at the time of such activity, at the establishment or other place where such plaintiffs were employed, covering such

activity, not inconsistent with a written or non-written contract, in effect at the time of such activity, between such plaintiffs, or any of them, their or his agent, or collective bargaining representative and the defendant,

[fol. 1754] and that such activity was engaged in during the portion of the day with respect to which it was so made compensable; all as provided in said Portal-to-Portal Act of 1947, and hence the District Court erred in making and entering its Findings of Fact Nos. 8, 9 and 10, which are erroneous and contrary to the evidence, the weight of the evidence, and the law, and the said Judgment, which is, pro tanto, excessive, with respect to each of the plaintiffs, and contrary to law.

3. The Court erred in including in its judgment, with respect to each of the plaintiffs, an allowance of overtime compensation, plus liquidated damages for (a) the one-half hour lunch periods and (b) the time prior to the beginning of and following the ending of plaintiffs' regular working shifts, contrary to the provisions of the Portal-to-Portal Act of 1947.

4. The Court erred in making and entering its Findings of Fact and Conclusions of Law and Judgment, in the application of the overtime compensation provisions of the Fair Labor Standards Act of 1938, as amended, and in determining the time for which the defendant employed the plaintiffs, and each of them, by counting more time than that during which the plaintiffs engaged in activities which were compensable within the meaning of the Portal-to-Portal Act of 1947.

5. The Court erred in making and entering its Judgment, in that under the provisions of the Portal-to-Portal Act of 1947 the Court had no jurisdiction to allow overtime compensation, plus liquidated damages, for (a) the one-half hour lunch periods or (b) the time prior to the beginning and following the ending of plaintiffs' regular working shifts.

6. The Court erred in making and enfering said Findings of Fact and Conclusions of Law and Judgment, in

that each and every act or omission complained of in the First Amended Complaint was done or omitted to be done [fol. 1755] in good faith, in conformity with, and in reliance upon administrative regulations, orders, rulings, approvals or interpretations, of one or more agencies of the United States, and, under the provisions of Section 9 of the Portal-to-Portal Act of 1947, such facts, if established, constitute a bar to this action or proceeding, and defendant has offered and requested leave of Court to plead and prove the said facts.

7. The Court erred in making and entering its Findings of Fact and Conclusions of Law and Judgment in that each and every act or omission complained of in the First Amended Complaint was done or omitted to be done in good faith, in conformity with and in reliance upon administrative practices or enforcement policies of one or more agencies of the United States, with respect to the class of employers to which defendant belongs, and, under the provisions of the Portal-to-Portal Act of 1947, such facts, if established, constitute a bar to this action or proceeding, and defendant has offered and requested leave of Court to plead and prove the said facts.

8. The Court erred in making and entering its Findings of Fact and Conclusions of Law and Judgment in that each and every act or omission which gave rise to the present action was done or omitted to be done in good faith, and defendant had reasonable grounds for believing that such acts or omissions were not a violation of the Fair Labor Standards Act of 1938, as amended, and, under the provisions of the Portal-to-Portal Act of 1947, if the defendant shows such facts to the satisfaction of the Court, the Court may in its sound discretion award no liquidated damages, or award any amount thereof not to exceed the amount specified in Section 16 (b) of such Fair Labor Standards Act of 1938, as amended, and defendant has offered and requested leave of Court to show such facts to the satisfaction of the Court.

[fol. 1756] 9. The Court erred in finding (Finding of Fact No. 2) that the ammunition manufactured at the St. Louis

Ordnance Plant was intended for transportation in interstate commerce to points outside of the State of Missouri, and that said ammunition and by-products thereof were transported in interstate commerce and that said defendant was engaged in commerce and in the production of goods for commerce within the meaning of the Fair Labor Standards Act of 1938, and that defendant was subject to the provisions of such Act.

10. The Court erred in finding (Finding of Fact No. 3) that the plaintiffs, and each of them, were engaged in the production of goods for interstate commerce within the meaning of the Fair Labor Standards Act of 1938.

11. The Court erred in finding (Finding of Fact No. 4) that the plaintiffs, and each of them, were employed by defendant at the base rates of pay alleged in Paragraphs Numbered 1 to 59, inclusive, of the First Amended Complaint herein.

12. The Court erred in finding (Finding of Fact No. 4) that plaintiffs, and each of them, all performed similar duties and were similarly situated within the meaning of Section 16 (b) of the Fair Labor Standards Act of 1938.

13. The Court erred in finding (Finding of Fact No. 5) that the services and duties performed by the plaintiffs, and each of them, were necessary to and interwoven with the interstate commerce business of the defendants, and were necessary to and contributed to and were interwoven with the production of goods for interstate commerce by the defendant.

14. The Court erred in finding (Finding of Fact No. 6) that defendant failed to prove as to any of the plaintiffs that any substantial exercise of discretion and independ-
[fol. 1757] ent judgment was required by them in the performance of their duties, and failed to prove that any of the plaintiffs were employed in an administrative capacity, as that term is defined and delimited by the Regulations of the Administrator, and that none of the plaintiffs were exempted as administrative employees.

15. The Court erred in finding (Finding of Fact No. 7) that those plaintiffs who were employed as Assistant

Chief Safety Engineers and Assistant Staff Supervisors were not exempted as executive employees because no such exemption was pleaded as to them in the defendant's answer, and also because defendant failed to prove that they, or any of them, customarily and regularly exercised discretionary powers in the performance of their duties, or that they had authority to hire or fire other employees, or that their suggestions and recommendations as to the hiring or firing, and as to the advancement or promotion or other change of status of other employees were given particular weight, as specified in the Administrator's Regulations, and that defendant failed to prove that these plaintiffs, or any of them, were employed in a bona fide executive capacity, as defined and delimited in the Administrator's Regulations, and that none of the plaintiffs were exempted as executive employees.

16. The Court erred in finding (Finding of Fact No. 8) that plaintiffs, and each of them, worked total actual hours, as shown on summaries prepared and furnished by defendant and received in evidence as Plaintiffs' Exhibits A-1 to A-59, respectively, in each pay period there shown, and to the extent said hours exceeded forty hours in each week or any week same were in excess of the applicable maximum prescribed by Section 7 of the Act, and that plaintiffs, and each of them, are entitled to [fol. 1758] be compensated therefor at the rate of one and one-half times the regular rate at which they were, respectively, employed, and that said Exhibits constitute a sufficient basis for the computation of overtime pay due to each of the plaintiffs.

17. The Court erred in finding (Finding of Fact No. 9) that the lunch period of one-half hour each day was compensable time, and that defendant improperly and unlawfully deducted this one-half hour on the summaries prepared by it, as aforesaid, and received in evidence as Plaintiffs' Exhibits A-1 to A-59, commencing with the first pay period and including the pay period ending October 10, 1943, and that Plaintiffs' Exhibits B-1 to B-59, wherein this one-half hour is added to the actual hours reported in defendant's summaries, correctly reflect the actual hours worked by plaintiffs, and each of them, and correctly compute the claim of each plaintiff.

18. The Court erred in finding (Finding of Fact No. 10) that the salaries paid to plaintiffs were base pay for a forty hour week, and that plaintiffs are entitled to be compensated for all hours worked in excess thereof at one and one-half times the regular hourly rate, and that the proper method of computing the regular hourly rate is to divide the weekly wage by 40, and the proper method of computing the overtime is to multiply the hours worked in each pay period in excess of forty by one and one-half times the regular hourly rate computed as above stated, and that the computations made in Plaintiffs' Exhibits B-1 to B-59, received in evidence, are correctly computed, and that the sum of columns 6 and 7 of said exhibits correctly state the total overtime compensation lawfully due to each plaintiff.

[fol. 1759] 19. The Court erred in concluding (Conclusions of Law No. 1) that at all times referred to in the evidence herein defendant was engaged in commerce and in the production of goods for commerce, and was an employer within the meaning of the Fair Labor Standards Act of 1938.

20. The Court erred in concluding (Conclusions of Law No. 2) that during their respective periods of employment plaintiffs and each of them were engaged in the production of goods for commerce within the meaning of said Act.

21. The Court erred in concluding (Conclusions of Law No. 3) that none of the plaintiffs are exempted from the benefits of the Act under any provisions of the Act or under any Regulations of the Administrator, either on the ground that they were employed in an administrative capacity or on the ground that they were employed in an executive capacity, or for any other reason.

22. The Court erred in concluding (Conclusions of Law No. 4) that the salaries received by plaintiffs were payment for a forty hour week, and all hours worked in excess thereof are compensable overtime to be computed by the following method, to-wit: multiply the monthly pay by twelve and divide the result by fifty-two, thus obtaining the weekly wage; divide this weekly wage by forty, thus obtaining the regular hourly rate; multiply the hours

worked in excess of forty by one and one-half times this regular hourly rate and the result is the overtime compensation due; add to this result an equal amount as liquidated damages and the result is the total amount which each plaintiff is entitled to recover.

23. The Court erred in concluding (Conclusions of Law No. 5) that the provision of the Fair Labor Standards Act for the payment of liquidated damages and attorney's fee [fol. 1760] is compensatory in character and not penal, and that in the absence of holdings to the contrary by the Missouri courts, the Five Year Statute of Limitations of the State of Missouri applies to the causes of action at bar, and that the cause of action of none of the plaintiffs is barred by any Statute of Limitations.

24. The Court erred in concluding (Conclusions of Law No. 6) that there shall also be assessed against defendant an attorney's fee in the sum of Twenty Four Thousand Six Hundred Twenty-Five Dollars ($24,625.00) to be paid by defendant to Thomas Bond, plaintiffs' attorney of record.

25. The Court erred in ordering, adjudging and decreeing that judgment be entered herein in favor of each plaintiff and against defendant, instead of in favor of the defendant and against each plaintiff.

26. The Court erred in ordering, adjudging and decreeing that judgment be entered herein in favor of each plaintiff and against defendant in the respective amounts set forth for each plaintiff under the caption "Unpaid Overtime Compensation", and in ordering, adjudging and decreeing that to each such amount an equal amount be added as liquidated damages, as set forth opposite the name of each plaintiff under the caption "Liquidated Damages", and in ordering, adjudging and decreeing that judgment be entered herein in favor of each plaintiff and against defendant in the respective amounts set forth opposite the name of each plaintiff under the caption "Total Judgment", and in ordering, adjudging and decreeing that in addition to the above amounts plaintiffs have judgment against defendant for their attorney's fee in the sum of Twenty Four Thousand Six Hundred Twenty-five Dollars [fol. 1761] ($24,625.00), and that said sum be paid by de-

fendant to Thomas Bond, plaintiffs' attorney of record, and that plaintiffs recover their costs.

27. The Court erred in the trial of said cause in admitting and receiving in evidence, over the objection of defendant, incompetent, irrelevant and immaterial evidence offered by the plaintiffs.

28. The Court erred in the trial of said cause in failing and refusing to admit and receive in evidence competent, relevant and material evidence offered by defendant.

29. The said judgment is contrary to law, the evidence and the weight of the evidence.

30. The said judgment is for the wrong party, being in favor of the plaintiffs and against the defendant, when it should have been in favor of the defendant and against the plaintiffs.

31. The Court erred in overruling defendant's Motion for a New Trial herein.

32. The Court erred in refusing to reopen the hearing of said cause and in refusing to retry any portion thereof.

33. The Court erred by refusing to permit defendant to plead and prove its defenses under the provisions of the Portal-to-Portal Act of 1947.

RHODES E. CAVE,
R. H. McROBERTS,
MARION S. FRANCIS,
1630 Boatmen's Bank Building,
St. Louis 2, Missouri,
Attorneys for Defendant, The United States Cartridge Company.

BRYAN, CAVE, McPHEETERS & McROBERTS,
1630 Boatmen's Bank Bldg.,
St. Louis 2, Missouri,
Of Counsel.

[fol. 1762] Service of the above Statement of Points Upon Which Appellant Intends to Rely Upon Its Appeal acknowledged this 29th day of October, 1947.

THOMAS BOND,
Attorney for Plaintiffs.

I hereby certify that service of the foregoing Statement of Points Upon Which Appellant Intends to Rely Upon Its Appeal was made upon L. Metcalfe Walling, Amicus Curiae, by mailing a copy thereof to his attorney, Reid Williams, Regional Attorney, Department of Labor, at his last known address, 3000 Fidelity Building, Kansas City 6, Missouri, on the 29 day of October, 1947.

MARION S. FRANCIS,
Attorney for Defendant The United States Cartridge Company.

[fol. 1763] (Designation of Defendant of Contents of Record on Appeal.)

(Filed October 29, 1947.)

To the Clerk of the United States District Court
for the Eastern District of Missouri:

The Clerk will please prepare, certify and transmit to the United States Circuit Court of Appeals for the Eighth Circuit a Transcript of the Record and include in such transcript only the matters designated as follows:

1. Plaintiffs' First Amended Complaint (including caption and signatures), filed April 5, 1946.

2. Defendant's Answer to First Amended Complaint (excluding caption and signatures), filed April 18, 1946.

3. Plaintiffs' Amended and Additional Interrogatories (excluding captions and signatures), filed March 26, 1946.

4. Defendant's Answers to Amended and Additional Interrogatories Propounded by Plaintiffs (excluding caption and signatures), filed April 20, 1946.

5. Plaintiffs' Request for Admissions under Rule 36, (excluding caption and signatures) filed April 24, 1946.

6. Defendant's Reply to Request for Admissions (excluding caption and signatures), filed May 6, 1946.

7. Order entry of May 15, 1946, granting leave to defendant to file amended answer to interrogatory No. 22.

[fol. 1764] 8. Defendant's Amended Answer to Interrogatory No. 22 (excluding caption and signatures), filed May 15, 1946.

9. Full and complete transcript of all evidence and proceedings upon trial, including all exhibits.

10. Findings of Fact and Conclusions of Law (excluding caption, but including signatures and date of entry), made and filed by the Court on May 19, 1947.

11. The final Judgment and the order of entry thereof (excluding caption, but including the signature and order of entry thereof) filed and entered on May 19, 1947.

12. Defendant's Motion for a New Trial, together with the affidavit thereto attached (excluding captions and signatures), filed May 29, 1947.

13. Affidavits of F. M. Harris and others in opposition to Motion for New Trial (excluding captions and signatures), filed June 11, 1947.

14. Order of the Court denying and overruling defendant's Motion for a New Trial (excluding caption, but including signature) filed and entered September 2, 1947.

15. Defendant's Notice of Appeal (excluding caption and signatures) filed on September 17, 1947, together with Clerk's certificates as to service of Notice of Appeal.

16. Order dated October 16, 1947, extending time within which defendant may file and docket record on appeal.

17. Order for Security on appeal in lieu of Supersedeas Bond filed October 22, 1947.

18. Record entry of October 22, 1947 setting forth receipt of security deposit by Clerk.

19. Plaintiffs' Motion for Substitution of Parties Plaintiff, filed Aug. 4, 1947.

20. Order of Substitution of Parties Plaintiff entered Sept. 22, 1947.

21. This designation of the record and certificate of service thereof.

[fol. 1765] 22. Statement of Points Upon Which Defendant Intends to Rely Upon Its Appeal, and certificate of service thereof.

RHODES E. CAVE,
R. H. McROBERTS,
MARION S. FRANCIS,
1630 Boatmen's Bank Building,
St. Louis 2, Missouri,
Attorneys for Defendant, The United States Cartridge Company.

BRYAN, CAVE, McPHEETERS & McROBERTS,
1630 Boatmen's Bank Building,
St. Louis 2, Missouri,
Of Counsel.

Service of the above Designation of Contents of the Record on Appeal acknowledged this 29th day of October, 1947.

THOMAS BOND,
Attorney for Plaintiffs.

I hereby certify that service of the foregoing Designation of Contents of the Record on Appeal was made upon L. Metcalf Walling, Amicus Curiae, by mailing a copy thereof to his attorney, Reid Williams, Regional Attorney, Department of Labor, at his last known address, 3000 Fidelity Building, Kansas City 6, Missouri, on the 29th day of October, 1947.

MARION S. FRANCIS,
Attorney for Defendant The United States Cartridge Company.

[fol. 1766] (Designation of Plaintiffs of Additional Matter to be Contained in Record on Appeal.)

(Filed November 3, 1947.)

To the Clerk of the United States District Court for the Eastern District of Missouri:

In addition to the matter heretofore designated by defendant, appellant, the Clerk will please include in the record on appeal the following matter, to-wit:

Docket entry of commencement of action by the filing of the complaint and the issuance of summons, excluding caption, filed and issued May 4, 1945.

This additional designation with certificate of service thereon.

THOMAS BOND,
Attorney for Plaintiffs, Appellees,
408 Olive Street,
St. Louis, Mo. Chestnut, 6824.

I hereby certify that service of the above and foregoing designation of additional matter to be contained in the record on appeal was made upon defendant, The United States Cartridge Company, by mailing a copy thereof to its attorneys, Messrs. Bryan, Cave, McPheeters & McRoberts, for the attention of Mr. R. H. McRoberts, at their last known address, 1630 Boatmen's Bank Bldg., St. Louis, Missouri, on the 3rd day of November, 1947.

THOMAS BOND,
Attorney for Plaintiffs, Appellees.

[fol. 1767] (Clerk's Certificate to Transcript.)

United States of America,
Eastern Division,
Eastern District of Missouri. } ss.

I, James J. O'Connor, Clerk of the United States District Court within and for the Eastern Division of the Eastern Judicial District of Missouri, do hereby certify that the attached and foregoing is a full, true and complete transcript (except in so far as the same is restricted by the designations of the respective parties in interest, of the matters to be incorporated herein as the record on appeal of defendant) of the record and proceedings in cause No. 3597 of this Court, entitled R. M. Powell, et al. vs. The United States Cartridge Company, a corporation, wherein The United States Cartridge Company, a corporation, has appealed to the United States Circuit Court of Appeals, 8th Circuit, from the final judgment and decree entered on May 19, 1947 as well as from the order entered September 2, 1947, overruling defendant's motion for a new trial, as fully as the same remains on file and of record in my office.

In Testimony Whereof, I have hereunto subscribed my name and affixed the seal of the aforesaid Court in my office in the City of St. Louis, Missouri, in said Division of said District this 19th day of November, in the year of our Lord, Nineteen Hundred and Forty-seven.

JAMES J. O'CONNOR,
(Seal) Clerk, U. S. District Court.

By JOHN J. JARVIS,
Deputy Clerk.

Filed Nov 19 1947 E. E. Koch Clerk.

[fol. 1768] (Stipulation as to printing record.)

In the United States Circuit Court of Appeals
for the Eighth Circuit

R. M. Powell, et al.,
Plaintiffs (Appellees),
vs.
The United States Cartridge Company,
a corporation,
Defendant (Appellant).

No. 13,663

It is hereby stipulated and agreed that the following portions of the record on appeal need not be included in the printed record, to-wit:

Plaintiffs' Exhibits A-4 to A-28, A-30 to A-46, and A-48 to A-50, inclusive. (Print A-1, A-2, A-3, A-29, and A-47).

Plaintiffs' Exhibits B-4 to B-28, B-30 to B-46, and B-48 to B-59, inclusive. (Print B-1, B-2, B-3, B-29 and B-47).

Plaintiffs' Exhibit C-1, C-2 and C-4.

Plaintiffs' Exhibit D.

Plaintiffs' Exhibits E-1 to E-7, both inclusive, appearing on pages 925 to 991, both inclusive.

Those portions of Defendant's Exhibit 9 consisting of the time cards of Arthur C. Kropp to Arthur C. Kropp, both inclusive, appearing on pages 1089 to 1139, both inclusive.

Those portions of Defendant's Exhibit 13 appearing on pages 1244 to 1249, both inclusive.

Those portions of Defendant's Exhibit 22 appearing on pages 1450 to 1464, both inclusive.

Those portions of Defendant's Exhibit 25 appearing on pages 1526 to 1536, both inclusive, and 1542 to 1545, both inclusive (the portion of said Exhibit to be

printed consisting of that portion beginning with the words "Article III-B" on page 1536, down to the end of Paragraph T on page 1542).

All of Defendant's Exhibit 25 appearing on pages 1551 to 1573 except Article III-V appearing on pages 1566 and 1569.

[fol. 1769] Provided, however, that it is expressly understood and agreed that either of the parties hereto, in their printed briefs and oral arguments, may refer to and quote from any part or portions of the said record on appeal so omitted from the printed record, and that the Court may consult and refer to any portions of the said record so omitted.

It is further stipulated that the figures shown in the Judgment of the District Court under the caption "Unpaid Over-time Compensation" opposite the names of each of the plaintiffs are the same as the final figures in each of the corresponding Exhibits B-1 to B-59, respectively, said final figures being sometimes designated in said Exhibits as "Total Amount Claimed", "Total Claim", "Claim" or "Total".

RHODES E. CAVE,
R. H. McROBERTS,
MARION S. FRANCIS,
1630 Boatmen's Bank Building,
St. Louis 2, Missouri,
Attorneys for Defendant Appellant
The United States Cartridge Company.

THOMAS BOND,
408 Olive Street,
St. Louis 2, Missouri,
Attorney for Plaintiffs Appellees.

(Endorsed): No. 13,663. Filed in U. S. Circuit Court of Appeals on December 11, 1947.

[fol. 979] And thereafter the following proceedings were had in said cause in the United States Court of Appeals for the Eighth Circuit, viz:

(Appearance of Counsel for Appellant.)

The United States Cartridge Company, a corporation, Appellant,
No. 13,663. vs.
R. M. Powell, et al.

The Clerk will enter my appearance as Counsel for the defendant-appellant.

RHODES E. CAVE,
R. H. McROBERTS,
MARION S. FRANCIS.

(Endorsed): Filed in U. S. Circuit Court of Appeals, Nov. 19, 1947.

(Appearance of Counsel for Appellees.)

The Clerk will enter my appearance as Counsel for the Appellees.

THOMAS BOND,
408 Olive St.,
St. Louis, Mo.

(Endorsed): Filed in U. S. Circuit Court of Appeals, Nov. 24, 1947.

[fol. 980] (Order Denying Motion for Substitution of Parties Appellee.)

January Term, 1948.

Tuesday, January 20, 1948.

Motion of appellees and LaVerne J. Ludwig, Administratrix of the Estate of B. J. Ludwig, Deceased, that she be substituted as party appellee herein for and instead of B. J. Ludwig, deceased, and of Gladys Connell, Administratrix of the Etate of F. Connell, deceased, that she be substituted as a party appellee herein for and instead of F. Connell, deceased, was heretofore submitted to the Court, and

after consideration thereof and of the objections of appellant and the brief in support of the objections and in support of the motion, It is now here Ordered by the Court that said motion for substitution be, and the same is hereby, denied without passing upon the question of the validity of the judgments appealed from as entered or the validity of the orders of the Trial Court granting substitution.

January 20, 1948.

[fol. 981] (Order granting William R. McComb, Administrator of the Wage and Hour Division, U. S. Department of Labor, leave to file brief amicus curiae.)

January Term, 1948.

Wednesday, February 11, 1948.

The appellant and the appellees having consented thereto in writing, It is hereby ordered that William R. McComb, Administrator of the Wage and Hour Division, United States Department of Labor, has leave to file a brief amicus curiae to be served on the other parties herein on or before April 10, 1948.

February 11, 1948

Approved as to form:
Attorneys for Appellant:
Bryan, Cave, McPheeters & McRoberts,
By R. H. McRoberts,
1630 Boatmen's Bank Building,
St. Louis, Missouri.

Attorney for Appellees:
Thomas Bond,
408 Olive Street,
St. Louis, Missouri.

[fol. 982] (Order vacating Submission, Setting Cause for Reargument and as to filing further briefs.)

September Term, 1948.

Tuesday, September 21, 1948.

This cause was argued and submitted to this Court at the May, 1948 Term. Since that time the Supreme Court has

handed down a decision in Kennedy et al. vs. Silas Mason Company, 334 U. S. 249, in which it is pointed out that in considering the merits of the controversy there involved, which is very similar to that here presented, three Acts of Congress require consideration: (1) The Fair Labor Standards Act; (2) The act of July 2, 1940 (54 Stat. 712); (3) The Walsh-Healy Public Contracts Act of June 30, 1936 (49 Stat. 2036). The Supreme Court was of the view that the record was not sufficiently complete in that case "for deciding issues of far flung import," the judgment having been entered in a summary proceeding.

In the present case the record, except on the issues sought to be raised under the Portal-to-Portal Act, would seem to be sufficient to warrant the consideration of the question as to the applicability, if any, of the above enumerated Acts of Congress. In the briefs and in the oral arguments it was assumed that under the issues only the Fair Labor Standards Act and the Portal-to-Portal Act were involved.

In view of the importance of the questions involved as they are pointed out by the Supreme Court in Kennedy [fol. 983] et al. vs. Silas Mason Company, supra, and the limited scope of the briefs and arguments heretofore presented in this cause, It Is Now Here Ordered by the Court on its own motion, that the submission of this cause be and the same hereby is set aside and vacated, and said cause is set down for re-argument before this Court in banc on the 8th day of November, A. D. 1948, at ten o'clock a. m. at St. Louis, Missouri, that being the first day of the November, 1948, Term of this Court.

It Is Further Ordered that the parties hereto may, if so advised, file supplemental briefs, particularly directed to the applicability, if any, of either or any of the above enumerated Act of Congress to the issues in this cause. The appellant may serve and file brief on or before October 15, 1948; the appellees may serve and file brief on or before October 30, 1948; and reply brief for appellant, if any, may be served and filed on or before November 6, 1948.

September 21, 1948.

[fol. 984] (Order of Submission.)

November Term, 1948.

Monday, November 8, 1948.

Before Judges Gardner, Sanborn, Woodrough, Thomas, Johnsen, Riddick and Collet.

This cause having been called for hearing in its regular order, argument was commenced by Mr. R. H. McRoberts for appellant, continued by Mr. Thomas Bond for appellees, and concluded by Mr. R. H. McRoberts for appellant.

Thereupon, this cause was submitted to the Court in banc on the transcript of the record from said District Court and the briefs of counsel filed herein.

[fol. 985] Opinion.

United States Court of Appeals

For The Eighth Circuit.

No. 13,663.

The United States Cartridge Company, a corporation, Appellant,

vs.

R. M. Powell, et al., Appellees.

Appeal from the United States District Court for the Eastern District of Missouri.

[April 12, 1949.]

Mr. R. H. McRoberts (Mr. Rhodes E. Cave, Mr. Marion S. Francis, and Messrs. Bryan, Cave, McPheeters & McRoberts were with him on the brief) for Appellant.

Mr. Thomas Bond for Appellees.

Mr. William S. Tyson, Solicitor, Miss Bessie Margolin, Assistant Solicitor, Mr. William A. Lowe and Mr. E. Gerald Lamboley, Attorneys, and Mr. Reid Williams, Regional Attorney, United States Department of Labor, filed brief as Amicus Curiae.

Before GARDNER, Chief Judge, and SANBORN, WOODROUGH, THOMAS, JOHNSEN, RIDDICK, and COLLET, Circuit Judges.

COLLET, Circuit Judge, delivered the opinion of the Court.

This is an action brought by a group of fifty-nine plaintiffs who were employed during World War II at the St. Louis Ordinance Plant to recover overtime compensation, liquidated damages, attorney fees, and costs, under the Fair Labor Standards Act of 1938. On trial the court found all the issues in favor of plaintiffs and entered judgment aggregating $246,251.44 (twice the amount of overtime claimed), plus $24,625.00 as attorney fees and costs. The parties will be referred to as they were designated in the District Court.

Defendant was engaged in the operation of a large munitions plant near St. Louis, Missouri, manufacturing small arms ammunition for use by the military forces of the United States under a cost-plus-a-fixed-fee contract with the United States and under the supervision of the Ordnance Department of the War Department. It is admitted by the pleadings that plaintiffs were all employees of defendant. Plaintiffs allege that defendant was engaged in interstate commerce and in the production of goods for interstate commerce within the meaning of the Fair Labor Standards Act of 1938,[1] and that they were employed in the production of goods for interstate commerce at agreed

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[1] 29 U.S.C.A., Sec. 201 et seq.

salaries for a 40-hour week, with the understanding that for all hours which they worked over 40 per week they would be compensated at the rate provided by that Act of one and one-half times the regular rate of pay. Plaintiffs were all employed in defendant's Safety Department.

Defendant denied and still denies that it was engaged in interstate commerce or in the production of goods for interstate commerce, denied that plaintiffs were so employed or at agreed salaries for a 40-hour week or that they were entitled to overtime pay for time worked in excess of 40 hours per week. The defendant alleged and continues to contend that each of the plaintiffs was employed in a bona fide administrative capacity as that term is defined in the Fair Labor Standards Act with the result that that Act did not apply with respect to them. The defendant furthermore set up certain provisions of the Missouri Statute of Limitations as an affirmative defense. After judgment was entered a motion for rehearing was filed, requesting among other things that the cause be reopened to permit defendant to plead and prove the defenses made available to it under the Portal-to-Portal Act, which had become effective subsequent to the trial and shortly prior to the judgment. This motion was accompanied by an affidavit stating certain facts deemed relevant to those defenses. Plaintiffs answered this affidavit with a counter affidavit. The motion was denied. This appeal followed. We held the case under submission pending the determination of *Kennedy* v. *Silas Mason Co.*, 334 U.S. 249 (1948) because of the similarity of certain important issues in both cases. Upon the remand of the Kennedy-Silas Mason case we set aside the submission of this cause and set it for re-argument before this court en banc. The parties were granted leave to file supplemental briefs particularly directed to the applicability, if any, of either the Fair Labor Standards Act of 1938, supra; the Act of July 2, 1940, 54 Stat. 712, 50 U.S.C.A. App., Sec. 1171, 1172, and 5 U.S.C.A.,

Sec. 189(a); or the Walsh-Healey Public Contracts Act of June 30, 1936, 49 Stat. 2036, 41 U.S.C.A., Sec. 35 et seq. Pursuant thereto the cause was re-argued and supplemental briefs bearing upon the applicability of the above-mentioned Acts were filed.

Defendant contends (1) that plaintiffs were not engaged in the production of goods for interstate commerce within the meaning of the Fair Labor Standards Act, and were not included within the coverage of that Act, (2) that it was not engaged in interstate commerce or in the production of goods for interstate commerce within the meaning of the Fair Labor Standards Act, (3) that the ammunition produced by defendant for the United States was for use in the war and was not "goods" within the meaning of that Act, (4) that plaintiffs were not engaged in interstate commerce or in the production of goods for commerce, (5) that the burden was on plaintiffs to plead and prove the coverage of the Act, the hours worked, and that they were engaged in the production of "goods" as defined in the Fair Labor Standards Act, which burden was not sustained, (6) that plaintiffs were employed in a bona fide administrative capacity and were exempt from the provisions of the Fair Labor Standards Act, (7) that the judgment of the trial court is in any event excessive in that it (a) is based on the erroneous assumption that the salaries paid plaintiffs were base pay for a 40-hour week instead of a variable or 48-hour week, (b) includes in the computations of hours worked a one-half hour lunch period, and (c) includes as hours worked, time prior to the beginning of and following the ending of plaintiffs' regular work shifts, (8) that the claims of certain plaintiffs were barred by Sections 1012 and 1015 R.S. Mo. 1939, (9) that the provisions of the Portal-to-Portal Act of 1947 are binding in this case and defendant should have been given the opportunity to plead and sustain the defenses made available to it under the Act, and (10) that two of the plaintiffs died

while the cause was under submission and there has been no proper substitution and revival.

The trial court found that defendant was engaged in interstate commerce and in the production of goods for commerce within the meaning of the Fair Labor Standards Act and gave judgment for plaintiffs under that Act, including, as heretofore noted, the overtime claimed, liquidated damages, and attorney fees.

There is no serious dispute concerning the underlying facts. Defendant entered into a cost-plus-a-fixed-fee contract with the United States Government to operate and maintain the munitions plant in suit and to produce therein and thereat small arms and ammunition in huge quantities for the United States Government. The Government acquired the site for the plant, erected all of the buildings and installed all of the machinery, to all of which it retained title. The Government furnished defendant with all raw materials or the funds with which to acquire them. The title to all raw materials and finished munitions remained in the Government. A large part of those materials were shipped to the plant from outstate, some by the Government and some on defendant's orders consigned to defendant. All those materials were unloaded at the plant by defendant's employees. Defendant manufactured those raw materials into arms and ammunition at the plant in Missouri. In doing so it had the actual physical possession of the material and products thereof, but all operations were under the direct supervision of representatives of the United States Government. All completed products were carefully inspected by the Government. And all of those products were shipped upon the order of the Government to places specified by it. Predominately, if not entirely, those destinations were beyond the confines of the State of Missouri. Those shipments were usually on Government bills of lading, but occasionally they were made on defendant's bills of lading. All of the finished products with one

exception were shipped at Government expense to points for use by it in the war. That exception consisted of small quantities of test ammunition sent to Purdue University and a point in Pennsylvania for test purposes. A by-product, scrap copper or brass, resulting from the making of shells, appears to have been transported in defendant's trucks to a nearby cartridge company on defendant's commercial bill of lading. This appears to be the only product resulting from defendant's manufacturing process which left the plant on other than Government bills of lading. The title to this by-product appears to have remained in the Government. All shipments from the plant were crated and loaded by defendant. Bills of lading and shipping papers were prepared by defendant's employees. The defendant by the terms of the contract was required to do all things necessary to the operation of the plant, to hire all employees, to inspect and check all materials by its own inspectors, before submitting the goods to the Government for acceptance, to keep records and books of account showing the cost of all labor, material and other expenditures, to pay employee contributions under the Federal Social Security Act, and to pay all state and local taxes, licenses or fees required by state law, including state compensation laws. Extensive railroad switching facilities were constructed on the plant site (which was a military reservation). These facilities were also owned by the Government, as well as the switch engines and similar equipment. This equipment was stated by defendant to have been manned and operated by defendant's employees. The defendant was designated in the contract as an independent contractor[2] but the Government had, as heretofore noted, the right to make any changes its representatives deemed

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[2]From the contract, page 780 of the Record:

"It is expressly understood and agreed by the Contractor and the Government that in the performance of the work provided for in this contract, the Contractor is an independent contractor and in no wise an agent of the Government."

necessary in the method of performing the work and, as heretofore inferred, it paid all operating costs. Defendant's fixed fee was based upon the amount of the completed product produced. As many as 40,000 employees were at times engaged at the plant. All were engaged in the production of munitions for the Government under defendant's contract with the Government. More than six billion small arms cartridges were produced. The contract specifically provided that the provisions of the Walsh-Healey Act should apply to this contract.[3] These plaintiffs, as well as

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[3]From the contract, page 783 of the Record:

"Article III-D—Walsh Healey Act.

"1. The following representations and stipulations pursuant to the Walsh-Healey Public Contracts Act (Act of June 30, 1936; 49 Stat. 2036; 41 USC 35-45), shall apply to the performance of this contract:

"(a) The Contractor is the manufacurer of or a regular dealer in the materials, supplies, articles, or equipment to be manufactured or used in the performance of the contract.

"(b) All persons employed by the Contractor in the manufacture or furnishing of the materials, supplies, articles, or equipment used in the performance of the contract will be paid, without subsequent deduction or rebate on any account, not less than the minimum wages as determined by the Secretary of Labor to be the prevailing minimum wages for persons employed on similar work or in the particular or similar industries or groups of industries currently operating in the locality in which the materials, supplies, articles, or equipment are to be manufactured or furnished under the contract: Provided, however, that this stipulation with respect to minimum wages shall apply only to purchases or contracts relating to such industries as have been the subject matter of a determination by the Secretary of Labor.

"(c) No person employed by the Contractor in the manufacture of furnishing of the materials, supplies, articles, or equipment used in the performance of the contract shall be permitted to work in excess of 8 hours in any 1 day or in excess of 40 hours in any 1 week, unless such person is paid such applicable overtime rate as has been set by the Secretary of Labor.

"(d) No male person under 16 years of age and no female person under 18 years of age and no convict labor will be employed by the Contractor in the manufacture or production or furnishing of any of the materials, supplies, articles, or equipment included in the contract.

"(e) No part of the contract will be performed nor will any of the materials, supplies, articles, or equipment to be manufactured or furnished under said contract be manufactured or fabricated in any plants, factories, buildings, or surroundings or under working conditions which are insanitary or hazardous or dangerous to the health and safety of employees engaged in the performance of the contract. Compliance with the safety, sanitary, and factory inspection laws of the State in which the work or part hereof is to be performed shall be prima facie evidence of compliance with this subsection.

all other employees of defendant, were notified in a booklet given them at the commencement of their employment that overtime would be compensated for at the *rate* provided under the Walsh-Healey Act *and* the Fair Labor Standards Act.[4] The relationship between the Government and defendant in the operation of the plant was also described in this booklet.[4] As noted heretofore, defendant's answer admitted that plaintiffs were its employees. There was no issue presented concerning the propriety of the *rate* of pay under any Federal or State law. The controversy relates

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"(f) Any breach or violation of any of the foregoing representations and stipulations shall render the party responsible therefor liable to the United States of America for liquidated damages, in addition to damages for any other breach of the contract, in the sum of $10 per day for each male person under 16 years of age or each female person under 18 years of age, or each convict laborer knowingly employed in the performance of the contract, and a sum equal to the amount of any deductions, rebates, refunds, or underpayment of wages due to any employee engaged in the performance of the contract; and, in addition, the agency of the United States entering into the contract shall have the right to cancel same and to make open-market purchases or enter into other contracts for the completion of the original contract, charging any additional cost to the original Contractor. Any sums of money due to the United States of America by reason of any violation of any of the representations and stipulations of the contract as set forth herein may be withheld from any amounts due on the contract or may be recovered in a suit brought in the name of the United States of America by the Attorney General thereof. All sums withheld or recovered as deductions, rebates, refunds, or under-payments of wages shall be held in a special deposit account and shall be paid, on order of the Secretary of Labor, directly to the employees who have been paid less than minimum rates of pay as set forth in such contracts and on whose account such sums were withheld or recovered: Provided, that no claims by employees for such payments shall be entertained unless made within 1 year from the date of actual notice to the Contractor of the withholding or recovery of such sums by the United States of America.

"(g) The Contractor shall post a copy of the stipulations in a prominent and readily accessible place at the site of the contract work and shall keep such employment records as are required in the Regulations under the act available for inspection by authorized representatives of the Secretary of Labor.

"(h) The foregoing stipulations shall be deemed inoperative if this contract is for a definite amount not in excess of $10,000.00.

"2. Stipulation (b) of section 1 of this Article III-D with respect to wages is operative due to determination by the Secretary of Labor of prevailing minimum wage rates for the industry involved."

[4] From the booklet given employees, page 191 of the Record:

"The Saint Louis Ordnance Plant is wholly owned by the United States Government. The United States Cartridge Company is the operating agent."

From the booklet given employees, pages 203, 204 of the Record:

to whether the Fair Labor Standards Act applies, whether plaintiffs are within the class of employees entitled to overtime under the Act, and, if so, the extent of that overtime, whether liquidated damages and attorney fees are recoverable, and whether defendant should have been permitted to amend its answer setting up defenses under the Portal-to-Portal Act.

"Wages of Employees.

"It is the policy of the Saint Louis Ordnance Plant to pay each employee a wage in keeping with the rates determined by the Ordnance Department of the United States Army for ammunition production. Since our product is for our United States Government, and since each employee is a part of our government, it is naturally expected that each employee will strive diligently to turn out an honest day's work for a fair wage.

"The company pays you your wages but it is immediately repaid by the United States Government.

"In the final analysis, your wages come from the United States Government, whose only source of income is taxes collected from you and all other citizens.

"The United States Cartridge Company is merely managing the plant for the Federal Government.

"An employee's remuneration consists not only of the money he receives each payday, but also the Company's contribution to the Social Security, Workmen's Compensation for accident protection, and Unemployment Compensation funds."

From the booklet given employees, page 206 of the Record:

"Standard Hours of Work.

"There will be eight hours in any working day, and forty hours will consitute a working week. To meet the schedule required of us by the National Defense Program, it will be necessary to employ three shifts on production operations. When production demands require a longer work day, or longer work week, the Company will pay the legal overtime rate as provided under the Walsh-Healey Act, and the Fair Labor Standards Act. When three snifts are operating there will be rotation of the first, second and third shifts every two weeks. A lunch period will be allowed on each shift and will be paid for by the Company, that is, no deduction will be made for this lunch period.

"Payment of Overtime.

"Time and one-half will be paid in excess of eight hours per day or forty hours per week. Time and one-half also is paid for authorized work on Sunday and national holidays, except in departments or occupations where the established schedule requires seven days continuous operations. This means that overtime is paid for Sunday work and holidays on repair, maintenance, mechanical and new routine process operations, but not for work such as watching, plant protection, or continuous procedure operations. The following national holidays—New Year's Day, Memorial Day, Fourth of July, Labor Day, Thanksgiving Day and Christmas, will be observed.

"It will be the policy of the Company to avoid work on Sundays and Holidays as far as possible. However, since we are a part of the National Defense program, we shall have to adjust our schedule according to the needs of the situation."

There are many cases bearing upon the problem with which we are confronted.[5] No good purpose will be served by an analysis of each of them here, since it is obvious from the opinion of the Supreme Court in *Kennedy* v. *Silas Mason Company*, *supra*, that that court will in due time authoritatively determine the correctness of the various conclusions expressed in those cases.

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[5] *Holland* v. *Haile Gold Mines*, 44 F. Supp. 641; *Walling* v. *Haile Gold Mines, Inc.*, 136 F.2d 102; *Fox* v. *Summit King Mines*, 143 F.2d 926; *St. Johns River Shipbuilding Company* v. *Adams*, 164 F.2d 1012, 13 Labor Cases, Par. 64,171; *Crabb* v. *Welden Brothers*, 164 F.2d 797; *Clyde* v. *Broderick*, 52 F. Supp. 533; *Clyde* v. *Broderick*, 144 F.2d 348; *Anderson* v. *Federal Cartridge Corp.*, 13 Labor Cases, Par. 64,072 (D.C. Minn.); *Barksdale* v. *Ford, Bacon & Davis, Inc.*, 70 F. Supp. 690 (E.D. Ark.); *Clyde* v. *Broderick*, 52 F. Supp. 533 (D. Colo.), reversed on other grounds, 144 F.2d 348; *H. B. Deal & Company, Inc.*, v. *Leonard*, 210 Ark. 512, 196 S.W.2d 991; *Dickenson* v. *Trojan Powder Co.*, not officially reported, D. C. N. D. Ohio, W.D., April 18, 1944; *Dizins* v. *Hazeltine Electronics Corp.*, 70 F. Supp. 686 (S. D. N. Y.), affirmed 163 F.2d 100; *Hays* v. *Hercules Powder Co.*, 13 Labor Cases, Par. 64,123 (D. C. W. D. Mo.); *Kennedy* v. *Silas Mason Company*, 68 F. Supp. 576, affirmed 70 F. Supp. 929 (W.D. La.), affirmed 164 F.2d 1016, 13 Labor Cases, Par. 64,170; *Kruger* v. *Los Angeles Shipbuilding and Drydock Corp.*, 12 Labor Cases, Par. 63,660 (D. C. S. D. Calif.); *Lynch* v. *Embry-Riddle Co.*, 63 F. Supp. 992 (S.D. Fla.); *Matlock* v. *Sanderson & Porter*, 7 Labor Cases, Par. 61,806 (Cir. Ct. Ark.); *Patton* v. *Roane-Anderson Co.*, 14 Labor Cases, Par. 64,245 (D. C. E. D. Tenn.); *Raymond* v. *Parrish*, 30 S.E.2d 669 (Ga. App.); *Ritch* v. *Puget Sound Bridge & Dredging Co.*, 60 F. Supp. 670 (W.D. Wash.), reversed on other grounds 156 F.2d 334; *Selby* v. *J. A. Jones Construction Co.*, 14 Labor Cases, Par. 64,246 (D. C. E. D. Tenn.); *Stewart* v. *Kaiser Company, Inc.*, 71 F. Supp. 551 (D. Ore.); *Torres* v. *Lock Joint Pipe Co.*, Prentice-Hall Wage & Hour Service, Vol. 1, Par. 10,189.8 (D.C. Puerto Rico); *Trefs* v. *Foley Bros., Inc.*, 7 Labor Cases, Par. 61,743 (D. C. W. D. Mo.); *Young* v. *Gellex Corporation*, 14 Labor Cases, Par. 64,244 (D. C. E. D. Tenn.); *Cody, et al.*, v. *Dossin's Food Products*, 156 F.2d 678; *Jones* v. *Springfield Missouri Packing Co.*, 45 F. Supp. 997; *Gibson* v. *St. Paul Fire & Marine Insurance Co.*, 184 S.E. (West Va.) 562; *Tripp* v. *United States Fire Ins. Co.*, 44 Pac.2d (Kansas) 236; *Bell* v. *Porter*, 159 F.2d 117; *Jackson* v. *Northwest Airlines* (D.C. Minn., Oct. 9, 1947), 75 F. Supp. 32; *O'Riordan* v. *Helmers, Inc.* 6 W.H. Cases 961 (N.Y.C. Ct. 1947); *Ware* v. *Goodyear Corp.*, 6 W.H. Cases 160 (S.D. Ind., 1946); *Swettman* v. *Remington Rand*, 6 W.H. Cases 336 (S.D. Ill., 1946); *Mochl* v. *Dupont de Nemours & Co.*; 6 W.H. Cases 638 (N.D. Ill., 1947), 12 Labor Cases, Par. 63,545; *Blazier* v. *Western Pipe & Steel Co.*, 6 W.H. Cases 637 (S.D. Cal., 1946); *Tiller* v. *Anchor Optical Corp.*, 6 W.H. Cases 655 (S. D. N. Y., 1947); *Roland* v. *United Airlines*, 6 W.H. Cases 663 (N.D. Ill., 1947); *Belanger* v. *Hopeman Bros.*, 6 W.H. Cases 616 (D. Maine, 1947); *Cuthun* v. *Day & Zimmerman, Inc.*, 16 N.W.2d 258 (S. Ct. Iowa, 1944); *Timberlake* v. *Day & Zimmerman*, 49 F. Supp. 28 (S.D. Iowa, 1943); *Lasater* v. *Hercules Powder Co.*, 7 W.H. Cases 150 (E.D. Tenn., 1947); *McCumsky* v. *Norden, Inc.*, 7 W.H. Cases 142 (N. Y. S. Ct., 1947); *Simkins* v. *Elmhurst Construction Co.*, 181 Misc. 791, affirmed 181 Misc. 793, affirmed 268 App. Div. 858; *Steiner* v. *Pleasantville Constructors*, 181 Misc. 798, affirmed (modified on other grounds) 182 Misc. 66, affirmed 269 App. Div. 798; *Henderson* v. *Bechtel-McCone Corp.*, 7 W.H. Cases 107 (N.D. Ala., 1947); *Fox* v. *Summit Hill*, 143 F.2d 926 (9th Cir.); *Ware* v. *Goodyear Engineering Corp.*, 6 W.H. Cases 160 (S.D. Ind.); *Mochl*

As to the application of the Walsh-Healey Act. It is clear and undisputed that all of the articles manufactured by defendant were manufactured pursuant to a contract between defendant and an agency of the United States for the manufacture of "materials, supplies, articles and equipment in an amount exceeding $10,000.00", and that plaintiffs and all other employees of defendant were at all times engaged exclusively "in the manufacture of materials, supplies, articles and equipment used in the performance of the contract"[6] between defendant and the United States.

Which of these two acts did Congress intend should apply to a cost-plus-a-fixed-fee contractor manufacturing munitions of war exclusively for the United States under contract with the United States? If a portion of defendant's business had been devoted to the "production of goods for commerce" for others than the United States, the question whether the Walsh-Healey Act should apply to the employees engaged in the production of the munitions under contract with the United States and the Fair Labor Standards Act should apply to other employees would be a proper subject for consideration. But such is not the case here. All goods produced were for the United States under contract therewith. It has not been suggested and could not be reasonably contended that the Walsh-Healey Act was repealed by the passage of the Fair Labor Standards Act, in view of the amendment of the former subsequent to the passage of the latter, the recognition of the Walsh-Healey Act in the National Defense Act of July 2, 1940

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v. *Dupont de Nemours & Co.*, 6 W.H. Cases 638 (N.D. Ill.), 12 Labor Cases, Par. 63,545; *Bailey v. Porter*, 6 W.H. Cases 1017 (N.D. Ill. 1947); *Southern California Freight Lines v. Davis*, 167 F.2d 708; 14 Labor Cases, Par. 64,479; *Harrington v. Empire Construction Co.*, 167 F.2d 389; 14 Labor Cases, Par. 64,455; *Alfred Kovacs et al., v. Metropolitan Life Insurance Company, et al.*, 14 Labor Cases, Par. 64,480 (S. D. N.Y., April 20, 1948).

[6]Walsh-Healy Act, Sec. 35, Title 41 U.S.C.A.

(Sections 1171-1172, Title 50 App. U.S.C.A.),[7] and Executive Order 9001 of The President, issued December 29, 1941, 6 Fed. Register 6787.[8]

The Walsh-Healey Act is not an exercise by Congress of regulatory power over private industry or employment, nor an act of general application to industry. *Perkins* v. *Lukens Steel Co.*, 310 U.S. 113; *Endicott-Johnson Corp.* v. *Perkins*, 317 U.S. 501. The purpose of the Act was, as pointed out in *Endicott-Johnson Corp.* v. *Perkins*, to raise labor standards for the segment of industry doing business with the Government. To accomplish that purpose, it specified, as the terms on which the Government would do business with private concerns, the hours of employment and that overtime should be paid for all hours in excess of 40 hours per week. It applied irrespective of whether the workers employed in producing the goods contracted for were engaged in producing goods "for commerce" or exclusively in intra-state commerce. The sole criterion of application in that regard was that the goods were to be produced for the Government. And with respect to hours of work and rates of pay, the Walsh-Healey Act was more favorable to labor than the later Fair Labor Standards Act, in that there was no progressive reduction of weekly hours of labor from 44 hours to 40, as in the Fair Labor Standards Act, and there was no minimum wage fixed at

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[7]That Act provides: "That no contract entered into pursuant to the provisions of this section which would otherwise be subject to the provisions of the Act entitled 'An Act to provide conditions for the purchase of supplies and the making of contracts by the United States, and for other purposes', approved June 30, 1936 (49 Stat. 2036; 41 U.S.C., secs. 35-45), shall be exempt from the provisions of such Act [sections 35-45 of Title 41] solely because of being entered into without advertising pursuant to the provisions of this section."

[8]That Order provides: "No contract or modification or amendment thereof shall be exempt from the provisions of the Walsh-Healey Act (49 Stat. 2036) because of being entered into without advertising or competitive bidding, and the provisions of such act, the Davis-Bacon Act, as amended (49 Stat. 1011), the Copeland Act, as amended (48 Stat. 948), and the Eight Hour Law, as amended by the Act of September 9, 1940 (Public No. 781, 76th Congress) if otherwise applicable shall apply to contracts made and performed under the authority of this Order."

a figure comparatively low if compared with wages actually being paid in manufacturing industries. The Walsh-Healey Act fixed the wage to be paid at not less than the minimum wage (to be determined by the Secretary of Labor) for persons employed on similar work in the locality where the goods for the Government were to be produced. The Fair Labor Standards Act had also as its purpose the improvement of living conditions and labor standards. It was designed and intended to affect private industry engaged in interstate commerce. Its provisions relative to minimum wages and hours of labor for those employed in making goods for the United States were unnecessary as provision therefor equal or more advantageous to labor had already been made by the Walsh-Healey Act. The Fair Labor Standards Act further provided that the employee might recover liquidated damages and attorney fees. But the Walsh-Healey Act had already provided sanctions for the violation by those furnishing goods to the United States of its provisions relative to hours of employment and rates of pay, and had already provided that any wages due employes engaged in producing goods for the United States might be withheld by the United States and paid to the employee or recovered in the name of the United States by the Attorney General and paid to the employee. Thus, the Walsh-Healey Act had provided for the collection of any wages due employees such as plaintiffs without cost to them and had provided sanctions more severe in some respects than those of the Fair Labor Standards Act for failure to pay without compulsion.

The Wage and Hour Division of the Department of Labor, as Amicus Curiae, suggests that both Acts may be applicable and that plaintiffs may have the benefit of the most favorable provision of either—in this instance, the liquidated damages and attorney fee provisions of the Fair Labor Standards Act. We are not impressed with the view that Congress intended that an employee might elect

which of these Acts would apply to his individual employment or claim for compensation, with the attending confusion in computing wages and the collection of claims therefor. Nor are we impressed with the view that Congress intended that when an industry was engaged in producing munitions of war for the United States under a cost-plus-a-fixed-fee contract and failed to pay an employee engaged in such production his proper wages, that the United States should be required to pay him not only his unpaid wages but also an amount equal thereto as liquidated damages, and, in addition, his attorney fees, when another method of safe-guarding the employees' rights had been provided which does not entail such a penalty against the United States. We are of the opinion that the two Acts are sufficiently divergent that both may not apply at one and the same time, that the Walsh Healey Act was intended by Congress to apply to the employees of manufacturers engaged in producing munitions of war for the United States, and that under the Walsh-Healey Act liquidated damages and attorney fees may not be recovered by the employee.

It has been suggested that the National Defense Act of July 2, 1940, suspended the operation of the Fair Labor Standards Act and, a fortiori, the Walsh-Healey Act. The National Defense Act was passed in the interest of national defense, to provide for the production of war materials of all kinds necessary to the successful prosecution of the war. Summarized, it authorizes the Secretary of War to provide for the construction of plants and facilities for the development, manufacture, maintenance, and storage of military equipment, munitions and supplies, and to provide for the purchase, manufacture, shipment, and storage of such supplies. It carries a provision that the regular working hours of laborers and mechanics employed by the Department of the Army, who are engaged in the manufacture, or production, of military equipment, munitions, or supplies, shall

be eight hours per day or forty hours per week during the period of the national emergency and that overtime shall be compensated for at one and one-half times the regular rate of pay. But it contains a proviso, as heretofore noted, that no contract which would otherwise be subject to the provisions of the Walsh-Healey Act should be exempt therefrom merely because contracts entered into pursuant to the authority of the National Defense Act were made without advertisement. We have indicated above that we construe this latter proviso as a recognition by Congress of the continued effectiveness of the Walsh-Healey Act.

Our attention has been directed to our opinion in *Day & Zimmerman* v. *Reid*, 168 F.2d 356, as authority for plaintiffs' right to recover liquidated damages and attorney fees under the Fair Labor Standards Act. The defense interposed to plaintiffs' claim in that case was the Portal-to-Portal Act of 1947. The parties stipulated the amount due plaintiffs under the Fair Labor Standards Act, subject to a determination by the court of plaintiffs' right to recover that amount in view of the defense interposed under Section 9[9] and 11[10] of the Portal-to-Portal Act. The trial court construed and applied the Portal-to-Portal Act. Our review was limited to the correctness of the trial court's action in that regard. No question was raised concerning the application of the Fair Labor Standards Act, the Walsh-Healey Act, or the National Defense Act, and no such question was decided. That case is therefore no authority in the present case.

Since the district court did not have jurisdiction of the cause under the Fair Labor Standards Act and since the Walsh-Healey Act does apply and plaintiffs may not maintain this action under the Walsh-Healey Act, the cause is reversed.

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[9] 29 U.S.C.A., Sec. 258.

[10] 29 U.S.C.A., Sec. 260.

JOHNSEN, Circuit Judge, concurring separately.

On September 8, 1939, the President proclaimed the existence of a national emergency with respect to "the strengthening of our national defense within the limits of peace-time authorizations." Proclamation 2352, 3 CFR, 1939 Supp., pp. 59, 60.

The Congress took cognizance of the emergency and sought to "expedite" the strengthening of our national defense, by grants of additional powers to the President, the Secretary of War, the Secretary of the Navy, and the Secretary of the Treasury, "during the national emergency declared by the President * * * to exist," for the purpose of facilitating the obtaining of necessary implements, munitions, etc., for the military, naval, and coast-guard services.

Two measures, popularly known as the National Defense Acts, were enacted in June and July, 1940. The first of these, Act of June 28, 1940, 54 Stat. 676, ch. 440, 50 U.S.C.A. App. §1151 et seq., had relation primarily to the naval and the coast-guard services, but it contained the following general provision: "During the national emergency declared by the President on September 8, 1939, to exist, the provisions of the law prohibiting more than eight hours' labor in any one day of persons engaged upon work covered by Army, Navy, and Coast Guard contracts shall be suspended." 54 Stat. 678, 679, § 5(b), 50 U.S.C.A. App. §1155(b). The second of the National Defense Acts, Act of July 2, 1940, 54 Stat. 712, ch. 508, 50 U.S.C.A. App. §1171 et seq., 5 U.S.C.A. § 189a, had application to the War Department.

Under subsection (a) of §1 of this Act, the Secretary of War was given power, without the necessity of resorting to advertising, to provide, among other things, for the

purchase or manufacture of military equipment, munitions, and supplies, and for shelter, "under such conditions as he may deem necessary." He was similarly empowered to purchase or to construct munitions plants, as well as to provide "Government-owned facilities at privately owned plants." Subsection (b) expressly authorized him to operate any such plants acquired or constructed and any facilities so furnished, "either by means of Government personnel or through the agency of selected qualified commercial manufacturers under contracts entered into with them." There was a further general provision in section 1, authorizing him to make such contracts or such amendments or supplements to existing contracts, "as he may deem necessary to carry out the purposes specified in this section."

These were extraordinary powers, intended to be granted for a limited period only, and designed to accomplish an emergency purpose. The scheme, which is involved in the present situation, of producing munitions in government-owned plants, "through the agency of selected qualified commercial manufacturers," on the basis of cost plus a fixed fee for carrying on the operations, with title to both the materials used and the products manufactured resting at all times in the United States, was admittedly a novel and revolutionary set-up in the field of American industrial life. The "Statement of Labor Policy," issued jointly by the War and Navy Departments on June 22, 1942, with the approval of the President of the American Federation of Labor and the Chairman of the Congress of Industrial Organizations, characterized it in this language: "The industrial units thus created are unique. * * * These plants embody a new and tripartite relationship among Government, labor, and management."

The commercial operating agency was not economically affected by the production costs and so had no direct con-

cern about the wages and overtime rates that might be paid in the plant. These questions therefore were matters which the Government of necessity was required to resolve. If it could be said to have been the intention of Congress to make the Walsh-Healey Public Contracts Act, 49 Stat. 2036, 41 U.S.C.A. §35 et seq., govern the hybrid relationship involved, the scale of minimum wages and the rate of overtime pay were matters over which the Secretary of Labor had generally the power of determination and control.

I can see some sound reasons to doubt that the National Defense Acts could have intended to permit of any possibility of a slowing of the Secretary of War's and the Secretary of the Navy's emergency defense efforts through a necessary resort to the normal processes of investigation, determination, etc. by the Secretary of Labor, as the latter would have the power to compel them to do under the Walsh-Healey Act. Moreover, Congress did not expressly declare that the unique, hybrid relationship, which it was permitting to be created as an emergency measure, was within the operation of the Walsh-Healey Act. In fact, it specifically refused to make a general declaration that all contracts made by the Secretary of War under section 1 of the Act of July 2, 1940, should be subject to the provisions of the Walsh-Healey Act. The Conference Committee Report on the Bill had contained the following statement (Cong. Rec., Vol. 86, Part 8, p. 8901): "The conference agreement * * * provides that instead of all contracts under the section being subject to the provisions of the Walsh-Healey Act, no such contract which would otherwise be subject to such Act should be exempt from its provisions solely because it was entered into without advertising." And pursuant to the conference agreement, section 1 of the Act, on final passage, was made to contain the simple proviso, "That no contract entered into pursuant to the pro-

visions of this section which would otherwise be subject to the provisions of the (Walsh-Healey) Act * * * shall be exempt from the provisions of such Act solely because of being entered into without advertising pursuant to the provisions of this section."

Parenthetically, it may be observed that there, of course, would be contracts made by the Secretary of War, in fields apart from that of the operation of the government-owned munitions plants, which normally and regularly would be subject to the provisions of the Walsh-Healey Act, except as it might be sought to be contended that they had been taken out of the operation of that Act because they had been made without advertising. The proviso quoted above would preclude the making of any such argument.

Beyond the failure expressly to provide that the hybrid relationship involved in the operation of a government-owned munitions plant should be governed by the Walsh-Healey Act, the Act of July 2, 1940, as I have already pointed out, further used such terms in relation to the scope of the Secretary of War's contracting powers as, "under such conditions as he may deem necessary" and "as he may deem necessary to carry out the purposes specified in this section." If a test of these powers should have arisen in a situation indicating the impossibility or impracticality, in attempting to make prompt defense preparations, of having the wage scales and overtime rates fixed in these plants except by War Department action, I should doubt that any court would have difficulty in seeing in the nature and the language of the Act, as I have discussed them above, a reservoir of power in the Secretary of War so to act, independent of the wage and hour provisions of any other statute.

The Secretary of War's actions, under this concept of the statute, might perhaps be subject to the control of an

Executive Order issued by the President, and, of course, they necessarily would be so after the War itself began in 1941. The only other limitation that probably would exist on the Secretary's power was the clear indication of a congressional policy to have overtime rates paid for work in excess of 40 hours per week, as reflected in the express command in section 4(b) of the Act, 5 U.S.C.A. § 189a, applicable to any direct operation of defense plants by the Secretary of War himself, that "the regular working hours of laborers or mechanics employed by the War Department, who are engaged in the manufacture or production of military equipment, munitions, or supplies shall be eight hours per day or forty hours per week during the period of any national emergency declared by the President to exist: *Provided*, That under such regulations as the Secretary of War may prescribe, such hours may be exceeded, but compensation for employment in excess of forty hours in any workweek, computed at a rate not less than one and one-half times the regular rate, shall be paid to such laborers and mechanics."

But I do not think it necessary to discuss this aspect of the question further in the present case. Whether the Secretary of War had power generally under the Act of July 2, 1940, to fix wage scales and overtime rates and rights for the employees in the hybrid relationship involved in these munitions plants, as I have referred to above, without regard to the provisions of the Walsh-Healey Act, I agree that the provisions of the Walsh-Healey Act are in any event controlling of the employees' rights here. If the Secretary of War had such plenary powers under the Act of July 2, 1940, as I have discussed, the provisions of the Walsh-Healey Act are nevertheless controlling in the present situation, because the War Department, in its contract with the operator of the plant, specifically made the provisions of that Act applicable to the wage and over-

time rights of the employees, as the Secretary of War would have the right to do under the circumstances.

If the Act of July 2, 1940, did not give the Secretary of War such plenary powers in the defense situation as I have discussed, the Walsh-Healey Act, and not the Fair Labor Standards Act, still clearly is controlling here, as a matter of general application in the field involved. In the enactment of the Walsh-Healey Act, Congress, I think, intended to constitute such employees as would be engaged in producing supplies or goods directly for the Government under an express contract, as a special legislative class, and, through the force of the Government's contracting power, to control their hours of labor, their rate of minimum pay, and their overtime rights, to the extent that it deemed it necessary in this field. It did not relate its jurisdiction in the field to any test of commerce, and the question of commerce therefore, in my opinion, has nothing to do with the rights of the class.

The Walsh-Healey Act establishes a special and complete labor policy of its own. It is intended to prevent any working of a covered employee for more than eight hours a day or forty hours a week, except with the permission of the Secretary of Labor. 41 U.S.C.A. §35. Unless the Secretary of Labor permits overtime work to be done, the employer may not allow his employees to engage in any. If the Secretary permits overtime work, he has the right to fix the rate that shall be paid therefor, "which rate shall be not less than one and one-half times the basic hourly rate received by any employee affected." Id., §40. Minimum wages must be paid the employees of "not less than the minimum wages as determined by the Secretary of Labor to be the prevailing minimum wages for persons employed on similar work or in the particular or similar industries or groups of industries currently operating in

the locality in which the materials, supplies, articles, or equipment are to be manufactured or furnished under said contract." Id. §35. Where the contracting party otherwise has been engaged generally in commerce or in the production of goods for commerce, his wage scale presumably will have met the standards prescribed by the Fair Labor Standards Act, but manifestly the minimum wages determined by the Secretary of Labor to be applicable in the performance of some Government contract may exceed the Fair Labor Standards Act's requirements.

The Walsh-Healey Act further specifically recognizes that special elements of public interest may exist in the performance of such a Government contract, which command consideration, and it accordingly empowers the Secretary of Labor to make exceptions or dispensations with respect to the provisions of the Act in necessary situations, "in the public interest or to prevent injustice and undue hardship" or where otherwise it might "seriously impair the conduct of Government business." Id. §40.

All of these provisions set up standards and requirements, which are without any relationship to the Fair Labor Standards Act. And an employee to whom the Walsh-Healey Act has application cannot claim the right to come generally under the Fair Labor Standards Act, for that would nullify the power of the Secretary of Labor to exercise his judgment with respect to some of the elements which Congress recognized that he might find it necessary to give consideration to, in the practical performance of, or in meeting a public need under, a Government contract.

The employees here predicate and seek to recover overtime rights on the basis of the Fair Labor Standards Act. But whatever rights they may have had in the situation, as I have pointed out, are derived from the Walsh-Healey

Act, under the contract incorporating its provisions, and not from the Fair Labor Standards Act. The incongruity of their attempt to invoke the Fair Labor Standards Act is readily apparent, I think, when the fact is taken into account that, under the Walsh-Healey Act, there could be no overtime work unless the Secretary of Labor gave his permission thereto, and that, except during the existence of Executive Order No. 9240, dated September 9, 1942, 7 F.R. 7159, as amended by Executive Order No. 9248, dated September 17, 1942, 7 F.R. 7419, which, as a war measure, limited all overtime payments in industries related to the prosecution of the war to not more than one and one-half times the regular wage rates, the Secretary of Labor, as a condition of granting such permission, could require the payment of overtime rates in excess of this amount, if he saw fit. The situation under the Walsh-Healey Act therefore was not one that was subject to the automatic overtime rate of the Fair Labor Standards Act. And whether overtime rights stemming from the Walsh-Healey Act might have been fixed in some situation at one and one-half times, or double, or treble, the regular wage scale, there would be no more right in the one case than in the others to use the Fair Labor Standards Act as a vehicle for their collection.

It must be remembered that Congress provided the Walsh-Healey Act with its own system of sanctions and procedure for accomplishing the objectives and vindicating the rights which it was intended to establish. That the Walsh-Healey Act does not permit of a direct suit by an employee on the contract between the Government and the employer may be an argument sentimentally in favor of why the Fair Labor Standards Act ought to apply, but it is hardly sound rationale legally for holding that it does. Nor does the fact that the munitions produced may have been shipped in interstate commerce weigh in favor of the

application of the Fair Labor Standards Act, as against the inexorable fact that the Walsh-Healey Act stands as a special statute, for a specific class, involving indicated factors of consideration in public interest and governmental functioning, not made applicable to the general field of the Fair Labor Standards Act, and to which the commerce test therefore has no relation.

It might further be observed that, if Congress had intended the employees of the approximately 100 government-owned munitions plants, that were established, to have rights beyond those granted by the National Defense Acts or the Walsh-Healey Act, and to be able generally to recover double damages and attorneys' fees, it hardly seems reasonable to suppose that it would have left the situation so that those working in some plant, which might by chance be making guns, ammunition, or other supplies entirely for use at some training camp or on some rifle or artillery range, existing within the same state where the plant was located, would be precluded from such benefits on the basis of a commerce test, when it had the power, and there would seem to be no reason not, to have treated them equally with the employees of other such munitions plants. It might also be added that, if the Secretary of War had no such plenary powers under the Act of July 2, 1940, to fix wage rates and overtime rights, as I have initially suggested, but he was required to act in relation to such other statutes as existed and to guide his actions by whichever was applicable, the provision which he made in the contract, subjecting it to the obligations under the Walsh-Healey Act and not the Fair Labor Standards Act, could properly be viewed as an administrative interpretation and accorded the weight to which it normally would be entitled, in the emergency situation in which it was necessary for him to resolve the question and to act.

I can see no basis for any right in the situation to maintain an action under the Fair Labor Standards Act, and I agree that the suit should be dismissed.

Sanborn, Woodrough and Riddick, Circuit Judges, besides joining in the Court's official opinion, concur also in the foregoing separate opinion.

IN THE

United States Court of Appeals,

EIGHTH CIRCUIT,

IN BANC.

1007

THE UNITED STATES CARTRIDGE COMPANY, a Corporation, (Defendant) Appellant, vs. R. M. POWELL et al., (Plaintiffs) Appellees.	No. 13,663. Civil.

Appeal from the District Court of the United States for the Eastern District of Missouri.

APPELLEES' PETITION FOR A REHEARING AND TO MODIFY THE JUDGMENT.

Now come the appellees by their attorney and respectfully petition the Court to set aside the opinions and judgment heretofore filed and entered herein, and to grant appellees a rehearing thereof, or, in the alternative, to modify the same in respect to costs for the following reasons and on the following grounds:

I.

Material matters of fact and law were inadvertently overlooked by the Court in the following particulars:

(a) In respect to the Fair Labor Standards Act and the Walsh-Healey Act the opinion, p. 15, states:

> "We are of the opinion that the two Acts are sufficiently divergent that both may not apply at one and the same time."

This is the first time since the two enactments have been in effect that any Court has made any such pronouncement. No authority is cited for such a construction, and it is in conflict not only with administrative interpretation, but with all Federal decisions on the subject. Lasater v. Hercules Powder Co., 73 F. Supp. 264; Walling v. Patton-Tulley Transportation Co., 134 F. (2d) 945; Jackson v. Northwest Airlines, 75 F. Supp. 32, l. c. 38, top second column; Posadas v. National City Bank, 296 U. S. 497, l. c. 503.

The case of Lasater v. Hercules Powder Co., supra, is directly in point. It was an action for overtime compensation under the Fair Labor Standards Act. The defendant disclaimed liability among other reasons because of the contention that the plaintiffs were covered by the Walsh-Healey Act and other labor laws, and the Court expressly ruled that coverage by the Walsh-Healey Act, or any of the other Public Contract Acts, did not preclude a right of action under the Fair Labor Standards Act. In so ruling, the Court said (l. c. 268):

> "From an examination of the Eight Hour Law, the Davis-Bacon Act, and the Walsh-Healey Act, together with the Congressional history of labor laws raising standards of pay and working conditions, the conclusion is quite evident that the intended coverage of the Fair Labor Standards Act is not restricted because of these previous enactments. I deem it unnecessary to undertake to analyze the premises resulting in this conclusion.
>
> "The Fair Labor Standards Act is applicable to work under government contracts. Walling v. Patton-Tulley Transp. Co., 6 Cir., 134 F. 2d 945.".

The same principle was ruled by the Sixth Circuit in Walling v. Patton-Tulley Transportation Co., 134 F. (2d)

945, in a case involving the matter of reconciling the Fair Labor Standards Act with the Federal Eight-Hour Law, which is also applicable to employees working on Government contracts. In holding that these Acts were not repugnant, and that they were both valid and enforceable, the Court of Appeals for the Sixth Circuit said (l. c. 948):

> "We are unable to agree with this conclusion. Repeals by implication are not favored and a later law will not be construed to repeal one enacted prior thereto unless the two acts are so clearly repugnant that they may not easily be reconciled. If both statutes can be made effective by reasonable construction, such construction will be adopted. (Citing cases.)
>
> "We perceive no difficulty in the reconcilement of the Eight-Hour Law amendment with the Fair Labor Standards Act. The one limits employment at basic pay to 40 hours a week, the other deals solely with daily employment of men in certain classifications, and limits such employment at basic pay to 8 hours a day. No difficulty will be perceived in complying with both statutes,—giving overtime pay for work in excess of the weekly maximum, in the one case, and overtime pay for work in excess of the daily maximum, in the other."

See also C. C. H., Labor Law Reports, 4th Ed., Vol. 3, Sec. 26011, where it is said:

> "However, coverage under a government contracts law and coverage under the Fair Labor Standards Act are by no means mutually exclusive. On the contrary, cumulative application of both types of laws to employees of government contractors who are engaged in interstate commerce is in harmony with the common objectives pursued by Congress in enacting both types of laws. The purposes of the Fair Labor

Standards Act, which prescribes a certain minimum wage, are no more impaired by a government contract fixing the higher prevailing wage prescribed by the Secretary of Labor than by any individual or collective agreement fixing a wage in excess of the FLSA minimum rate. Both types of statutes must be complied with under circumstances showing engagement in interstate commerce, a government contractor is not excused from compliance with the Fair Labor Standards Act whenever the standards set by the latter are stricter."

That coverage under the Walsh-Healey Act does not exclude appellees from coverage under the Fair Labor Standards Act can also be inferred from the language of the two enactments. Section 18 of the Fair Labor Standards Act, 41 USCA 218, expressly provides that no provision of the Act shall exclude noncompliance with any other Federal or State law or municipal ordinance relating to wages and hours. Section 13, 29 USCA 213, excludes certain employees from the scope of the Act because they are regulated under other statutes, to-wit: Subparagraph 4 excludes employees of carriers by air subject to the provisions of Title II of the Railway Labor Act; (b) (1) exempts employees subject to Section 304 of Title 29, being the Motor Carriers Act; and (b) (2) exempts employees subject to Sections 1 to 27 of Title 49, being the Interstate Commerce Act. We submit that the omission of any reference to the Walsh-Healey Act indicates clearly that the employees subject to that Act are not exempted from the Fair Labor Standards Act. Further, by an amendment to the Walsh-Healey Act, approved May 13, 1942, 41 USCA 35 (c), Congress provided an exemption from the overtime provisions when an employee had entered into an agreement with his employer "pursuant to paragraphs 1 and 2 of Subsection (b) of Section 7 of an Act entitled Fair

Labor Standards Act of 1948." Congress thus recognized that certain employees came within the coverage of both Acts, and amended the Walsh-Healey Act so as to harmonize it with the Fair Labor Standards Act.

It is universally ruled that repeal or suspension of a statute by implication is not favored, and that a law with no express repealing or suspending clause will not be so construed unless the two laws are so clearly repugnant that no other conclusion can reasonably be drawn. See Posatas v. National City Bank, 296 U. S. 497, at page 503, where the Supreme Court said:

> "The cardinal rule is that repeals by implication are not favored. Where there are two acts upon the same subject, effect should be given to both if possible."

And see discussion of this proposition under Point III, pp. 15-20 of appellees' Supplemental Brief herein. Also under Point II, pp. 8-11 of Supplemental Brief for the Administrator of the Wage and Hour Division.

The above cases, particularly the Lasater and the Walling cases, are not discussed in the Court's opinion, which is in direct conflict therewith.

The only reason given by the Court for its ruling that the two acts cannot "apply at one and the same time" is "the attending confusion in computing wages and the collection of claims therefor." (Opinion p. 14.) There is no evidence of any such confusion in this record, and no claim by appellant of any accounting difficulties. It professed to operate under both laws. See its own booklet (R. 206), where it advised all employees "The Company will pay the legal overtime rate, as provided under the Walsh-Healey Act and the Fair Labor Standards Act." Employees were grouped under the Walsh-Healey Act

pursuant to the Regulations of the Secretary of Labor, and under the Fair Labor Standards Act pursuant to the Regulations of the Labor Administrator, and paid accordingly. There was no confusion.

The Court further suggests disapproval of the "United States being required to pay liquidated damages and * * * attorney's fees" (Opinion p. 14). It is obvious, of course, that the United States is not required to pay anything under this judgment. The judgment debtor is the appellant, who admittedly is the employer in this case. Whether appellant will be entitled to reimbursement against the United States where the liability accrued because of its fault in failing to obey the Fair Labor Standards Act, and Executive Order No. 9301, infra, is a matter for the General Accounting Office to decide.

We further submit that the incurment of labor costs as required by the provisions of the Fair Labor Standards Act was not only with the approval of, but by express direction of the United States Government. (See Executive Order No. 9301, signed by the President February 9, 1943, 8 Fed. Reg. p. 1825, United States Code, Supp. III, 1941-43, Title 29, Labor, Section 207 [not USCA], printed in full in Appendix to this Petition.) By this directive the President, in order to meet the manpower requirements of the armed forces, directed all departments and agencies of the Federal Government to require their contractors to establish a forty-eight-hour minimum work week in the war plants, and it was by virtue of this order that these appellees were required to work a six-day week, and it was further provided in the order that it should not be "construed as suspending or modifying **any** provision of the Fair Labor Standards Act." We quote paragraph 5 of the order so providing:

> "Nothing in this Order shall be construed as superseding or in conflict with any Federal, State or local

law limiting hours of work or with the provisions of any individual or collective bargaining agreement with respect to rates of pay for hours worked in excess of the agreed or customary workweek, nor shall this Order be construed as suspending or modifying any provision of the Fair Labor Standards Act (Act of June 25, 1938; 52 Stat. 1060; 29 U. S. C. 201, et seq.), or any other Federal, State or local law relating to the payment of wages for overtime."

Executive Orders Nos. 9240 and 9248 mentioned in the concurring opinion (p. 24) related to Premium and Holiday pay. Executive Order No. 9301, above quoted, was later and amendatory, and **a cross reference to 9301** follows the print of 9240. (See United States Code, Supp. IV, 1941-1945: Title 40, Public Buildings, Property and Works, Sec. 326.)

Further, both the Labor Department and the Law Department of the United States have by briefs on file herein argued that these appellees should be held to be within the coverage of the Fair Labor Standards Act.

We submit, therefore, that the ruling of this Court that the Walsh-Healey Act and the Fair Labor Standards Act cannot apply at one and the same time is untenable.

(b) The Opinion holds (p. 11) that "plaintiffs and all other employees of defendant" were within the language of the Walsh-Healey Act, and hence covered by it. Nothing could be further from the fact. The Walsh-Healey Act vests in the Secretary of Labor the authority to administer the Act and to determine coverage under the Act (Endicott-Johnson Co. v. Perkins, 317 U. S. 501, l. c. 507, 508). The findings, rulings and interpretations of the Secretary of Labor in the administration of the Act are not only entitled to the respect accorded administrative rulings and interpretations, but under the terms of Sec-

tion 5 of the Act (41 U. S. C. A., Sec. 39) are when supported by the evidence "conclusive in any court of the United States." Acting under the authority vested in him by the Act, the Secretary of Labor has issued rulings and interpretations for the determination of what employees are within the coverage of the Act and what are without the coverage of the Act. (See Rulings and Interpretations No. 3, issued by the U. S. Department of Labor October 1, 1945.) By Sections 36 and 37 of said Rulings and Interpretations the Secretary of Labor enumerates the classes of employees included in the Act, and by Sections 38 and 39 enumerates the classes of employees not covered by the Act. Some of the groups listed as not covered (Rulings and Interpretations, supra, pp. 23, 24), are office employees, custodial employees, firemen, maintenance men, cleaners, certain foremen, service men, workers engaged in certain general experiments, instructors, employees engaged in preparing material orders and requirements, marine workers, and others. It is thus apparent that a large segment of the workers at the St. Louis Ordnance Plant were not within the coverage of the Walsh-Healey Act.

The Act only covers those employees who are directly engaged in production, and we contend that under the Secretary of Labor's interpretations appellees were not covered. See Administrative Regs., Art. 102, p. 55, of the above mentioned Rulings and Interpretations No. 3, where the Secretary of Labor rules that the Walsh-Healey Act "shall not be deemed applicable to office or custodial employees". Appellant did not consider appellees covered by the Walsh-Healey Act. Its own occupational analyst exempted them from the overtime provisions of the Walsh-Healey Act because of the provisions of Art. 102 of the Secretary of Labor's Regulations. (See Defendant's Ex. 14, R. p. 611.)

We submit that these appellees having been thus excluded from the Walsh-Healey Act and denied its benefits, it is somewhat bitter irony to now tell them that they were covered by it, and hence have no right of action under the Fair Labor Standards Act. We submit that the appellant was right in exempting appellees from the Walsh-Healey Act, but it was wrong in exempting them from the provisions of the Fair Labor Standards Act relating to administrative employees. It was to test that exemption that this suit was brought. We were naive enough to think that this was the issue that would be tried. Unfortunately, it has been lost sight of in the logomachy that has been stirred up over everything except the real dispute in this case.

(c) Both the Court's opinion on page 7 and the concurring opinion on page 21 state that the cost-plus-a-fixed-fee contract specifically made the provisions of the Walsh-Healey Act applicable to the wage and overtime rights of the employees. This is incorrect. The stipulations under Art. III-D of the contract (R. p. 783), under the heading "Walsh-Healey Act" are the "representations and stipulations" that the law **requires** be included in **all** contracts for public work to which the Walsh-Healey Act applies. (See Sec. 1 of the Act, 41 U. S. C. A., Sec. 35) where it is provided that in all such contracts "there shall be included the following representations and stipulations." Then follow the same provisions that are included in the contract, and set out on page 783 of the record herein. These representations and stipulations were included because it was recognized that there would be workers in the plant who would be included in the Walsh-Healey Act, and therefore it was necessary for the contract to contain the representations and stipulations which the law required. That was the purpose and the only purpose of the inclusion

in the contract of the representations and stipulations required by the Walsh-Healey Act. The inclusion of this matter did not in any way indicate that the Walsh-Healey Act was to apply to labor relations to the exclusion of the Fair Labor Standards Act. The contemporary interpretation of the contract at the time showed that there was no such intention because the contractor immediately proceeded to operate under both Acts, and to classify and pay its employees under whichever of these Acts applied to such employees.

We submit therefore that it can not fairly be inferred that, because the contracting parties complied with the law in including these representations and stipulations, they intended to exclude the Fair Labor Standards Act.

II.

The concurring opinion inadvertently overlooks material matters of law and fact.

Judge Johnsen's concurring opinion seems to embody in some respects the defenses made by the Contractor in its Reply Brief in the Supreme Court in Kennedy v. Silas Mason Company, 334 U. S. 249, to the effect that the Act of July 2, 1940, 50 U. S. C. A., War Appendix, Sec. 1171 et seq., sets up a complete system of labor relations which suspended the operation of the Fair Labor Standards Act. This contention was ably answered by the Administrator of the Wage and Hour Division in his Supplemental Brief herein under Point III, pp. 11 to 22, which we ask be considered on this petition. The Administrator's argument seems to us to establish to a certainty that there is no tenable basis for such a construction of the 1940 Act. The concurring opinion, however, goes beyond the defense made by the Contractor, as aforesaid, in the above case,

and interprets the 1940 Act as also suspending the Walsh-Healey Act, and as investing the Secretary of War with unlimited power over labor relations, including the right "to fix wage scales and overtime rates and rights for the employees in the hybrid relationship involved in these munitions plants, * * * without regard to the provisions of the Walsh-Healey Act" (Op. p. 21), and apparently without regard to any other laws relating to wages, hours or labor relations.

The concurring opinion then rules that the inclusion in the cost-plus-a-fixed-fee contract herein (Deft's. Ex. 20) Art. III-D, p. 783, "of the representations and stipulations" required by Section 1 of the Walsh-Healey Act, 41 U. S. C. A., Section 35, to be included in all public contracts, was an exercise of this supposed plenary power, and made the Walsh-Healey Act the sole arbiter of all labor relations in the St. Louis Ordnance Plant.

We think reflection will make it clear that such a ruling is absolutely untenable for many reasons: (a) The Act of July 2nd itself, in terms, makes the Contractor operated plants subject to the Walsh-Healey Act. [See Sec. 1 (a) and Sec. 5, 50 U. S. C. A., War Appendix, Secs. 1171 and 1172.] (b) The argument of the Labor Administrator above referred to points out the reasons why the 1940 Act cannot be interpreted as suspending the Fair Labor Standards Act (see Supplemental Brief of Labor Administrator, pp. 11 to 22), which argument, for brevity, we hereby adopt by reference. (c) The Secretary of War never attempted to exercise any such power, and the inclusion in the contract of the "representations and stipulations" (R. p. 783) was not an attempt to set up labor relations, but was done merely to comply with the law (41 U. S. C. A. 35). (d) If, however, it could be said to be an exercise by the Secretary of Labor of such a supposed power, it was

nullified by the President in Executive Order No. 9301, signed February 9, 1943, 8 Fed. Reg. 1825, discussed and quoted, supra. The concurring opinion concedes that the Secretary of War's actions under the 1940 Act are subject to control of the President. We quote from the concurring opinion, p. 20, to-wit:

> "The Secretary of War's actions, under this concept of the statute, might perhaps be subject to the control of an Executive Order issued by the President, and, of course, they necessarily would be so after the war itself began in 1941."

This Executive Order (see Appendix) in express terms provides that it shall not suspend "any provision of the Fair Labor Standards Act." It thus seems perfectly obvious on analysis that the whole thesis of the concurring opinion is untenable.

III.

Costs.

We ask that the judgment be modified with respect to costs. The opinion makes no reference to costs, and hence we are informed that the costs, including this costly record, would be adjudged against the employees. We think under all the facts and circumstances of this case that such a result would be most inequitable. This suit was brought in good faith. At that time the right of the workers to sue under the Fair Labor Standards Act had been sustained by respectable authority [Umthum v. Day & Zimmermann, Inc., 16 N. W. (2d) 258 (Sup. Ct. Ia., 1944); Timberlake v. Day & Zimmerman, Inc., 49 Fed. Supp. 28 (S. D. Ia., 1943)] and we recall no rulings to the contrary.

In ordering the dismissal of this case the Court did so on a legalistic concept advanced for the first time in this

Court, admittedly contrary to administrator interpretation (Op. p. 14), and, as we view it, contrary to Federal decisions. Certainly, on the law as it was interpreted four years ago when this suit was filed, counsel could not have advised otherwise than that the workers in the war plants engaged in the production of goods for commerce were within the coverage of the Fair Labor Standards Act. Many such cases were filed by the workers in these war plants, of which the cases cited in the briefs and in the footnotes to pages 10 and 11 of the Court's opinion are but a few. Many of these cases have resulted in recoveries including liquidated damages and attorneys' fees, some in this very Court; none were dismissed because of any assumed coverage by the Walsh-Healey Act.

We submit that the matter of costs rests in the sound discretion of the Court, and that it would be a hardship to adjudge them against appellees, particularly if they are allowed to become a joint obligation. The great majority of these employees are in all probability unable to pay their part, with the result that the whole bill may be enforced against the few who may be fortunate enough to own a little property subject to execution. This could well result in loss of their homes. We do not feel that upon reflection this Court would be inclined to permit such a harsh result. There is ample precedence for relief against such a hardship. Where, as in this case, the reversal is for want of jurisdiction in the Court below, the Supreme Court of the United States has held that Federal Courts may make such order in respect to the costs of the appeal "as justice and right shall seem to require" (Peper v. Fordyce, 30 L. Ed. 435, l. c. 436, 119 U. S. 469). Further, it has been held that when the point on which the case was decided was not urged in the Court below, no costs will be allowed. Cornelius v. C. C. Pictures, Inc., 7 Fed. (2d) 308 (2nd Cir.), l. c. 309, where the Court said:

"The ground on which we place decision not having been urged in the court below, there will be no costs in this court."

The Court's opinion herein concedes that the point on which it ruled this case was "apparently * * * not presented to or considered by the trial court, but the question relates to jurisdiction, and is properly before us" (Op. p. 5). We respectfully ask, therefore, that, in any event, this judgment be modified so that costs be not allowed to either party.

Respectfully submitted,

THOMAS BOND,
408 Olive Street,
St. Louis, Missouri,
Attorney for Appellees.

Certificate of Counsel.

I, Thomas Bond, counsel for the above named appellees, petitioners herein, do hereby certify that the above and foregoing petition for rehearing is presented and filed in good faith and not for delay, and is believed to be meritorious.

Thomas Bond,
Attorney for Appellees.

APPENDIX.

48-Hour Minimum Wartime Workweek.

Executive Order 9301.

(Signed by the President, February 9, 1943.)

By virtue of the authority vested in me by the Constitution and statutes, as President of the United States, and in order to meet the manpower requirements of our armed forces and our expanding war production program by a fuller utilization of our available manpower, it is hereby ordered:

1. For the duration of the war, no plant, factory, or other place of employment shall be deemed to be making the most effective utilization of its manpower if the minimum workweek therein is less than 48 hours per week.

2. All departments and agencies of the Federal Government shall require their contractors to comply with the minimum workweek prescribed in this Order and with policies, directives, and regulations prescribed hereunder, and shall promptly take such action as may be necessary for that purpose.

3. The Chairman of the War Manpower Commission shall determine all questions of interpretation and application arising under this Order and shall formulate and issue such policies, directives, and regulations as he determines to be necessary to carry out this Order and to effectuate its purposes. The Chairman of the War Manpower Commission is authorized to establish a minimum workweek greater or less than that established in Section 1 of this Order or take other action with respect to any case or type of case

in which he determines that such different minimum workweek or other action would more effectively contribute to the war effort and promote the purposes of this Order.

4. All departments and agencies of the Federal Government shall comply with such policies, directives, and regulations as the Chairman of the War Manpower Commission shall prescribe pursuant to this Order, and shall so utilize their facilities, services, and personnel, and take such action under authority vested in them by law, as the Chairman determines to be necessary to effectuate the purposes of this Order and promote compliance with its provisions.

5. Nothing in this Order shall be construed as superseding or in conflict with any Federal, State or local law limiting hours of work or with the provisions of any individual or collective bargaining agreement with respect to rates of pay for hours worked in excess of the agreed or customary workweek, nor shall this Order be construed as suspending or modifying, any provisions of the Fair Labor Standards Act (Act of June 25, 1938; 52 Stat. 1060; 29 U. S. C. 201, et seq.) or any other Federal, State or local law relating to the payment of wages or overtime.

(Endorsed): Filed in U. S. Court of Appeals, Apr. 25, 1949.

IN THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 13663

THE UNITED STATES CARTRIDGE COMPANY, APPELLANT

v.

R. M. POWELL, ET AL., APPELLEES

Appeal from the District Court of the United States for the Eastern District of Missouri, Eastern Division

Brief for the Administrator of the Wage and Hour and Public Contracts Division, United States Department of Labor as Amicus Curiae in Support of Petition for Rehearing

The Administrator strongly urges the Court to grant the petition for rehearing because of the far-reaching implications of the decision and because the opinion of the Court indicates that the full significance of the issue on which the Court's decision turned may not have been adequately brought to the Court's attention. In addition, it appears that the Court overlooked the fact that at least some of the employees involved in this suit may be outside the scope of the Walsh-Healey Act (see Appellees' petition, p. 8), so that the decision excluding them from the Fair Labor Standards Act has the effect of ex-

cluding them entirely from all Federal labor standards legislation.

Although a written brief, as *amicus curiae*, was filed on behalf of the Administrator, prior to the Court's decision, that brief covered a variety of issues and only a comparatively minor portion dealt with the issue of the application of the Walsh-Healey Act. Also no counsel appeared on behalf of the Administrator at the oral argument. Under these circumstances, the argument on this issue may not have been presented with the completeness and clarity commensurate with the importance of the question.

The ruling that the Fair Labor Standards Act and the Walsh-Healey Act "both may not apply at one and the same time" and that the Fair Labor Standards Act is necessarily inapplicable to an employer when engaged only in the manufacture of munitions of war under a cost-plus contract with the Government, is directly contrary to the consistent construction of these statutes throughout the more than ten years of their existence, not only as interpreted by the Administrator, but as construed by Congress and the courts, and indeed by all other Government agencies concerned. As pointed out in the Government's brief filed in the Supreme Court in *Kennedy v. Silas Mason Co.*, 334 U. S. 249, "The Department of Justice and the Wage and Hour Administrator have consistently regarded these cost-plus contractors as subject to the Fair Labor Standards Act. * * * And it is to be noted that in 1942 the Secretary of War was

apparently of the same opinion" (Br., p. 13). The brief further pointed out that "The vast majority of the employees of such contractors were paid in accordance with the statutory standards. This was done pursuant to instructions from the Government contracting agency, *in accordance with the mutual understanding of the various Government departments concerned that the Fair Labor Standards Act was applicable to employees of such cost-plus contractors.* See opinion of the Comptroller General dated September 28, 1942, 22 Comp. Gen. Decisions 277 (n. 3, pp. 13-15, *supra*), quoting a letter from the War Department indicating its belief at that time that the Fair Labor Standards Act was applicable. The employees involved in this and similar suits are in the main employees who were thought to be within some exempting provisions of the Act or as to whom there has been some dispute regarding hours of work. * * * Except for employees as to whom there was some such particular defense, the employees of cost-plus contractors were considered subject to the Act and were compensated accordingly throughout the years of the operation of these contracts" (Government's brief in *Silas Mason*, p. 26, n. 11). [Italics added.] The brief further observes that "While the coverage of the Fair Labor Standards Act and the Walsh-Healey Act may overlap, there is nothing inconsistent in the application of both statutes, where both are applicable by their terms" (*id.* at p. 5, n. 1). This Court's decision is thus contrary to the long-established construction that has consistently been followed by the administrative agencies charged with the administration and en-

forcement of these regulatory statutes and approved and adopted by the Department of Justice.

The decision has far more serious and far-reaching implications, with respect to both the past and future administration of these two statutes, than this Court, judging from the statements in the opinion, could have realized. The assumption in the opinion that the two acts could not apply at one and the same time without "attending confusion in computing wages and the collection of claims therefor" (Op., p. 14) is simply not borne out by the more than ten years' experience in the practical administration and enforcement of these acts. On the contrary, the decision that the acts are mutually exclusive will create untold confusion and problems in the future administration of the Acts, since all of the administrative and enforcement machinery, and all of the numerous regulations and interpretations issued by the Administrator and the Secretary of Labor under these Acts, as well as all of the recommendations made to Congress concerning them, and all of the appropriations made by Congress for their enforcement, had been done on the assumption that the statutes were not mutually exclusive. This Court's decision may require substantial changes in the administrative machinery and a comprehensive review and modification of a large number of regulations and interpretations. The decision would also produce the anomalous result, as explained more fully *infra*, that many employees, who would clearly be entitled to the benefits of Federal labor standards if they were working under private contracts, will be *excluded*

from the labor standards of both statutes by reason of the fact that their employer is producing goods under Government contract.

The fact that the two Acts would overlap in certain circumstances has been appreciated by the administrative agencies from the beginning, and the administrative machinery for enforcement was originally set up and has operated continuously on this assumption. Indeed, prior to the enactment of the Fair Labor Standards Act, the Secretary of Labor drew the attention of Congress to the fact that the bill (Fair Labor Standards) "overlaps to some extent administrative functions performed with respect to Government contracts under the Walsh-Healey Act" (81 Cong. Rec. Appendix 1484, 75th Cong., 1st. sess., June 15, 1937). The Secretary recommended that the Walsh-Healey Act nevertheless "should be continued in full force and effect" for the reason, but obviously only for the reason, of taking advantage of the Walsh-Healey Act to the extent that its coverage was broader in scope (e. g., it might be applied to "certain distributive concerns engaged in intrastate business"), and to the extent that its labor standards might in some cases be higher (*ibid.*). There was clearly no intent and no suggestion was ever made that the retention of the Walsh-Healey Act would operate to exclude employees working under Government contract from the broader coverage and the more effective remedies provided in the Fair Labor Standards Act. On the contrary, an affirmative measure was incorporated in Section 18 of the Act to insure against any such result. The provision in Section 18 that

nothing in the Act "shall excuse noncompliance with any Federal or State law or municipal ordinance establishing a higher standard than the standard established under this Act," when considered together with the fact that Congress was very explicit with respect to other possibly overlapping Federal regulations when it wished to exclude employees from the Fair Labor Standards Act because they were regulated by other statutes [see Section 13 (a) (4) exempting employees subject to regulation under the Railway Labor Act and Section 7 (b) (1) and (2) exempting employees subject to regulation by the Interstate Commerce Commission], seems conclusive evidence that there was no intent to exempt employees because they might be subject to the Walsh-Healey Act.

If there were any reasonable doubt as to the legislative intent in the original enactment of the Fair Labor Standards Act, such doubt, it is submitted, has been completely dispelled by the repeated subsequent actions by Congress recognizing the applicability of both Acts, specifically with respect to Government cost-plus contracts. Thus, in 1942 the operations of Wage and Hour Division and of the Public Contracts Division, which had previously been conducted by separate administrative machinery, were consolidated for the reason, as reported to Congress, that the war had increased the amount of industry subject to the Walsh-Healey Act and that "most of these new establishments were also subject to the provisions of the Wage and Hour Law" so that consolidation would result in "great saving in time

and effort." See Administrator's Annual Report to Congress for the fiscal year ending June 30, 1942, p. 91. See also Annual Report for 1948, pointing out that the consolidation had been effected "since most employers subject to the Public Contracts Act, which applies to manufacture or supply contracts let by the government for equipment or supplies in amounts of $10,000, are subject to the Fair Labor Standards Act as well" (p. 9).[1]

Each annual report since 1942 has expressly brought to the attention of the Congress the Administrator's view that most employers subject to the Public Contracts are also subject to the Fair Labor Standards Act as well[2] and detailed schedules of the Administrator's inspection activities showing the enforcement of that view.[3]

The reports also show that in a number of cases administrative proceedings under the Walsh-Healey Act have been accompanied by criminal prosecutions under Section 16(a) of the Fair Labor Standards Act.[4] The records of the United States District Courts show at least 20 criminal cases in which defendants had been convicted and fined for violations under the Fair Labor Standards Act where those same defendants

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1 Annual Reports to Congress are made pursuant to Section 4(d) of the Act.

2 1943 Annual Report, p. 9; 1944 Annual Report, p. 10; 1945 Annual Report, p. 2; 1946 Annual Report, p. 14; 1948 Annual Report, p. 5.

3 1943 Annual Report, p. 2; 1944 Annual Report, p. 37; 1945 Annual Report, p. 17; 1946 Annual Report, pp. 18, 20; 1947 Annual Report, p. 69; 1948 Annual Report, p. 176.

4 See Administrator's Annual Report for 1948, p. 9.

were found liable in administrative proceedings under the Walsh-Healey Act.[5] The Annual Reports also show that over 40,000 establishments have been found by the Administrator to be within the coverage of both Acts.[6]

Thus, repeatedly each year it has been brought to the attention of Congress that both Acts were being applied to Government contracts. On the basis of these reports Congress each year has voted appropriations for such enforcement without the slightest hint of criticism that the money was being expended in enforcement activities not contemplated in the basic statutes. In analogous situations such action has been held to constitute Congressional confirmation and ratification of an administrative interpretation of such long-standing and consistent application. Thus, in *Brooks v. Dewar*, 313 U. S. 354, 361, it was held that after information as to a questioned system of temporary licenses had come to the attention of Congress through annual reports of the Secretary of the Interior "The repeated appropriations of the proceeds of the fees thus covered and to be covered, into the Treasury, not only confirms the department construction of the statute but constitutes a ratification of the action of the Secretary as the agent of Congress in

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[5] These prosecutions were not predicated on any theory of a segregated portion of defendant's business being devoted to production for others than the United States, such as is suggested on page 12 of this Court's opinion.

[6] Tabular presentation has been made in the annual report for each year since 1942, but the report of 1948 summarizes the whole activity between 1942 and 1948 at page 31.

the administration of the Act." This principle has had wide application. Similarly, in *Fleming v. Mohawk Co.*, 331 U. S. 111, 116, the Supreme Court stated not only that such "contemporaneous and consistent" administrative construction was "entitled to great weight" but that "the appropriation by Congress of funds for the use of such agencies stands as confirmation and ratification of the action." See also *Wells v. Nickles*, 104 U. S. 444, 497, and *Isbrandtsen-Moller Co. v. United States*, 300 U. S. 139, 147.

In addition to all of the above evidence of Congressional awareness and approval of the applicability of the Fair Labor Standards Act to employees subject also to the Walsh-Healey Act, further conclusive evidence that Congress recognized the Act to be thus applicable is found in the enactment of the Portal-to-Portal Act of 1947 (Public Law 49, 80th Cong., Chapter 52—1st Sess.). As pointed out in the Government's brief in the *Silas Mason* case (pp. 35-36), one of the stated purposes of the Portal Act was to invalidate portal-to-portal claims by employees under the Fair Labor Standards Act because of the "increased cost of war contracts" by virtue of such liabilities to cost-plus contracts from such claims. "Thus Congress both during and after the war seems never to have doubted that the Act covers employees of cost-plus contractors with the Government who were engaged in the production of munitions of war" (see *Silas Mason* brief, p. 36).

As indicated above, the administrative and enforcement machinery has been set up on this assumption

and all of the interpretations and regulations under the two Acts emanating from the Administrator or the Secretary of Labor have been issued on the basis of such construction. Thus, although the full impact of this Court's decision cannot be estimated or predicted as yet, it is unavoidable that such a sudden, unexpected change of construction will result in immeasurable confusion and disruption in the administration and enforcement of these Acts.

The confusion and disruption will be aggravated by the abridgement of remedies and penalties resulting from this Court's decision. The Walsh-Healey Act contains no criminal sanction such as that provided in Section 16 (a) of the Fair Labor Standards Act, nor the employee suit remedy as provided in Section 16 (b) of the Fair Labor Standards Act. While, as noted in this Court's opinion, the Walsh-Healey Act provides other sanctions and in some respects the Walsh-Healey labor standards may be more favorable to labor than the minimum standards of the Fair Labor Standards Act, the Walsh-Healey sanctions are by no means substitutes for the two above remedies of the Fair Labor Standards Act, either from the point of view of the Administrator or from the point of view of the employee. As the Supreme Court has pointed out, one of the important features of the Section 16 (b) remedy is that it has the "virtue of minimizing the cost of enforcement by the Government. It is both a common-sense and economical method of regulation" which "puts directly into the hands of the employees who are affected by violation

the means and ability to assert and enforce their own rights, thus avoiding the assumption by Government of the sole responsibility to enforce the act." *Brooklyn Savings Bank v. O'Neil*, 324 U. S. 697 at 706, n. 16. "And," as the Supreme Court has further pointed out, "not the least effective aspect of this remedy is the possibility that an employer who gambles on evading the Act will be liable for payment not only of the basic minimum originally due but also damages equal to the sum left unpaid." 324 U. S. at 709. The extent to which the unavailability of this remedy, and of the criminal sanction, will impair enforcement of the Walsh-Healey Act is incalculable. Although no precise estimate can be made of the savings in cost attributable to the general belief that the sanctions in the Fair Labor Standards Act are applicable, a comparison of the proportion of administrative proceedings required for enforcement of the Walsh-Healey Act during the one year prior to the enactment of the Fair Labor Standards Act with the proportion of such proceedings required in subsequent years indicates that the deterrent effect of the additional remedies provided in the Fair Labor Standards Act has been very tangible and substantial.

That the sanctions of the Walsh-Healey Act are no substitute for the remedies of the Fair Labor Standards Act from the employees' point of view seems adequately illustrated by the result in the instant case. Apart from the fact that the employee under the Walsh-Healey Act cannot receive double damages, he must await the convenience and dis-

cretion of the Administrator in order to recover unpaid wages and is wholly dependent on the Administrator's decision to take action, and the availability of adequate funds and administrative machinery in order to recover anything at all. Even in the event that there is adequate administrative machinery for prompt action by the Administrator, this case illustrates that the employee may be confronted with further obstacles and problems apparently overlooked by this Court's opinion. As appellees' petition for rehearing points out (p. 8), the Walsh-Healey Act has never been interpreted or administered to extend its benefits to employees engaged only in processes and occupations "necessary to" the manufacture or production, as distinguished from employees engaged directly in the productive processes. On the other hand, the Fair Labor Standards Act, by its terms and as construed by the Supreme Court, applies broadly to employees "employed in producing, manufacturing, mining, handling, transporting, or in any other manner working on such goods, or in any process or occupation necessary to the production thereof, in any State" (Section 3 (j)). Though the duties of the appellees in the instant case were found to be necessary to and interwoven with the production carried on by appellant (R. 917), there is no baise in the record for concluding that their employment in the safety department in such occupations as Assistant Chief Safety Engineer and Assistant Staff Supervisors (R. 917) involved actual engagement "in the manufacture of materials, sup-

plies, articles, and equipment used in the performance of the contract." While the testimony in the record may also be inadequate to establish the contrary view (since this issue was not tried in the court below and only a few of the appellees testified), the parties are in agreement that appellees were not so engaged (Defendant's Ex. 14, R. 611, as to appellants; p. 9 of Petition for Rehearing as to appellees).

Thus, this Court's decision has the anomalous result of excluding altogether from the Federal labor standards employees who would clearly be within the scope of the Fair Labor Standards Act if they were not engaged in work on Government contracts. Under these circumstances the Court is presented with almost precisely the problem posed and left unanswered in its opinion, that is, "the question whether the Walsh-Healey Act should apply to the employees engaged in the production of the munitions under contract with the United States and the Fair Labor Standards Act should apply to other employees." We believe we have shown in the foregoing discussion that serious confusion and disruption in the administration and enforcement of these Acts will result from this Court's decision even if it is assumed that all of the Government's contractors' employees are subject to the Walsh-Healey Act. The confusion and problems will obviously be aggravated and multiplied if simultaneously some employees are subject to the Walsh-Healey Act and others to the Fair Labor Standards Act.

CONCLUSION

It is submitted that rehearing should be ordered so that the Administrator may have opportunity for full oral and written presentation of his views.

Respectfully submitted.

WILLIAM S. TYSON,
Solicitor,

BESSIE MARGOLIN,
Assistant Solicitor,

WILLIAM A. LOWE,
Attorney,

United States Department of Labor,
Washington, D. C.

REID WILLIAMS,
Regional Attorney.

MAY 1949

Endorsed: Filed in U. S. Court of Appeals, May 5, 1949.

[fol. 1041] (Order Denying Petition of Appellees for Rehearing and Modifying Opinion, etc.)

May Term, 1949.

Saturday, May 7, 1949.

The Court has considered the petition of appellees or a rehearing and to modify the judgment of this Court in this cause; also the motion of appellant to modify the opinion and suggestions of appellees in opposition, and it is now here Ordered that the petition for rehearing be, and is hereby, denied, and that the official opinion filed April 12, 1949, be, and is hereby, modified by striking therefrom on page 5, the last sentence in the first paragraph, reading as follows:

"Apparently the possible applicability of the Walsh-Healey Act or of the Act of July 2, 1940, or the bearing of either of those Acts upon the applicability of the Fair Labor Standards Act was not presented to or considered by the trial court, but the question relates to jurisdiction and is properly before us."

And it is further Ordered by this Court that the judgment of this Court entered herein April 12, 1949, providing that appellant recover from appellees the costs in this Court, be, and is by the Court hereby vacated, set aside and held for naught, and that a new judgment be entered this day providing that the reversal of the judgment of the District Court be without taxation of costs in this Court in favor of either of the parties, appellant or appellees, and for a remand with directions for proceedings consistent with the opinions of this Court.

May 7, 1949.

[fol. 1042] (Judgment.)

United States Court of Appeals
for the Eighth Circuit.

May Term, 1949.

Saturday, May 7, 1949.

The United States Cartridge Company, a corporation,
Appellant,

No. 13,663. vs.

R. M. Powell, A. C. Kropp, F. N. Harris, J. M. Tyler, J. C. Marshall, A. W. McCluing, G. H. Bentine, Joe Reeves, Herbert Hahn, N. W. Myers, B. J. Ludwig, E. L. Stockho, William Niedringhaus, William Stutz, S. P. Coley, L. W. Trimble, R. M. Stewart, B. H. Hargate, J. S. Schneider, Walter Gorg, Jr., B. M. Casey, A. H. Erickson, Elmer Maher, Emmett Hoskins, F. P. Knight, R. A. Westra, D. F. Bateman, Al Herman, George Burmeister, G. B. Darby, R. E. Jennicbes, J. J. Schwartz, A. C. Kemp, Byron Yancey, J. D. Cavanaugh, W. E. O'Meara, Roland Carbone, W. A. Broad, C. L. Valoi, Mike Malloy, Russell Barnett, William Hirschberger, Frank Connell, Floy L. Jennings, Sterling Cook, Cliff Champion, Don Burke, W. C. Viehmann, F. M. Kercheval, Guy Cruce, R. Baxter, N. C. Walther, George Gillen, James Vollbracht, R. J. Peterson, Jack DeLargy, C. C. Brace, S. F. Peters, A. Lockhart.

Appeal from the United States District Court for the Eastern District of Missouri.

This Cause came on to be heard on the record from the United States District Court for the Eastern District of Missouri, and was argued by counsel.

[fol. 1043] On Consideration Whereof, It is now here Ordered and Adjudged by this Court that the judgment of the said District Court in this cause be, and the same is here-

by, reversed without taxation of costs in this Court in favor of either of the parties, appellant or appellees.

And it is further Ordered by this Court that this cause be, and the same is hereby, remanded to the said District Court with directions for proceedings consistent with the opinions of this Court.

May 7, 1949.

[fol. 1044] (Application of Appellees for Order Staying Issuance of Mandate.)

Now come the above named appellees by their attorney and respectfully state that heretofore, on, to-wit, the 12th day of April, 1949, this Court entered its opinion and judgment herein reversing the judgment of the United States District Court for the Eastern Division of the Eastern Judicial District of Missouri, and directing that this case be dismissed; that thereafter and within the time allowed by the rules of this Court appellees duly filed their petition for a rehearing herein; that said petition was received and considered by the Court and was on the 7th day of May, 1949 denied by this Court, the opinion modified, and a new judgment of reversal without costs entered.

Appellees further state that they intend to apply to the Supreme Court of the United States for a Writ of Certiorari to review the decision and judgment of this Court in the above entitled case, and appellees desire that the issuance of this Court's mandate be stayed for such reasonable time as may be necessary to enable appellees to apply for and obtain said Writ of Certiorari.

Appellees further state that their counsel is now engaged in the preparation of their petition for Writ of Certiorari and a brief in support thereof and the requisite number of copies of the record to accompany the same; that the record is a lengthy one and contains much technical matter, and the preparation of said petition and brief will require at least thirty (30) days.

Appellees further state that the time allowed by law for filing said petition for a Writ of Certiorari in the Supreme

[fol. 1045] Court of the United States is ninety days from and after the date on which appellees' petition for a rehearing was denied.

Wherefore, the premises considered, appellees pray that it be ordered and directed by this Court that the issuance of the mandate in the above entitled cause be stayed for a period of thirty days from and after the date of said order staying said mandate, and that same be further stayed thereafter until appellees' petition for a writ of Certiorari may be acted upon and finally disposed of by said Supreme Court of the United States; and appellees pray for such other and further orders in the premises as to the Court may seem reasonable and just.

Dated at St. Louis, Missouri, this 16th day of May, 1949.

THOMAS BOND,
Attorney for Appellees.

I hereby certify that service of the foregoing application of appellees for order staying issuance of mandate was made upon appellant by mailing a copy thereof to Bryan, Cavé, McPheeters & McRoberts, 1630 Boatmen's Bank Building, St. Louis 2, Missouri, for the attention of Mr. R. H. McRoberts, this 16th day of May, 1949.

THOMAS BOND,
Attorney for Appellees.

(Endorsed): Filed in U. S. Court of Appeals, May 16, 1949.

[fol. 1046] (Order Staying Issuance of Mandate.)

May Term, 1949.

Tuesday, May 17, 1949.

On Consideration of the motion of appellees for a stay of the mandate in this cause pending a petition to the Supreme Court of the United States for a writ of certiorari, It is now here ordered by this Court that the issuance of the mandate herein be, and the same is hereby, stayed for a

period of thirty days from and after this date, and if within said period of thirty days there is filed with the Clerk of this Court a certificate of the Clerk of the Supreme Court of the United States that a petition for writ of certiorari, record and brief have been filed, the stay hereby granted shall continue until the final disposition of the case by the Supreme Court.

May 17, 1949.

[fol. 1047] (Praecipe for Record for Supreme Court, U. S.)

In preparing the record for use on Petition to the Supreme Court of the United States for writ of certiorari, please include the following matters therein, viz:

Printed Record on which appeal was heard in United States Court of Appeals for the Eighth Circuit;

Appearances of Counsel;

Order Denying Motion for Substitution of Parties Appellee;

Order Granting William R. McComb, Administrator of the Wage and Hour Division, U. S. Department of Labor, leave to file brief amicus curiae;

Order vacating Submission, Setting Cause for Reargument and as to filing further briefs;

Submission of Cause to Court on November 8, 1948;

Opinion filed April 12, 1949;

Petition of Appellees for Rehearing;

Brief of Administrator of Wage and Hour Division, U. S. Department of Labor, as Amicus Curiae in Support of Petition for Rehearing;

Order denying Petition of Appellees for Rehearing and Modifying Opinion, etc.;

Judgment of May 7, 1949;

Application of Appellees for Stay of Mandate;

Order on Application for Stay of Mandate:

This Praecipe.

Dated this 12th day of May, 1949.

THOMAS BOND,
Counsel for Appellees.

(Endorsed): Filed in U. S. Court of Appeals, May 12, 1949.

[fol. 1048] (Clerk's Certificate.)

United States Court of Appeals

Eighth Circuit

I, E. E. Koch, Clerk of the United States Court of Appeals for the Eighth Circuit, do hereby certify that the foregoing transcript composed of two volumes, Volume I consisting of pages a to 435, inclusive, and Volume II consisting of pages 437 to 1048, inclusive, contains the printed record on which the appeal from the District Court of the United States for the Eastern District of Missouri was heard in said Court of Appeals, and full, true and complete copies of the pleadings, record entries and proceedings, including the opinion, had and filed in the United States Court of Appeals, except the full captions, titles and endorsements omitted in pursuance of the rules of the Supreme Court of the United States, prepared in accordance with praecipe of counsel for appellees, in a certain cause in said Court of Appeals wherein The United States Cartridge Company, a Corporation, was Appellant and R. M. Powell, et al., were Appelles, No. 13,663.

In Testimony Whereof, I hereunto subscribe my name and affix the seal of the United States Court of Appeals for the Eighth Circuit, at office in the City of St. Louis, Missouri, this 17th day of May, A. D. 1949.

E. E. KOCH,
Clerk of the United States Court of Appeals for the Eighth Circuit.

(Seal)

[fol. 1043] IN THE UNITED STATES COURT OF APPEALS, EIGHTH CIRCUIT

No. 13,663, Civil

THE UNITED STATES CARTRIDGE COMPANY, a Corporation, Appellant,

vs.

R. M. POWELL, et al., Appellees

PRAECIPE AND DESIGNATION OF ADDITIONAL PARTS OF THE RECORD FOR CONSIDERATION OF THE SUPREME COURT OF THE UNITED STATES UPON PETITION FOR CERTIORARI

To the Clerk of the United States Circuit Court of Appeals, Eighth Circuit:

It is respectfully requested that you prepare, certify and transmit to the Supreme Court of the United States the following proceedings and matters before your Court for inclusion in the printed record and for the use of said Court in its consideration of the petition for certiorari filed herein:

1. Appellant's Motion to Modify Opinion, together with Exhibits A, B and C thereto attached and made a part thereof, and all filed on April 27, 1949, the same being a motion which was sustained by the Court, in that it resulted in the modification of the original opinion as prayed in said motion and as shown by the order on said motion, page 1037 of the printed record of said proceedings.

2. This Praecipe and Designation.

Rhodes E. Cave, Robert H. McRoberts, Marion S. Francis, 1630 Boatmen's Bank Building, St. Louis, Missouri, Attorneys for Appellant, The United States Cartridge Company.

Bryan, Cave, McPheeters & McRoberts, Of Counsel.

[fol. 1044] I hereby certify that service of the foregoing Praecipe and Designation was made upon L. Metcalfe Walling, amicus curiae, by mailing a copy thereof to his attorney, Ried Williams, Regional Attorney, Department of Labor, at his last know address, 3000 Fidelity Building, Kansas City 6, Missouri, on the 10th day of June, 1949; and

service was made upon appellees by mailing a copy thereof to their attorney, Thomas Bond, at his last known address, 408 Olive Street, St. Louis, Missouri, on the same day.

Marion S. Francis, Attorney for Appellant, The United States Cartridge Company.

(Endorsed): Filed in U. S. Court of Appeals, Jun. 10, 1949.

[fol. 1045] IN THE UNITED STATES COURT OF APPEALS, EIGHTH CIRCUIT, IN BANC

No. 13,663, Civil

THE UNITED STATES CARTRIDGE COMPANY, a Corporation, Appellant,

vs.

R. M. POWELL, et al., Appellees

Appeal from the District Court of the United States for the Eastern District of Missouri

APPELLANT'S MOTION TO MODIFY OPINION

Comes now The United States Cartridge Company, a corporation, appellant in the above entitled cause, by its attorneys, and respectfully moves the Court to modify the opinion of the Court heretofore filed and entered herein by striking out the statement on page 5 thereof reading as follows:

> Apparently the possible applicability of the Walsh-Healey Act * * * or the bearing of either of those Acts upon the applicability of the Fair Labor Standards Act was not presented to or considered by the trial court, * * *."

And for grounds for its said motion appellant says:

1. The possible applicability of the Walsh-Healey Act, and the bearing of that Act upon the applicability of the Fair Labor Standards Act was presented to the trial court.

(a) In the Brief on Behalf of Defendant The United States Cartridge Company filed with the trial court on September 24, 1946, as indicated by the excerpt from pages 6

to 9 thereof, and from Appendix "A" thereto, filed herewith as Exhibit A hereto;

[fol. 1046] (b) in the Reply Brief for Plaintiffs filed with the trial court on October 12, 1946, as indicated by the excerpt from page 19 thereof, filed herewith as Exhibit B hereto; and

(c) in the Memorandum on Oral Argument and Reply for the Administrator of the Wage and Hour Division, United States Department of Labor, as Amicus Curiae filed with the trial court on October 31, 1946, as indicated by the excerpt from pages 5 to 8 thereof, filed herewith as Exhibit C hereto.

2. In their petition for a Rehearing and to Modify the Judgment appellees request that the judgment of this Court be modified with respect to costs, basing such request, in part, upon the above quoted portion of the Court's opinion, and make the further statement (page 12): "In ordering the dismissal of this case the Court did so on a legalistic concept *advanced for the first time in this Court*, . . ." (Emphasis ours).

3. This statement in the Court's opinion may be misleading to the Supreme Court in the event a Petition for a Writ of Certiorari shall be filed and granted.

Respectfully submitted,

Rhodes E. Cave, R. H. McRoberts, Marion S. Francis, 1630 Boatmen's Bank Building, St. Louis 2, Missouri, Attorneys for Appellant, The United States Cartridge Company.

Bryan, Cave, McPheeters & McRoberts, 1630 Boatmen's Bank Building, St. Louis 2, Missouri, Of Counsel.

April 27, 1949.

[fol. 1047] EXHIBIT A

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DIVISION OF THE EASTERN JUDICIAL DISTRICT OF MISSOURI

No. 3597

Court No. 1. Civil Action

R. M. POWELL, et al., Plaintiffs,

vs.

THE UNITED STATES CARTRIDGE COMPANY, a Corporation, Defendant

Brief on Behalf of Defendant, the United States Cartridge Company

* * * * * * * *

"(3) *The Walsh-Healey Act.*

The Fair Labor Standards Act was passed in 1938. At that time, the Walsh-Healey Act, 41 U. S. C. 35-45, was in effect, having been enacted in 1936. The Walsh-Healey Act applies to contracts of the Government for the manufacture or furnishing of materials, supplies, articles, and equipment in any amount exceeding $10,000.00, and was unquestionably applicable to the employees of contractors such as The United States Cartridge Company. Under the Walsh-Healey Act employees working for independent contractors on Government contracts, were entitled to a forty-hour week, with time and one-half for overtime. They had the right to collect such unpaid wages at Government expense, although the Walsh-Healey Act did not give an employee as liquidated damages an amount of unearned overtime equal to the amount of earned overtime withheld. Thus, *at the time the Fair Labor Standards Act was passed, there was in full force and effect a law giving to employees of Government contractors all of the benefits which the plaintiffs now claim under the Fair Labor Standards Act, except the right to receive in addition to the alleged unpaid overtime compensation 'an equal amount as liquidated damages'.* Can it be truly said that the failure to provide for such additional 'windfall' was one of the evils which [fol. 1048] Congress sought to cure by the enactment of the

Fair Labor Standards Act? Is it reasonable to assume that Congress intended by the Fair Labor Standards Act to provide that employees on Government contracts should receive, at *Government expense*, not merely time and one-half overtime, but an additional equal amount 'as liquidated damages'; that Congress was intending to penalize the Government in the event that employees working on cost-plus Government contracts should not be paid the overtime provided for under the Walsh-Healey Act? On the contrary, the fact that the Walsh-Healey Act was in effect at the time the Fair Labor Standards Act was passed, that the Walsh-Healey Act made adequate provision with respect to overtime compensation of employees working on Government contracts, that there was no evil in this respect needing further legislation for its correction, must be taken into consideration in determining the intention of Congress with respect to the scope of the Fair Labor Standards Act. We submit that since Congress had by the Walsh-Healey Act already made provision for workmen employed by contractors dealing with the Government, it was the purpose of Congress in enacting the Fair Labor Standards Act to extend the benefits already enjoyed by workers on Government contracts over the larger field of workers in private industry whose employers were not engaged as Government contractors. This Congress expressly sought to do pursuant to the power delegated to it under the Commerce Clause of the Constitution, and inserted the double damage provision as an aid to enforcement, and, as will be pointed out later, as a species of compulsion against private industry. Surely Congress did not need to provide further penalties against the Government over and beyond those contained in the Walsh-Healey Act. While Congress may have had, in the field of private industry, unregulated by the provisions of the Walsh-Healey Act, a reason for providing for liquidated damages without reference in any respect to actual damages, as a means of compulsion to [fol. 1049] secure observance of the law, there was no need of any such liquidated damages in the field of Government contracts, particularly cost-plus contracts, where every action of the employer is controlled by the Government, checked and supervised by Government auditors and inspectors, and where the Government pays the bill. Clearly no such thought could have been in the mind of Congress when it sought, in the exercise of its delegated power to

regulate commerce among the several states, to require private industry to meet the standards already applicable to Government contractors, and to provide, in addition, a practical inducement to compliance. Nor did Congress intend, by the enactment of the Fair Labor Standards Act, to supersede the Walsh-Healey Act in the field of Government contracts; and the Government recognized the fact that the Walsh-Healey Act had not been superseded by specifically including its provisions in Contract No. W-ORD-491.

We submit then that the Act must be read in the light of Congress' finding as to the evil which it sought to remedy, the policy which it sought to enforce, the power which it sought to exercise, the means of accomplishment of the desired end, and the existence on the statute books of the Walsh-Healey Act, already covering with respect to employees on Government contracts the same field covered by the Fair Labor Standards Act. So read, it will appear that Congress did not intend to have any general language used in the Act applied against the Government itself."

* * * * * * *

To said Brief on Behalf of Defendant The United States Cartridge Company there was attached an appendix reading, in part, as follows:

"APPENDIX 'A'

Material Portions of Contract No. W-ORD-491

"Contract No. W-ORD-491

"Cost-Plus-a-Fixed-Fee Operation Contract.

"War Department"

[fol. 1050]

* * * * * * *

"Article III-D—Walsh-Healey Act.

"1. The following representations and stipulations pursuant to the Walsh-Healey Public Contracts Act (Act of

June 30, 1936: 49 Stat. 2036; 41 USC 35-45), shall apply to the performance of this contract:

(Here follow the specific representations and stipulations required by the Walsh-Healey Act.)"

. . . . . .

[fol. 1051] EXHIBIT B

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DIVISION OF THE EASTERN JUDICIAL DISTRICT OF MISSOURI

Court Room No. 1

Civil Action No. 3597

R. M. POWELL, et al., Plaintiffs,

vs.

THE UNITED STATES CARTRIDGE COMPANY, a Corporation, Defendant

REPLY BRIEF FOR PLAINTIFFS

. . . . . .

"We may add at this point that defendant's counsel are in error in their contention that these plaintiffs could obtain relief under the Walsh-Healey Act. This act applies only to strictly production workers (41 U.S.C.A. Secs. 35-45, *Perkins, etc. v. Endicott-Johnson Corp.*, 40 Fed. Sup. 254, l. c. 256, paragraphs 2 and 3)."

. . . . . .

[fol. 1052] EXHIBIT C

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DIVISION OF THE EASTERN JUDICIAL DISTRICT OF MISSOURI

Civil No. 3597

R. M. POWELL, et al., Plaintiffs,

v.

THE UNITED STATES CARTRIDGE COMPANY, a Corporation, Defendant

MEMORANDUM ON ORAL ARGUMENT AND REPLY FOR THE ADMINISTRATOR OF THE WAGE AND HOUR DIVISION, UNITED STATES DEPARTMENT OF LABOR, AS AMICUS CURIAE

* * * * * * *

"The defendant, in its argument, has injected another issue into this case which we believe requires some refutation. Defendant states (pages 6 to 9) that its employees were covered by the Walsh-Healey Act and that 'this Act' gives the 'employees' of Government contractors all of the benefits which the plaintiffs now claim under the Fair Labor Standards Act 'except the right to receive, in addition to the alleged unpaid overtime compensation, "an equal amount as liquidated damages."' This general argument of the defendant is not an accurate statement of the coverage of the Walsh-Healey Act. Actually the Walsh-Healey Act and the administration thereof by the Secretary of Labor, in substance, is limited to employees who are closely related to the operations 'preparatory or necessary to, or in the performance of the Government contract.' Supervisory, custodial, maintenance, and many other employees were not deemed to be covered by the Walsh-Healey Act. For the information of the Court and counsel, we are attaching herewith Rulings and Interpretations No. 2 of the [fol. 1053] United States Department of Labor relating to the Walsh-Healey Public Contracts Act, and we call particular attention to 'Section III—Employees,' page 19, wherein the employees covered and not covered by the Act are described. These rulings and interpretations were in effect until superseded on October 1, 1945, by Rulings and

Interpretations No. 3, a copy of which is also furnished herewith to Court and counsel for their information.

Coverage of employees under the Fair Labor Standards Act is much broader and more comprehensive than employees covered under the Walsh-Healey Act. The term 'produced' as defined under Section 3 (j) of the Act, has been given a broad application (*Fleming v. Kirschbaum Co.*, 124 Fed. (2d) 567, at 571; affirmed 316 U. S. 517), and has been applied to cover employees engaged in 'all steps, whether manufacture or not, which lead to readiness for putting goods into the stream of commerce.' (*Western Union Telegraph Co. v. Lenroot*, 323 U. S. 490, 503). Thus, the Act has been applied to elevator operators, watchmen (*Kirschbaum v. Walling*, supra), to auxiliary fire guards (*Armour & Co. v. Wantock*, 323 U. S. 126), window washers, and similar maintenance men (*Martino v. Michigan Window Cleaning Co.*, 66 Sup. Ct. 379), and numerous other employees whose work was necessary to the production of goods for commerce, such as clerical employees, truck drivers, cooks, etc. See *Walling v. Jacksonville Paper Co.*, 128 F. (2d) 395 (C.C.A. 5); *Walling v. Mutual Wholesale Food & Supply Co.*, 141 F. (2d) 331 (C.C.A. 8); *Consolidated Timber Co. v. Womack*, 132 F. (2d) 101 (C.C.A. 9); *Hanson v. Lagerstrom*, 133 F. (2d) 120 (C.C.A. 8); *Walling v. C. E. Amidon*, 153 F. (2d) 159 (C.C.A. 10); and *Culver v. Bell & Loffland, Inc.*, 146 F. (2d) 29 (C.C.A. 9).

It was also understood by the War Department and the cost-plus contractors, such as defendant, that there were employees in these ordnance plants who likely were not under the Walsh-Healey Act but were within the coverage [fol. 1054] of the Fair Labor Standards Act. For example, see *Eustice v. Federal Cartridge Corp.*, 6 Wage Hour Cases 221 (U.S.D.C. Minn.), decided June 13, 1946. The question there was whether or not certain firemen working under the so-called two-platoon system in the Twin Cities Ordnance Plant, operated by the defendant, Federal Cartridge Corporation as a cost-plus-a-fixed-fee contractor with the United States Government, for the manufacture of ordnance for the United States Army, had been paid overtime in accordance with the Fair Labor Standards Act. The two-platoon contract had been entered into with the defendant's employees on January 11, 1944, and there appears in the Court's decision, reference to the correspondence of date

February 11, 1944, between Deputy Administrator Wm. R. McComb, replying to Lt.-Col. Wm. J. Brennan, Jr., Chief, Labor Section, Office of Chief of Ordnance, War Department, that he had examined the proposed plan of the two-platoon system and approved it, saying: 'The operation of this plan appears to be unobjectionable under the Fair Labor Standards Act, and you may so advise the contractor-operator.' It should be noted, parenthetically, that Lt.-Col. Brennan is an official of the War Department in the Office of the Chief of Ordnance, and that defendant's contract (defendant's Ex. 20, in Article III-T-Definitions) refers to the Chief of Ordnance as one of the representatives of the War Department who, throughout the contract, is charged with the principal duties relating to the administration of the contract on the part of the War Department.

In another recent case, *Swettman v. Remington-Rand, Inc.*, 6 W-H Cases 336 (U.S.D.C., S.D. 111.), decided October 10, 1946, police matrons in an ordnance plant operated by the defendant employer under a cost-plus-a-fixed-fee contract with the United States Government were held to come within the provisions of the Fair Labor Standards Act. The ordnance plant was the Sangamon Ordnance Plant, and the contract was for the assembling and loading of ammuni-
[fol. 1055] tion for the United States Army. The plaintiffs were employed for varying periods of time between December 17, 1942, and August 25, 1945, during which time they worked a varying number of hours and were not paid overtime for their hours in the workweek in excess of 40 hours. The Court concluded that the plaintiffs came within the provisions of the Fair Labor Standards Act and were entitled to the benefits provided thereby. There are numerous other cases of a similar nature applying the Act to varying classes of employees of cost-plus-a-fixed-fee contractors. For example, see *Dolan v. Day & Zimmerman, Inc.*, 6 W-H Cases 9 (U.S.C.D. Mass.), decided April 18, 1946; *Hoff v. North American Aviation Co.*, 6 W-H Cases 216 (U.S.D.C., N.D. Tex.); *Ferguson* v *Fred B. Prophet Co.*, 6 W-H Cases 284 (U.S.D.C., S.D. Ind.), see Finding No. 10.

Thus, the conclusion that the Fair Labors Standards Act does not apply to cost-plus-a-fixed-fee Government contractors for the reason that such employees were covered by the provisions of the Walsh-Healey Act, is clearly at variance with the decided cases and unsupported by the actual

wage payments and wage practices which were effective during the life of this contract and recognized by the defendant as well as the contracting governmental agency."

[fol. 1056] STATE OF MISSOURI,
City of St. Louis, ss:

R. H. McRoberts, being duly sworn, on his oath states that the above and foregoing Exhibits A, B and C are true and correct copies, respectively, of excerpts from:

(a) the Brief on Behalf of Defendant The United States Cartridge Company filed on September 24, 1946, and Appendix "A" thereto,

(b) the Reply Brief for Plaintiffs filed on October 12, 1946, and

(c) the Memorandum on Oral Argument and Reply for the Administrator of the Wage and Hour Division, United States Department of Labor, as Amicus Curiae, filed on October 31, 1946, in the District Court of the United States for the Eastern District of Missouri, in the case of R. M. Powell, et al., Plaintiffs, vs. The United States Cartridge Company, a corporation, Defendant, being No. 3597, Civil Action of the said Court.

R. H. McRoberts.

Subscribed and sworn to before me this 27th day of April, 1949. My commission expires July 4, 1949. Ruth F. Weakly, Notary Public. (Seal.)

[fol. 1057] I hereby certify that service of the foregoing Appellant's Motion to Modify Opinion was made upon Appellees by mailing a copy thereof to their attorney, Thomas Bond, 408 Olive Street, St. Louis 2, Missouri, on April 27, 1949; and I further certify that service of said Motion was made upon L. Metcalfe Walling, Amicus Curiae, by mailing a copy thereof to his attorney, Reid Williams, Regional Attorney, Department of Labor, at his last known address, 3000 Fidelity Building, Kansas City 6, Missouri, on April 27, 1949.

Marion S. Francis, Attorney for Appellant.

[Endorsed:] Filed in U. S. Court of Appeals, Apr. 27, 1949.

[fol. 1058] UNITED STATES COURT OF APPEALS, EIGHTH CIRCUIT

I, E. E. Koch, Clerk of the United States Court of Appeals for the Eighth Circuit, do hereby certify that the foregoing fifteen typewritten pages contain full, true and complete copies of the Praecipe and Designation of Appellant of Additional Parts of the Record for consideration of the Supreme Court of the United States upon petition for writ of certiorari filed by appellees and of the Motion to Modify Opinion, in the case of The United States Cartridge Company, a Corporation, Appellant, vs. R. M. Powell, et al., Appellees, No. 13663, as full, true and complete as the originals thereof remains on file and of record in my office.

In Testimony Whereof, I hereunto subscribe my name and affix the seal of the United States Court of Appeals for the Eighth Circuit, at office in the City of St. Louis, Missouri, this 10th day of June, A. D. 1949.

E. E. Koch, Clerk of the United States Court of Appeals for the Eighth Circuit. (Seal.)

In the Supreme Court of the United States.

October Term, 1949.

R. M. Powell, et al.,
Petitioners,
v.
The United States Cartridge Company, a corporation,
Respondent.
No. 96.

Stipulation.

It is hereby stipulated and agreed by and between the parties hereto by their respective attorneys that certain photostats of exhibits appearing in the record on file herein are not essential to a consideration of the questions presented by the petition for the writ, and that same may be omitted from the thirty additional copies of the record required to be filed herein upon certiorari being granted, under the provisions of Rule 38, Paragraph 7 of this Court, and that said additional copies of said record with said photostats deleted may be accepted as in all respects in compliance with the Rules of this Court.

A list of the photostats of exhibits thus to be deleted and omitted in the preparation of the aforesaid additional copies of the record is attached as Exhibit A hereto.

Dated this 13th day of October, 1949.

THOMAS BOND,
Attorney for Petitioners.

R. H. McROBERTS,
WILLIAM L. MARBURY,
Attorneys for Respondent.

Exhibit A.

List of Non-essential Exhibits to be Deleted and Omitted in the Preparation of Additional Sets of the Record in Powell, et al., v. The United States Cartridge Company, Docket No. 96, October Term, 1949.

Record p. 43, organizational chart.

" " 81, accident report.

" " 95, fire extinguisher chart.

" " 121 to 147, inclusive, Plaintiffs' Exhibits A-1, A-2, A-3, A-29, and A-47, being summaries of information taken from the payroll records.

" " 149 to 181, inclusive, Plaintiffs' Exhibits B-1, B-2, B-3, B-29, and B-47, being computation of the overtime claims of certain plaintiffs.

" " 325 and 327, Defendant's Exhibits 7 and 8, being notices of employment.

" " 429, Plaintiffs' Exhibit O-1, paid invoice for inbound material.

" " 431, Plaintiffs' Exhibit O-2, same.

" " 453, Defendant's Exhibit 9, sample time card.

" " 459, Defendant's Exhibit 10, duplicate organization chart.

" " 589, 591, Defendant's Exhibit 12, job description.

" " 597 to 607, inclusive, Defendant's Exhibit 13, job description.

" " 609, Defendant's Exhibit 14, job description.

" " 611, Defendant's Exhibit 14, exemption ruling by occupational analyst.

" " 623, Defendant's Exhibit 15, sample time card.

" " 625, Defendant's Exhibit 16, sample time card.

" " 371, Plaintiffs' Exhibit J, being bill of lading on munitions shipment.

SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed October 10, 1949

The petition herein for a writ of certiorari to the United States Court of Appeals for the Eighth Circuit is granted. The case is assigned for argument immediately preceding the hearing of Nos. 58 and 79 which cases are transferred to the summary docket.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

LIBRARY
SUPREME COURT, U.S.

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1949

No. 79

JULIA RHODA AARON AND ALL OTHER PLAINTIFFS AND INTERVENERS LISTED IN THE COMPLAINTS AND INTERVENTIONS IN THE DISTRICT COURT IN CIVIL ACTION NO. L. R. 1584, CONSOLIDATED, PETITIONERS,

vs.

FORD, BACON & DAVIS, INCORPORATED

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITION FOR CERTIORARI FILED MAY 24, 1949.

CERTIORARI GRANTED JUNE 27, 1949.

(This Printed Volume of the Record Is Bound in Three Sections Consisting of the Record, the Supplemental Record and the Proceedings in the Court of Appeals. Each Section Carries Its Own Pagination)

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Pleas and proceedings in the United States Court of Appeals for the Eighth Circuit, at the March Term, 1949, of said Court, before the Honorable Archibald K. Gardner, Chief Judge, and the Honorable John B. Sanborn, the Honorable Joseph W. Woodrough, the Honorable Seth Thomas, the Honorable Harvey M. Johnsen, the Honorable Walter G. Riddick and the Honorable John Caskie Collet, Circuit Judges.

Attest:

E. E. KOCH,
Clerk of the United States Court of Appeals for the Eighth Circuit.

(Seal)

Be it Remembered that heretofore, to-wit: on the 15th day of November, A. D. 1947, transcript of record pursuant to an appeal taken from the District Court of the United States for the Eastern District of Arkansas, was filed in the office of the Clerk of the United States Circuit Court of Appeals for the Eighth Circuit, and thereafter on the 22nd day of November, A. D. 1947, abstract of record was also filed in the office of said Clerk of said Circuit Court of Appeals, in a certain cause wherein Julia Rhoda Aaron and all other plaintiffs and interveners listed in the Complaints and Interventions in The District Court in Civil Action No. L. R. 1584, Consolidated, were Appellants, and Ford, Bacon & Davis, Incorporated, was Appellee.

Record as printed by appellants and Supplemental Record as printed by appellee, on which the appeal was heard in the United States Court of Appeals for the Eighth Circuit, are in the words and figures following, to-wit:

RECORD.

United States Circuit Court of Appeals
EIGHTH CIRCUIT

No. 13,660

CIVIL

JULIA RHODA AARON AND ALL OTHER PLAINTIFFS AND INTERVENERS LISTED IN THE COMPLAINTS AND INTERVENTIONS IN THE DISTRICT COURT IN CIVIL ACTION No. L. R. 1584 CONSOLIDATED, APPELLANTS,

vs.

FORD, BACON & DAVIS, INCORPORATED, APPELLEE.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF ARKANSAS.

ABSTRACT FILED NOVEMBER 22, 1947.

United States Circuit Court of Appeals
EIGHTH CIRCUIT

No. 13,660

CIVIL

JULIA RHODA AARON AND ALL OTHER PLAINTIFFS AND INTERVENERS LISTED IN THE COMPLAINTS AND INTERVENTIONS IN THE DISTRICT COURT IN CIVIL ACTION No. L. R. 1584 CONSOLIDATED, APPELLANTS,

vs.

FORD, BACON & DAVIS, INCORPORATED, APPELLEE.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF ARKANSAS.

ABSTRACT FILED NOVEMBER 22, 1947.

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[fol. 1] In the United States District Court, Eastern District of Arkansas, Western Division.

Julia Rhoda Aaron et al.,	Civil Action No. L.R.-1584;
Monnie Adams et al.,	Civil Action No. L.R.-1578;
Mary B. Alexander et al.,	Civil Action No. L.R.-1545;
Carroll Arrington et al.,	Civil Action No. L.R.-1192;
Willie K. Hobbs et al.,	Civil Action No. L.R.-1469;
Dan P. Moore et al.,	Civil Action No. L.R.-1244;
H. J. Story et al.,	Civil Action No. L.R.-1382,

Plaintiffs,

vs.

Ford, Bacon & Davis, Inc., Defendant,

Consolidated and now known as

Julia Rhoda Aaron et al., Plaintiffs,
No. L.R.-1584 vs. Civil Action Consolidated.
Ford, Bacon & Davis, Inc., Defendant.

Record on Appeal to the Circuit Court of Appeals

Agreed Statement

This appeal involves seven separate actions filed against the defendant, Ford, Bacon & Davis, Inc., operator of the Government-owned Arkansas Ordnance Plant under a cost-plus-a-fixed-fee contract with the Government. The first of these actions was filed on October 1, 1945, and the last on February 6, 1947. Over 1,800 individuals made claims for additional compensation in these seven actions. A conservative estimate of the total amount in suit, exclusive of liquidated damages and costs, is in excess of $500,000.00. Various pleadings were filed in each case by each party, until finally the issues were joined. Thereafter, the defendant filed identical motions for summary judgment in each of the seven cases. Upon request of the plaintiffs, the seven actions were consolidated, and a hearing was held

in the consolidated case. At this hearing counsel for plaintiffs stipulated that the affidavits in opposition to the motion for summary judgment raised no disputed issues of fact. Thereupon the court, after hearing argument of counsel, granted the motion for summary judgment, and from the judgment entered thereon plaintiffs appealed.

[fol. 2] Although the complaint and subsequent pleadings in each of the cases are not identical, for the purpose of this appeal it is believed that all issues can be presented adequately and clearly by including in the record the essential pleadings in one case only.

Therefore, in order to reduce the cost of preparing the record on appeal and to relieve the court of the burden imposed by a tremendous record, the parties hereby agree that the record on appeal shall contain the following matters:

1. This agreed statement.

2. The complaint filed by 1,278 named individuals on February 6, 1947, in the case of Julia Rhoda Aaron et al., vs. Ford, Bacon & Davis, Inc.

3. The answer filed in said case on May 23, 1947.

4. The motion for summary judgment filed on July 23, 1947.

5. The response to motion for summary judgment filed on August 11, 1947.

6. The motion for consolidation filed on August 15, 1947.

7. The order of consolidation.

8. The plaintiffs' requests for admissions of fact and the responses filed thereto by defendant.

9. The interrogatories propounded by plaintiffs and the responses thereto by the defendant.

10. The order for summary judgment.

11. The opinion of the court.

12. The notice of appeal.

13. Bond for costs on appeal.

14. The appellants' statement of points relied on.

15. The order extending the time to file record on appeal.

TALLEY & OWEN,
C. H. EARL,
GERLAND P. PATTEN,
JUNE P. WOOTEN.

By Gerland P. Patten,
Attorneys for Plaintiffs
and Interveners.

OWENS, EHRMAN &
McHANEY,

By E. L. McHaney, Jr.,
Attorneys for Defendant.

Approved:

Harry J. Lemley,
United States District Judge.

(Endorsed): Filed in U. S. District Court on October 30, 1947.

[fol. 3] Complaint

Comes the plaintiffs by their Attorneys, C. H. Earl, J. W. McHughes, and Gerland P. Patten, and for a cause of action against the defendant, allege:

I.

That the plaintiffs were employed by the defendant for the time shown on the attached exhibit which is attached hereto and made a part hereof and marked Exhibit "A". The employment of the plaintiffs was based upon and evidenced by a written instrument, a copy of which is attached hereto and made a part hereof and marked Exhibit "A".

II.

That the plaintiffs and each of them have a cause of action against the defendant arising out of their employment by the defendant for overtime wages due to them under the provisions of the Fair Labor Standards Act of 1938, whereby it is provided that a working week shall be forty (40) hours and any hours worked in excess thereof shall be paid for at the rate of one and one-half times the regular base pay rate.

III.

That the defendant, Ford, Bacon & Davis, Inc., is a corporation organized and existing under and by virtue of the laws of the State of New Jersey and at all times mentioned herein as duly qualified and authorized to engage in business in the State of Arkansas and was so engaged; that the defendant at all times mentioned herein controlled, maintained, and operated an Ordnance Plant in Pulaski County, Arkansas, called the Arkansas Ordnance Plant, wherein goods for commerce were produced.

IV.

That the plaintiffs named above; beginning with Ethel Lee Anderson and ending with Joe Williams were handlers, carriers, and processors of explosives. Their duties were to process, carry and otherwise handle the various types of powder that went into and became an ingredient of the items of ordnance manufactured, made, processed, and produced at the Arkansas Ordnance Plant. That the plaintiffs named above, beginning with Mattie L. Bell and ending with David Young, were production employees on production lines and acted as line leaders and assistant line leaders. Their duties were to prepare the working place for other employees known as operators and to direct and [fol. 4] assist in the handling, processing, and producing of items or ordnance at the Arkansas Ordnance Plant. The other plaintiffs named above beginning with Julia Rhoda Aaron and ending with Robert Young, were operators whose duties were to handle, make, load, assemble, process, and produce items of ordnance at the Arkansas Ordnance Plant. That all of the above-named plaintiffs were engaged in the production of goods for commerce within the meaning of the Fair Labor Standard Act.

V.

That plaintiffs and each of them state that during the time of their respective employment with the defendant, they performed work and labor for it in excess of forty (40) hours per week for which they have not been compensated. The plaintiffs were paid on an hourly basis for a work day of eight (8) hours and a work week of forty (40) hours based on scheduled work hours. The scheduled work hours were divided into three shifts and were from seven (7) o'clock in the morning to three (3) o'clock in the afternoon, from three (3) o'clock in the afternoon to eleven (11) o'clock in the evening, and from eleven (11) o'clock in the evening until seven (7) o'clock the next morning. There was also one production line, referred to as the "Colored Line" which had scheduled work hours from nine (9) o'clock in the morning until five (5) o'clock in the afternoon. The plaintiffs were compelled by the necessities of the defendant's business, by the physical arrangement of the Plant, by the productive aims of the defendant, and by instructions of the defendant to perform work and labor for and to be upon the premises controlled, maintained and operated by the defendant for approximately thirty-five (35) minutes prior and thirty (30) minutes subsequent to the scheduled work hours each work day for which they were not compensated. This action is to recover compensation for such work, labor and time.

The Arkansas Ordnance Plant, at which these plaintiffs were employed, was located upon an inclosed reservation containing several thousand acres. On the reservation and several miles distant from gates (referred to hereinafter as "outer gate") giving admittance to the reservation were production areas. Each production area was inclosed, with a gate (hereinafter referred to as the "inner gate") giving admittance thereto and through which employees working in that area were required to pass. From one hundred (100) to five hundred (500) feet from the inner gate, on the outside of the inclosed production area, was a space (here-
[fol. 5] inafter referred as the "parking area") about a block square designed and used for the loading and unloading of buses and for the parking of privately owned vehicles. From three hundred (300) to eight (800) hundred feet from the inner gate and within the inclosed produc-

tion area was a clock house containing time clocks, time cards, time card racks, etc. From thirty (30) to one hundred (100) feet from the clock house, and usually connected thereto by covered walkways, were buildings (one for men and one for women, referred to hereinafter as "change house") wherein were lockers, bathing facilities, sanitary facilities, and other facilities required by the defendant's business. Underneath the change house was a concrete basement (hereinafter referred to as "bomb shelter") wherein were facilities for serving and eating food and for smoking. From three (300) to fifteen hundred (1500) feet from the bomb shelter were buildings wherein plaintiffs worked.

The distance from the nearest outer gate to the inner gate of the respective production areas was from two (2) to four (4) miles depending on the particular production area. The employees could drive their own vehicles, they could ride with another employee in his car, they could ride public carrier buses, or they could ride buses furnished by the employer. At the outer gate armed employees of the defendant were stationed to check all vehicles and all personnel seeking entrance to the reservation. Said armed employees satisfied themselves, as required by the rules and regulations of the defendant, that all of the vehicles had been inspected and approved by the defendant and bore thereon prescribed identifying patches, that the personnel were in proper physical condition and bore on their person prescribed identifying insignia, that certain prohibited articles were not carried onto said reservation, and that the vehicles and personnel conformed to all the conditions required of them by the defendant. If satisfied, the armed employees permitted the plaintiffs, and other employees, to pass through said outer gate. Once permitted to pass through the outer gate and enter upon the premises of the defendant, the plaintiffs, their actions, their conduct, and their movement from the outer gate to the inner gate of their respective production areas whereon they worked were subject to the detailed, immediate, supervised and absolute control of the defendant. Such control included, but was not limited to, the following: (1) the vehicles in which the plaintiffs rode were operated only by control of and with approval of the defendant, or after being inspected and approved by it; (identifying insignia must

be worn by plaintiffs at all times; (3) the route (roads) to the respective production areas was designated and no [fol. 6] deviation therefrom permitted; (4) the speed of the vehicles, together with all other traffic signals and procedures, both of a general nature and of a special nature applicable to the defendant's premises, were established and enforced by the defendant; (5) no stopping on the side of the road was permitted except in emergencies; (6) no parking on the side of the road was permitted; (7) no visiting on other production areas before proceeding on to the areas whereon plaintiffs worked was permitted; (8) no delay in movement of traffic was permitted; (9) no slighting from the vehicles and proceeding on foot was permitted; (10) no motorcycles, bicycles, scooters, horses, carriages or heavy trucks were permitted as a means of transportation of personnel; (11) the mode of transportation and travel was prescribed and was limited to the use of buses, automobiles and light trucks modified to carry personnel; (12) employees, including these plaintiffs, found off the established route were subject to immediate arrest, detention, reprimand and discharge; (13) devious and unauthorized approaches to the production areas were not permitted; (14) the time to be consumed in the movement was prescribed; (15) no movement other than a continuous, undelayed one, from the outer gate to the production areas was tolerated, except as authorized; (16) armed employees of the defendant patrolled the roads and areas to enforce the control measures of the defendant; (17) the manner of loading and unloading of buses and the parking of vehicles at the parking areas were prescribed; (18) the time for and to be consumed in the loading and unloading of passengers from the buses and the parking of vehicles on the parking area were prescribed and regulated; (19) the route from the parking area to the inner gate of the production area was designated; and (20) violations and infractions of the control measures subjected the employees, including these plaintiffs, to immediate arrest, detention, investigation, reprimand and discharge. The movement from the outer gate to the production areas was necessary to enable the plaintiffs to reach their places of work, was necessary to the productive aims of the defendant, necessitated by the physical arrangement of the Plant, and was for the benefit of the defendant.

The plaintiffs, their actions, conduct and movement through the inner gate of the production area to the clock house located on the production area wherein plaintiffs worked were subject to the detailed, immediate, supervised and absolute control of the defendant. Such control included, but was not limited to, the following: (1) no smoking was permitted; (2) running was forbidden; (3) possession of matches or cigarette lighters was prohibited; (4) loud talk and/or loud laughter was discouraged; (5) horseplay was strictly forbidden; (6) assembly of two or more in a group to stop and talk was forbidden; (7) the throwing or casting away of any article was prohibited; (8) any [fol. 7] delay in movement was forbidden; (9) bicycles, scooters or skates could not be used; (10) the roadway or walkway to be used was prescribed; (11) the person was subject to detention and search at any time; (12) the plaintiffs, and other employees, once admitted to the production area, could not leave same before the end of their scheduled work hours without first obtaining permission of the defendant, which was granted only in emergencies; (13) armed employees of the defendant were stationed at the inner gate to enforce the control measures of the defendant; (14) the plaintiffs were compelled to identify themselves to the armed employees at the inner gate by displaying prescribed identifying insignia, compelled to surrender matches and cigarette lighters, were subject to search and were, in fact, frequently searched; and (15) violations and infractions of the control measure subject the plaintiffs to immediate arrest, detention, investigation, reprimand and discharge. The movement through the inner gate to the clock house was necessary to enable the plaintiffs to reach their places of work, was necessary to the productive aims of the defendant, necessitated by the physical arrangement of the Plant, and was for the benefit of the defendant.

The defendant required the plaintiffs to present themselves at the clock house on the production line in sufficient time for them to clock in, go to the change house, divest themselves of all articles of a particular nature, such as rings, watches, bracelets, combs and purses and pocket books, change into clothing prescribed by the defendant, was exposed parts of their bodies and treat said exposed parts with preparations furnished by the defendant and

esigned to prevent powder poisoning, and, in the case of owder carriers and backline workers, bathe and dress emselves completely in prescribed clothing furnished em by the defendant, and go to the bomb shelter, arrange emselves therein in a prescribed manner and upon the ounding of a signal at five (5) minutes prior to the sched-led work hours, march, in semi-military formation, along rescribed walkways to their respective places of work. ome of the plaintiffs, charged with additional duties, in-tead of going to the bomb shelter from the change house ere instructed to and did go directly to their places of ork and upon arrival thereat, began to perform the duties equired of them by the defendant. Some of the plaintiffs, hose places of work were in buildings or at places in the roduction area more distant from the bomb shelter than ere the loading buildings, were directed to and did leave he bomb shelter prior to the sounding of the signal men-ioned above and proceeded on to their respective places f work so that they might arrive thereat exactly at the be-inning of the scheduled work hours.

fol. 8] Some of the plaintiffs named above, whose uties were the handling and processing of explosives, ere instructed and did report for duty thirty (30) minutes rior to the scheduled work hours. Other plaintiffs amed above, whose duties were to act as line leader and ssistant line leaders, were instructed to and did report or duty and began the performance of the duties of their mployment fifteen (15) minutes prior to the scheduled ork hours.

The plaintiffs, their actions, conduct and movement from he time they presented themselves at the clock house on he production line to the moment they reached their espective work places and began the performance of the uties required of them by their employment were under he direct, immediate, supervised and absolute control of he defendant. Such control included, but was not lim-ted to, the following: (1) the walkway to be used to o from the clock house to the change house was pre-cribed and designated; (2) movement on said walkway ust be without delay, nor was stopping, running or loit-ring thereon permitted; (3) no smoking was permitted; 4) the door or doors to be used in gaining entrance to

the change house was designated and the use of any other door or doors forbidden; (5) the time spent in the change house and the door or doors for leaving same were established and enforced; (6) the articles to be removed because the wearing of them at work was prohibited were set out specifically and included articles customarily and necessarily worn daily by the plaintiffs when not employed at their duties; (7) the clothing to be worn by the plaintiffs while at work was prescribed by the defendant, sold by defendants authority upon the premises of the Arkansas Ordnance Plant; (8) the application of preparations on exposed parts of the body was required by the plaintiffs by the defendant; (9) the walkway to be used in going from the change house to the bomb shelter and the door or doors to be used to enter the bomb shelter were prescribed and the use of others were forbidden; (10) the plaintiffs must group themselves in the bomb shelter in such a manner that they could arrange themselves at the door according to the building in which they worked; (11) their formation, their gait, the walkway or walkways to be used from the bomb shelter to the places of work were prescribed, regulated, and directed by supervisory personnel of the defendant physically present and physically directing and leading said movement to places of work from the bomb shelter; (12) the plaintiffs, once clocked in, could not clock out before the expiration of their scheduled work hours without the permission of the defendants first obtained, and granted only in emergencies; (13) the plaintiff's were subject to and were frequently directed to perform duties relating to their employment prior to the begining of their sched-
[fol. 9] uled work hours; (14) supervisory personnel of the defendant were present to enforce the control measures of the defendant, and, if need arose, armed employees of the defendant could be called from the inner gate; and (15) deviations from, violations and infractions of the control measures were not tolerated and subjected the employee to disciplinary action. The time spent by the plaintiffs from the time they presented themselves at the clock house to the time they began the performance of their duties at their work places at the beginning of the scheduled work hours was spent solely in obedience to the direction and instructions of the defendant and was

necessary to enable the plaintiffs to reach their places of work, was necessary to the productive aims of the defendant, necessitated by the physical arrangement of the Plant, and was for the benefit of the defendant.

The control measure applied to the plaintiffs from the time they entered the outer gate until they reached their respective work places at the beginning of the scheduled work hours were likewise applied to them from the time they left their respective work places at the end of their scheduled work hours until they departed through the outer gate. The activities of the plaintiffs at the expiration of their scheduled work hours were as follows: (1) they were marched in semi-military formation from their places of work to the change house, if their places of work were not in the loading buildings, they proceeded in groups under the direction of supervisory personnel from their work places to the change house; (2) in the change house, they washed the exposed parts of their bodies and treated same with preparations designed to present powder poisoning, removed shoes and garments required to be worn while on duty because of the nature of their work, put on their street clothes, secured those articles removed prior to the beginning of their scheduled work hours such as combs, rings, watches, purses, pocket books, etc., went to the clock house and clocked out.

The time required to go from the clock house through the inner gate and from there through the outer gate subsequent to the scheduled work hours was the same as required for the movement prior to the scheduled work hours. The activities and movements subsequent to the scheduled work hours were likewise necessary to enable the plaintiffs to retire from their places of work, was necessary to the productive aims of the defendant, was necessitated by the physical arrangement of the Plant, and was for the benefit of the defendant.

That the plaintiffs do not have possession of or access to the records showing the time shown on the clock cards, the rate of pay, the amount paid them, or records showing the control exercised over them while they were upon the [fol. 10] premises controlled, maintained and operated by the defendant. That said records are in the exclu-

sive possession and control of the defendant. Said records consist of the following: (1) The Pay Roll Record sheets of each plaintiff which show the date of employment, the hourly rate of pay, the date of pay increases, if any, the amount of such increased pay, the number of hours for which each plaintiffs were paid per day, per week, and the dates of termination; (2) the Time Clock Cards showing the hour and fractional part thereof at which each plaintiff clocked in and clocked out each day of employment by the defendant; (3) the complete set of plant Rules and Regulations compiled by the Plant Safety Division; (4) the Ordnance Safety Manual; (5) complete set of Traffic Regulations concerning the conduct of pedestrians and vehicular traffic within the plant; (6) a complete set of "Operation Orders" issued by the General Manager's Office, which control the conduct and activity of employees generally throughout the whole plant; (7) a complete set of Production Orders issued by the General Superintendent of Production concerning the productive activity and the type and manner of work of production employees; (8) a complete set of orders and regulations issued to the guards concerning identification and inspection of employees and the control to be exercised over them while upon the premises; (9) all regulations concerning the conduct and activity of employees during lunch periods or rest periods, if any; (10) a copy of the contract between the United States of America and the defendant, with all amendments thereto; (11) the map or chart of the premises involved showing the pertinent areas and distances drawn to scale; and (12) the contract, rules or regulations governing the operation of ~~public~~ carrier buses on the premises of the Arkansas Ordnance Plant.

That plaintiffs and each of them are entitled to recover of and from the defendant for all time worked in excess of forty (40) hours per week as provided for by the Fair Standard Labor Act for which they have not yet been compensated, said recovery to be based upon the rate of one and one-half times the regular base pay rate, for an equivalent sum as liquidated damages and for an Attorney's fee. That defendant should be required to permit plaintiffs or their Attorney to inspect and copy each of the documents mentioned above.

VI.

Wherefore, plaintiffs pray that defendant be compelled to permit plaintiffs to inspect and copy each of the documents enumerated in paragraph five (5) of this complaint, as well as any other documents which might be relevant [fol. 11] and pertinent to the allegations of this complaint, and that plaintiffs and each of them have and recover of and from the defendant a sum of money equal to one and one-half times the base pay rate per hour for all time worked in excess of forty (40) hours per week for which they have not been paid, a like sum as liquidated damages, a reasonable Attorney's fee, costs and all proper relief.

C. H. EARL,

J. W. McHUGHES,

GERLAND P. PATTEN,
Gerland P. Patten,
Attorney for the Plaintiffs,
918 Pyramid Building,
Little Rock, Arkansas.

(Endorsed) Filed in U. S. District Court on February 6, 1947.

[fol. 12] Answer

Comes the defendant, and, in answer to the complaint of the plaintiffs, states:

1. Defendant states that it has been unable to check the employment records of the Arkansas Ordnance Plant, and that therefore it does not have sufficient information or knowledge to form a belief as to whether all of the plaintiffs were employed at the Arkansas Ordnance Plant and therefore denies same.

2. Defendant admits that it is a corporation organized and existing under and by virtue of the laws of the State of New Jersey, and that during the times mentioned in the complaint it was authorized to and did engage in business in Pulaski County, Arkansas.

3. Defendant denies that plaintiffs were employed under written contracts of employment, and denies that plaintiff's employment was evidenced by written instruments.

4. Defendant denies each and every allegation of the complaint not herein specifically admitted.

5. Defendant denies that it was engaged in the production of goods for commerce and denies that plaintiffs were engaged in commerce or engaged in the production of goods for commerce.

6. Defendant states that the Arkansas Ordnance Plant at Jacksonville, Arkansas, was at all times mentioned in the complaint owned by the United States Government; that all materials, tools, improvements, machines, and other property thereon were the property of the United States Government; that said Ordnance Plant was operated by the Government through the agency of this defendant. That under the contract between this defendant and the United States Government as interpreted, executed, and acted upon by the parties to said contract, the defendant, Ford, Bacon & Davis, Inc., was at all times relevant hereto as respects the employment of plaintiffs the agent of the United States; that plaintiffs were the employees of the United States, and that the Fair Labor Standards Act is not applicable to the plaintiffs as such employees or to the United States as an employer.

7. Defendant states that the services rendered by the plaintiffs at the Arkansas Ordnance Plant were for the sole and exclusive benefit of the United States Government; that; in effect, plaintiffs were employed by the [fol. 13] United States; that their services were performed under and subject to the supervision and control of the United States; that the United States Government is the real party in interest herein; and that as employees of the United States the plaintiffs were not subject to the provisions of the Fair Labor Standards Act.

8. Defendant states that pursuant to the instructions of the United States Government it paid the plaintiffs for all

time normally considered as working time; that said payments were made by check; that accompanying said checks were written statements showing the hours worked by each of the plaintiffs and the rates paid therefor; that plaintiffs accepted said checks and the statements attached thereto without objection. That the statements attached to said checks constitute accounts stated, and the payment and acceptance of the sums shown to be due thereon constitute accord and satisfaction, and that plaintiffs are estopped to claim any additional sums by virtue of work or labor performed at the Arkansas Ordnance Plant.

9. Defendant pleads the provisions of Section 8932 of Pope's Digest of the Statutes of the State of Arkansas as a complete defense to all claims set forth in the complaint which arose prior to February 6, 1945.

10. In the alternative, defendant pleads the provisions of Section 8928 of Pope's Digest of the Statutes of the State of Arkansas as a complete defense to all claims set forth in the complaint which arose prior to February 6, 1944.

11. Defendant states that it appears from the complaint that the plaintiffs seek to recover wages for time consumed in traveling to and from their places of work and for other activities engaged in preliminary and postliminary to their regular hours of work. That said activities and travel time were not compensable by express provision of any written or unwritten contract in effect at the time of the employment of the plaintiffs or by any custom or practice in effect at such time at the Arkansas Ordnance Plant.

12. Defendant states that it has in good faith endeavored to discharge all obligations due plaintiffs under and by virtue of their contracts of employment at the Arkansas Ordnance Plant; that the plaintiffs, and each of them, were paid by the defendant in accordance with regulations, orders, and rulings of the Ordnance Department of the United States Army, an agency of the United States, and that the said Ordnance Department approved and directed all wage and salary payments to employees at the Arkansas Ordnance Plant.

[fol. 14] Wherefore, defendant prays that the complaint of the plaintiffs be dismissed; that defendant have judgment for its costs herein expended, and for all proper relief.

OWENS, EHRMAN & McHANEY,

By E. L. McHaney, Jr.,
923 Pyramid Building,
Little Rock, Arkansas.

Attorneys for Defendant.

Request for Jury Trial

The defendant hereby requests a trial by jury in this case.

OWENS, EHRMAN & McHANEY,

By E. L. McHaney, Jr.,
923 Pyramid Building,
Little Rock, Arkansas.

Attorneys for Defendant.

The above and foregoing answer has been served upon the plaintiffs by delivering a true copy thereof to their attorney of record, the Honorable Gerland P. Patten, at his correct address, 918 Pyramid Building, Little Rock, Arkansas, on this 22 day of May, 1947.

OWENS, EHRMAN & McHANEY,

By E. L. McHaney, Jr.,
923 Pyramid Building,
Little Rock, Arkansas.

Attorneys for Defendant.

(Endorsed): Filed in U. S. District Court on May 23, 1947.

[fol. 15] Motion for Summary Judgment

The defendant's motion for summary judgment alleged:

(a) That the plaintiffs were not engaged in commerce or in the production of goods for commerce.

(b) That the plaintiffs were employees of the United States Government and exempt under the Wage and Hour Law.

(c) The Portal-to-Portal Act bars the plaintiffs.

That there is no genuine issue as to any material fact and the defendant is entitled to judgment.

Affidavit of Ellis Brown

He was employed by the War Department and his duties were to check the defendant's records, verify expenditures, verify purchases and O. K. them for payment.

The defendant sent out bids upon which purchase orders were made, such being delivered to a Government representative for approval and being sent to the various subsequent bidders and when the material was delivered to the Plant it was inspected by the defendant and the Government, and if accepted a check was drawn against funds advanced by the Government in payment therefor.

A substantial portion of the materials purchased by the defendant was from outside the State of Arkansas and after being processed at the Plant they were shipped to the various military facilities outside and inside the State.

The materials processed were munitions of war. They were loaded for shipment by the defendant's employees under the supervision of Government employees.

[fol. 16] The material was shipped on Government bills of lading at a reduced freight rate and no transportation tax was paid on such shipments. The items manufactured were fuses, detonators, primers and other small articles used to discharge various munitions and powders. A great deal of such went directly over seas.

All of the money used by the defendant was supplied by the Government, some of it being earmarked for specific purposes and the other being a general fund. All of the material for the manufacture of the products was furnished by the Government, who set up schedules of production of such, this material being known as "free issue", such being procured by the Government direct, a good portion of such being shipped on Government bills of lading.

Instructions were issued to take title to all property at the point of origin in order that the same might be declared military property and thus be shipped at a reduced rate.

All expenditures made by the defendant were approved by the Ordnance Department before payment was made. No Arkansas sales tax was paid by the defendant. The Ordnance Department issued rules and regulations which had to be complied with by the defendant. At first all telegrams were made at Government rates and later at commercial rates. No communications tax was paid on any telegraph, telephone or teletype charges.

The electric power was furnished the defendant under a direct contract with the Arkansas Power and Light Company.

Many times unfinished schedules of other plants were arbitrarily foisted upon the defendant.

That portion of the freight which was shipped at commercial rates was very small.

In the event goods shipped to the Plant were not acceptable to the Government it would be returned to the vendor.

The defendant used none of its money at any time, such being furnished by the Government. The Government paid direct all Government bills of lading and all telephone and teletype charges.

[fol. 17] The plant operated by the defendant was at all times under the close supervision of military personnel and Government inspectors were at all times on the premises. The Government owned all the lands, buildings, materials, tools and property of every kind on the plant premises.

Affidavit of W. F. Whittle

He has been employed by the defendant since 1942. First he was a cost accountant. Later, he was pay master, and as such had charge of the records pertaining to time and payrolls.

All of the money used by the defendant in the operation of its plant was furnished by the Government. This included payments to personnel. All the physical properties at the plant site were owned by the Government. The Government deposited money in a local bank, which was from time to time reimbursed as the defendant made withdrawals therefrom.

The defendant spent $15,495,437.44 for materials. The Government furnished materials of the approximate value of $275,854,354.21. ($275,854,354.21). For direct materials the Government expended $9,574,602.34, and the Government furnished material of the approximate value of $275,768,000. The contractor disbursed for the Government $84,220,301.78. The total Government expenditure was $279,714,018.32.

Ninety per cent (90%) of the materials worked on were furnished by the Government as "free issue". No sales tax was paid the State of Arkansas on materials purchased by the defendant.

The defendant was required to follow Ordnance Procurement Regulations. All materials bought by the defendant had to be consigned to the Contracting Officer in the defendant's plant, who was an Army officer.

[fol. 18] When material was shipped to the defendant on commercial bills of lading a freight rate adjustment was made converting the bills of lading into a Government bill of lading, thus reducing the freight rate.

The Government retained the right to discharge any employee and exercised control over the hiring of personnel.

The defendant's plant was classified as an ordnance establishment, such being under the direct control of the Chief of Ordnance, and the maximum number of Army

officers at the plant was thirty (30), which number was reduced during the later days of operation to about five or six.

The defendant had no discretion as to the kind or amount of material to be processed. The Government shipped free issue to the defendant with instructions to process such.

The defendant had to comply with all provisions of the Ordnance Safety Manual relative to its operation. The defendant was exempt from the payment of transportation and Federal excise taxes.

Some items used by the defendant had to be procured through the Treasury Department. Title to all the land and physical properties at the defendant's plant was owned by the Government, which was turned over to an Army officer, who was accountable to the Government for all such properties.

All payrolls were audited by Ordnance Department and in many instances Ordnance accompanied the defendant's employees who were delivering payroll checks.

All reports of hire and fire, change in classification, change in wage rates, were approved by the Government before they became official. The Ordnance Department supervised the defendant's activities at all times and controlled the direct method of doing the work.

[fol. 19] All employees traveling on official business were exempt from transportation tax.

The defendant was required to pay Federal Old Age Benefits taxes and Unemployment Compensation taxes and was required to carry Workmen's Compensation insurance.

The Government set up a fund which was used by the defendant for the carrying on of the activities of the plant, and this fund was drawn upon by the defendant.

The material used at the plant, purchased outside the State was charged on Government bills of lading and consigned to Ordnance Property Officer, care of the defendant, Jacksonville, Arkansas.

All properties shipped from the plant were shipped on Government bills of lading to a Government agent at another ordnance plant or to a Port Transportation Officer for overseas shipment.

All employees were paid for the work performed by them, which was compensable under the terms of their contract or by custom and practice in effect at that time.

There was no agreement to pay for travel time and there was no custom or practice calling for the payment for such time. The same was true as respects lunch periods.

All employees were paid for work performed in conformity with and in reliance on regulations, orders, rulings, approvals and interpretation of the Ordnance Department, who approved and directed all wage payments.

Affidavit of A. R. Clarke

He was Personnel Director for the defendant from 1941 to 1945. As director of Personnel his duty was to employ and terminate personnel. He assisted in setting up wage schedules which were submitted to and approved by the Ordnance Department. After such were approved the defendant was not at liberty to deviate from such pay- [fol. 20] ments. No wage payments were made except upon the approval of the Ordnance Department.

All salary payments were made by the defendant, in good faith, in conformity with the reliance on regulations, orders, rulings, approvals and interpretations of the Ordnance Department.

There was no contract in force providing for the payment of travel time or for lunch period. It was necessary for him on several occasions to go to Washington for the purpose of obtaining approval for changes in wages and classifications.

An Army officer was at the plant to supervise the performance of the defendant's contract with the Government.

Affidavit of Clifford Shaw

I was employed by the defendant in April, 1942, and terminated in October, 1945. He supervised and directed the work necessary to meet production schedules. The defendant engaged solely in the manufacture of munitions of war.

The Government would forward the defendant production orders and supplied the material for their completion.

The Government supplied the manufacturing method or process to be used as evidenced by detailed drawings and specifications.

The Government specified step-by-step procedure in the manufacture of the product, as well as the procedure to be followed in mixing powders and these procedures had to be followed.

[fol. 21] (Exhibit 1)

The following is an abstract of the pertinent provisions of the contract between Ford, Bacon & Davis and the War Department, pursuant to which the Arkansas Ordnance Plant was constructed and operated.

Cost-Plus-A-Fixed-Fee Contract No. W-ORD-519
DA-W-ORD-6

This contract is authorized by the following laws: The Act of July 2, 1940 (Public Law No. 703, 76th Congress), the Act of March 11, 1941 (Public Law No. 11, 77th Cong.), and the Act of June 30, 1941 (Public Law No. 139, 77th Cong.).

Contract is signed by L. H. Campbell, Jr., Brig. Gen. U. S. Army.

Contract made July 15, 1941 between the Government and Ford, Bacon and Davis, Inc., hereinafter called the Contractor, witnesseth that:

Whereas government desires to have contractor design, construct, equip, operate and train personnel for a new ordnance facility, and whereas this contract has been

negotiated as authorized by law and the Secretary of War, it is hereby agreed as follows:

Title I. Design, Engineering and Construction.

Article I A—Description Of New Ordnance Facility.

1. The plant shall be located on a site to be furnished by the government for the loading of fuzes, boosters, primers and detonators based upon a certain estimated daily capacity as follows: (Omitted as not material.)

2. Said plant shall consist of necessary building, equipment, and storage facilities to keep on hand about 30 days' supply of incoming materials and about 60 days production of finished product.

3. Plant shall conform to certain drawings attached and to be furnished by the contracting officer.

Article I B Statement of Work.

1. Contractor shall furnish the labor, materials, tools, machinery, equipment, etc. and supplies not furnished by Government and do all things necessary in construction of plant, installation of equipment and the furnishing of architectural and engineering services.

2. The Contracting Officer appointed by the Chief of Ordnance will supervise general layout and preparation of detailed plans, and all designs must have his approval and the performance of construction work of the entire project will be under supervision of Contracting Officer appointed by the Quartermaster General.

3. The Contracting Officer may issue additional instructions or require additional work without notice to [fol. 22] sureties. Also, unless capacity of plant is changed as much as 25% there shall be no change made in the fixed fee set for its construction.

Article I C Estimates.

It is estimated that the plant will cost $14,812,188.00 excluding the contractors fee, that the plant will be completed within 10 months, but such estimates are not guaranteed to be correct.

Article I-D Consideration.

The contractor shall receive the following: (a) Reimbursement for expenditures as provided in Title V. (b) Rental for contractor's equipment as provided in Title V. (c) Fixed fee of $445,580. The fixed fee as set forth is based upon the premise that the contractor will subcontract plumbing, etc.

Article I-E Character and Extent of Architectural and Engineering Services.

Contractor shall make all surveys, prepare layout plan, adapt government designs and drawings to the project, obtain necessary approval from all state, local and federal authorities, prepare estimates and shall submit plans and specifications to contracting officer for his approval, prepare all progress reports and records as work progresses.

Contractor shall consult and advise with the Contracting Officer, shall submit to him a schedule showing the order in which the work is to be done and the estimated completion dates. In the event the contractor falls behind in the completion schedule the Contracting Officer may take whatever steps necessary to insure that schedules will be met. He may also reduce the amount of the contractor's personnel and or overhead if he deems either to be excessive.

Government shall furnish the contractor such available schedules, sketches, data and pertinent information on hand. All of contractor's notes and other data concerning construction and equipping of the plant shall become the property of the Government. Contractor may employ such extra technical advice as the Contracting Officer shall deem necessary.

Article I-F Rates of Wages—Non Rebate.

1. In accordance with provisions of 40 U. S. C. 276a and 276a-1 the following provisions shall apply to the work under this Title I:

[fol. 23] a. Contractor or subcontractors shall pay all mechanics and laborers not less often than once a week, and without subsequent deduction or rebate on any ac-

count, wages at not less than the rate established by the Secretary of Labor for the work herein specified, such scale of wages to be posted in a prominent place at the work site. Government may withhold payments to Contractor to ensure compliance with this provision.

b. If contractor fails to comply with above provision as to minimum wages, the contract can be terminated, completed by the Government and the contractor held liable for any excessive costs as the result of the Government's completion of the contract.

2. Following provisions shall apply to work under this Title I:

a. All wage rates, including compensation for overtime under Article I-G of Title I, for laborers and mechanics shall be approved in writing by the Chief of Branch or his representative. In the event Contractor should pay greater wages than those approved, it cannot be reimbursed for such expenses occasioned by additional payments.

b. Contractor shall attach an affidavit to each weekly payroll to be furnished to Contracting Officer in the form required by the Secretary of Labor by regulation promulgated at 6 F. R. 1211 pursuant to 40 U. S. C. 276b. and c. stating under oath that full weekly wages have been paid to those whose names appear thereon and that no rebates or deductions have been or will be made. Contractor shall comply with all applicable requirements of regulations issued by the Secretary of Labor pursuant to the above Act. The contractor shall make similar requirements of his subcontractors.

Article I-G Eight-Hour Law - Overtime Compensation.

No laborer or mechanic doing any part of the work contemplated by this Title I in the employ of the Contractor or any subcontractor contracting for any part of said work contemplated, shall be required or permitted to work more than eight hours in any one calendar day upon such work at the site thereof, except upon the conditions that compensation is paid to such laborer or mechanic in accordance with the provisions of this Article. The wages of every laborer and mechanic employed by the Contractor

[fol. 24] or any subcontractor engaged in the performance of this Title I shall be computed on a basic rate of eight hours per day and work in excess of eight hours per day is permitted only upon the conditions that every such laborer and mechanic shall be compensated for all hours worked in excess of eight hours per day at not less than one and one-half times the basic rate of pay. For each violation of the requirements of this Article a penalty of five dollars shall be imposed upon the Contractor for each laborer or mechanic for every calendar day in which such employee is required or permitted to labor more than eight hours upon said work without receiving compensation computed in accordance with this Article and all penalties thus imposed shall be withheld for the use and benefit of the Government: Provided, that this stipulation shall be subject in all respects to the exceptions and provisions of 40 U. S. C. Secs. 321, 324, 325, and 326 relating to hours of labor, as in part modified by the provisions of Section 5(5) of Public Act No. 671, 76th Congress, Approved June 28, 1940 and Sec. 303 of Pub. Act. No. 781, 76th Con., app. Sept. 9, 1940, relating to compensation for overtime.

Title II. Procurement of Production Equipment.

Article II-A Statement of Work.

1. The Contractor shall, in the shortest reasonable time, determine the production equipment requirements and shall proceed to do all things necessary to their procurement.

2. Government reserves right to furnish such production equipment as it sees fit, provided same is suitable. Contractor may manufacture equipment subject to approval by Contracting Officer, and Government may procure such equipment separately in event it is able to do so at a better price than that furnished by the Contractor.

Article II-B Estimates.

Estimated cost, subject to change, is $6,000,000.00.

Article II-C Consideration.

Consideration shall be reimbursement for expenditures as provided in Title V plus a fixed fee of $40,000.00.

Article II-D Eight Hour Law—Overtime Compensation.

The provisions of Article I-G of Title I shall apply to the work under this Title II.

[fol. 25] Title III. Training of Key Personnel (Optional).

Article III-A Statement of Work.

1. Upon notice to contractor by government, the contractor shall hire and train key personnel in the duties necessary to the operation of the plant in the event the government calls upon the contractor to operate same.

2. Such trained personnel shall be held in readiness, upon direction of the contracting officer, in case such notice of intent to operate the plant shall be given.

3. The character and extent of work to be done under this Title shall be subject to the approval of the Contracting Officer.

Article III-B Estimate.

Estimated cost is $150,000.00.

Article III-C Consideration.

Consideration shall be reimbursement of expenses, plus a fixed fee of $1.00.

Article III-D Eight Hour Law—Overtime Compensation.

Provisions of Article I-G of Title I shall apply to this work.

Title IV. Operation of Plant (Optional).

Article IV-A Statement of Work.

1. If notified by the Contracting Officer to do so, the contractor shall undertake all preparations necessary to the operation of the plant, including training of additional personnel.

2. As each unit of plant is completed the Contractor shall proceed to operate it as directed from time to time by the Contracting Officer.

3. When the plant is completed to the extent necessary to its operation the Contractor shall notify the Contracting Officer, and shall operate the plant for a period of 12 months following this notice.

4. The 12 month period may be extended for another 12 months upon not less than 90 days' written notice to the Contractor at the option of the Government.

5. Work under this Title IV shall be performed in accordance with specifications to be furnished by the Contracting Officer.

6. Government shall furnish all explosives and all metal [fol. 26] parts for the loading of the ammunition, including shipping materials and containers, when and as requisitioned by Contractor.

7. In carrying out the work under this Title IV the Contractor is authorized and shall do all things necessary or convenient in the operating and closing down of the Plant, or any part thereof, including (but not limited to) the employment of all persons engaged in the work hereunder (who shall be subject to the control and constitute employees of the Contractor), the providing of all materials and supplies except such as the Government is to furnish or supply as elsewhere specifically provided herein, the storage of materials and supplies and of the finished products to the extent of the storage facilities at said Plant, the preparation of the product for shipment and the loading of same on cars or other carriers in accordance with the Government's shipping instructions.

8. In providing materials and supplies as provided in Section 7, next above, the Contractor shall be free (but shall not be obligated) to use any materials or supplies of its own manufacture, upon advising the Government in advance as to the prices at which and the conditions upon which such materials and supplies will be provided, which prices and conditions, however, shall not be less favorable than those quoted to third parties for similar quantities and deliveries, and may be quoted without regard to the provisions of Section 6 of Article V-A of Title V. In the event the Government is able to obtain materials or supplies of equal quality and quantity at a lower price or on

more favorable conditions from any responsible competitive sources or from its own manufacture, it may undertake to do so upon so informing the Contractor within ten (10) days after being advised of the Contractor's price for such material and supplies.

9. The Contractor shall maintain a satisfactory system of inspection, gaging and gage checking concurrent with operations, and no ordnance material shall be submitted for the Government inspector's approval which has not previously been inspected by agents of the Contractor and found to be up to the contract standard.

[fol. 27] Article IV-B—Estimates.

Estimated cost under Title IV will be $33,525,000.00.

Article IV-C—Consideration

Contractor shall be reimbursed for expenditures, and shall receive a fixed fee of $540,000.00; and in the event of continued operation shall receive $420,000.00 for the next twelve months of continued operation.

Article IV-D—Walsh-Healey Act

1. The following representations and stipulations pursuant to the Walsh-Healey Public Contracts Act (41 USCA 35-45) shall apply to the operation of the plant. (Sub paragraphs a-f inclusive are verbatim repetitions of the provisions of 41 USCA 35-36 inclusive). Sub paragraphs g-h provide that the contractor shall post a copy of the foregoing stipulations in a public place at the work site and shall keep such employment records as are required by the Secretary of Labor.

2. Paragraph b of Section 1, above, with respect to minimum wage rates is inoperative due to lack of determination by the Secretary of Labor of prevailing minimum wage rates for the industry involved.

Title V. Cost of the Work and Payment Therefor.

Article V-A—Reimbursement for Contractor's Expenditures.

1. The contractors shall be reimbursed for the following:

a. All labor, materials, tools, machinery, equipment, and services used in the work.

b. All subcontracts.

c. Transportation, loading, unloading and storage charges on material, supplies and equipment.

d. Such transportation and travel expenses of personnel as may be approved by the contracting officer.

e. Expenses of procuring labor and material, etc.

f. Salaries of employees of the contractor engaged directly in the work provided in this contract.

g. Buildings, fixtures, and equipment necessary for offices, commissaries and other facilities and the cost of operating same.

h. Premiums on such bonds and insurance policies as required.

[fol. 28] i. Losses and expenses sustained by the contractor and approved by the contracting officer.

j. The cost of reconstructing or replacing any of the above.

k. Employer's contribution under the Social Security act and any other disbursements required by law.

l. Costs in connection with reworking rejected material and for material finally rejected.

m. Extra payments to employees made under welfare or other employees relations plans or incurred pursuant to a collective bargaining agreement.

n. Accounting expenditures in connection with audit.

o. Expenses in connection with any temporary or permanent closing of the plant.

p. $2,000 per month for all services performed at the contractor's New York offices.

q. Expenses incidental to the payroll such as cost of guards and check cashing facilities.

r. Rental actually paid by the contractor and approved by the Contracting Officer.

s. Loading and unloading of construction plant and repairs and maintenance incidental thereto.

t. Repairs and parts.

u. Temporary rights in land required by the work.

v. Such other items as should, in the opinion of the Contracting Officer, be included in the cost of the work.

2. For the use of its equipment rentals shall be paid to the contractor based upon standard rates approved by the office of the Quartermaster General and the Government may at its option purchase any part of the construction plant owned by the contractor by paying a stipulated price set forth in this section.

3. Government reserves the right to furnish any materials, equipment, tools, or services necessary to completion of the work.

4. The Government reserves the right to pay directly to the common carrier all transportation charges.

[fol. 29] 5. The Government reserves the right to pay directly to the person concerned all sums due from the contractor for labor, materials, or other charges.

6. No salaries of contractor's executives, and no other expense unless specifically authorized herein shall be included in the cost of the work.

7. The contractor shall take advantage of all discounts, rebates, allowances, salvage, etc. and if he fails to do so may not be reimbursed for same.

8. All revenue received by contractor from operation of hospital, commissaries, or other facilities shall be accounted for by it and applied in reducing the cost of the work.

Article V-B—Payments—Reimbursement for Cost

1a. Reimbursement will be made upon delivery to the Contracting Officer of the original payrolls or receipted invoices for materials, etc.

2. (Omitted as immaterial)

3a. The fixed fee shall be paid in monthly partial payments less 10% for work done under Article I-D of Title I.

b. Same provision as set forth above as to work done in Article II-C of Title II.

c. (Omitted)

(Paragraphs D and E omitted as immaterial)

4. If contractor fails to pay bills for labor, material, etc. promptly contracting officer may withhold payments due contractor and may take payments directly to them.

5. Upon completion of the work the balance due the contractor shall be paid.

Article V-C—Advances

1. Upon request of the contractor and approval of the Chief of Ordnance the contractor may be advanced up to 30% of the estimated cost of the work.

2. (Omitted as not material)

[fol. 30] 3. (Omitted as not material)

4. All advance payments shall be deposited in a special bank account separate from the contractor's general funds and used as a revolving fund for carrying out the purposes of this contract, and the Government shall have a lien on any balances to secure the repayment of such advances superior to that of the Bank.

5. Contractor may make advance payments to third parties for materials or supplies upon approval by the contracting officer.

Title VI—Termination.

Article VI-A—Termination by Government.

1. This contract may be terminated by written notice from the Contracting Officer at any time and such work shall be terminated immediately.

2. In event termination is because of the fault of the contractor, the Contracting Officer may enter upon premises and take possession of all materials, tools, etc. for the pur-

pose of completing the contract or may employ other persons to do so.

3. Upon termination of the contract full and complete settlement of all claims arising out of this contract shall be made as follows: (Balance omitted as not material)

Title VII—General.

Article VII-A—Responsibility of Contractor.

1. All work under Title IV of this contract to be at the expense of the Government including loss, expense, or damage of any kind whatsoever, except such as may be occasioned by the personal failure on the part of the officers and employees of the contractor to exercise good faith and ordinary care.

Article VII-B—Contingencies.

The contractor shall be excused for delays in performance occasioned by accident, sabotage, on materials or labor shortage, labor disputes, etc. and shall be liable for loss or damage only to the extent that same is due to its corporate officials and supervisors failing to exercise good faith or ordinary care.

[fol. 31] Article VII-C—Changes.

Changes in the work under Title II, III and IV may be made by the Contracting Officer, and if such changes result in an increase in the amount of work the amount of the fixed fee may be changed in writing. In the event of disagreement the same shall be settled as provided in Article VIII-N.

Article VII-E—Materials and Workmanship.

The work and material shall be of the best and most workmanlike quality unless otherwise approved by the Contracting Officer

Article VII-F. Records and Accounts in Inspection and Audit.

The contractor agrees to keep records and books of account on a recognized cost accounting basis and the contracting officer shall at all times have access to the books, records, premises, etc.

Article VII-G—Special Requirements.

The contractor hereby agrees that it will:

1. Procure and maintain such bonds and insurance as may be required by the Contracting Officer.

2. Procure all necessary permits and licenses, obey and abide by all applicable laws, regulations and ordinances and other rules of the United States of America, State, territory, or subdivision thereof wherein the work is done or of any other duly constituted public authority.

3. Reduce to writing contracts made by it in excess of $2,000, make all such contracts in its own name and not bind or purport to bind the Government thereunder. No purchases in excess of $500 shall be made without approval of the Contracting Officer.

4. Will make no subcontract without approval of the Contracting Officer.

5. Maintain a duly qualified representative at the work site to receive and execute such notices, directions, and instructions as the Contracting Officer may give under the terms of this contract.

6. Contracting Officer may require contractor to dismiss any employee deemed incompetent or whose retention is not in the public interest, subject to appeal under provisions of Article VII-X.

7. Furnish such equipment and machinery within ten days of the date on which they are stated to be available. [fol. 32] Failure to do so will result in their replacement at the cost of the contractor.

8. Use its best efforts to protect and subserve the interest of the Government.

Article VII-H—Preference for Domestic Articles.

In performance of the work covered by this contract only materials mined, produced or manufactured in the United States, shall be used unless excepted by the Secretary of War.

Article VII-I—Convict Labor.

Contractor shall not employ any person undergoing sentence of imprisonment at hard labor.

Article VII-J—Workmen's Compensation Laws.

The contractor, and his subcontractor shall maintain workmen's compensation insurance for the protection of its employees as may be required by Federal or State laws.

Article VII-K—Accident Prevention.

Contractor will comply with safety requirements deemed necessary by the contracting officer and will report to him all cases of death, injury, and occupational disease arising out of work under this contract.

Article VII-L—Officials Not to Benefit.

No member of Congress or resident commissioner shall be admitted to any share or benefit under this contract.

Article VII-M—Covenant Against Contingent Fees.

(Omitted)

Article VII-N—Disputes.

All disputes arising under this contract shall be decided by the contracting officer subject to written appeal by the contractor within 30 days to the Chief of Branch, and in certain cases the decision of the Chief of Branch may be

appealed by the contractor to the Secretary of War whose decision shall be final.

Article VII-O—Contractor's Organization and Methods.

Contractor shall submit to the contracting officer a chart showing the organization and a description of the duties performed by each position. There shall also be submitted statements of procedure as to all operations engaged in by the contractor such as purchasing, disbursing, accounting, employment, transportation, etc.

[fol. 33] Article VII-P—Assignment of Claims.

Neither this contract nor any interest therein may be assigned or transferred.

Article VII-Q—Loading and Unloading Railway Cars.

Contractor shall load and unload all railway cars promptly upon their arrival.

Article VII-R—Notice to Government of Labor Disputes.

When actual or potential labor dispute delays or threatens performance of Title I of this contract notice shall be given to the Chief of Construction Division O. Q. M. G.

Article VII-S—Approval Required.

This contract shall not be binding until approved by the Secretary of War.

Article VII-T—Statutory Provisions.

The undertaking to comply with the various statutory requirements hereinbefore set forth shall be operative only to the extent that such statutory requirements are applicable.

Article VII-U—Definitions.

(Omitted)

Article VII-V—Racial Discrimination.

Contractor shall not discriminate against any worker because of race, creed, color or national origin.

Article VII-W—Alterations.

(Omitted)

In Witness Whereof the parties hereto have executed this contract in triplicate as of the day and year first above written.

Signed by various representatives of the United States of America and Ford, Bacon, and Davis, Inc.

[fol. 34]

Exhibit No. 2

Ford, Bacon & Davis, Inc.
Arkansas Ordnance Plant
Little Rock, Arkansas

Statement Of Production Costs
As of May 10, 1946

Contractor's Expenditures			
501	Gross Payrolls	$ 65 [illegible] 61	
502	F.O.A.B. Taxes (Employer's Portion)	673 [illegible] 48	
503	Arkansas Unemployment Compensation Tax	1 737 18 67	
504	Workmen's Compensation Insurance	1 [illegible] 70 [illegible]	
505	Federal Excise Tax	193 [illegible] 84	
506	Group Life & Hospital Insurance (Employer's Portion)	170 [illegible]	
507	Purchased Direct Materials	9 571 [illegible] 34	
508	Indirect Materials & Supplies	5 [illegible] 30	
509	Other Operating Expense	806 [illegible] 14	
551	Revenues Credited to Operating Cost	1 [illegible] 75 Cr.	
552	Discount Taken	53 [illegible] 39 Cr.	
	Total Contractor's Disbursements—Reimbursements *		$ 81 [illegible] 78

* Disbursement of Government funds by Contractor, reimbursed by Government.

Government Expenditures **				
	Direct Materials, Government Supplied, Free Issue (Estimate)	$275,768,[illegible]		
520	Direct Government Expenditures, Expenditure Order No. 3	655,021.04		
548	Indirect Materials — Government Furnished	86,351.21		
553	1034 Voucher Credit — Sale of Services	39,792.08 Cr.		
521	Local Ordnance Administrative Expense — Salaries & Wages	1,727,301.83		
522	Contractor's Fixed Fee Paid	1,517,333.32		
	Total Government Expenditures **			$279,714,018.32
533	Rework of Components	39,702.87 Cr.		
533A	Rework of Packing Materials	185,741.46 Cr.		
531	Construction Cost Charged Operations in Error	3.38 Cr.		
620	Materials, Supplies & Services Furnished to the Government	932.73 Cr.		
536	Materials Manufactured for Inventory	121,971.96 Cr.		
			$	347,442.04 Cr.
	Total Operating Costs		$363,586,878.06	
	Credits To Operating Costs			
530	Project Charges to Capital Expense	179,716.78 Cr.		
531	Project Charges to Other Procurement Authorities	604,399.84 Cr.		
55	Total Credits to Operating Costs			784,116.62 Cr.
	Total Net Production Costs		$362,802,761.44	

** Direct Expenditure by Government applicable to plant operations.

[fol. 35] Exhibits Attached to Affidavit of W. F. Whittle.

Exhibit 2A—photostatic copy of part of letter, addressee not shown, stating policy of Department of Revenue of

State of Arkansas to be not to charge sales and gasoline tax to purchases made by contractor on fixed fee basis if the cost of the materials, supplies, etc. is to be reimbursed by the government and to be considered in computing the fee of the contractor.

Exhibit 3—excerpts from ordnance procurement [instructions] providing that the contractor operating the establishment to designate a property accountable officer who will be responsible for all property used in the execution of the contract; that title to material, supplies, etc., shall be taken in the government at point of origin if it will save costs and will not cause delay to the execution of contract; that the facility shall be considered a military reservation; and defining the duties of the commanding officer thereof; and defining the jurisdictional status of the Arkansas Ordnance Plant as under the jurisdiction of the Federal Government responsibility for plant protection in the Ordnance Department.

Exhibit 3A—Purchase Order form No. 11-b. regular form of purchase order showing "operator: Ford, Bacon & Davis, Inc., Contract No. W-ORD-519; DA-W-ORD-6, Ship to: Ordnance Property Officer, Jacksonville, Arkansas: for Account of Operator: Ford, Bacon & Davis, Inc., signed by Ford, Bacon & Davis, Inc., operator, as Purchasing Agent, entered on purchase order register by ....., approved: for the Commanding Officer".

Exhibit 3b—assignment of Army Officers at the Arkansas Ordnance Plant of December 2, 1942, issued by the Commanding Officer of the establishment. Assignments included that of Commanding Officer, Administrative Officer, Transportation Officer, Executive Officer, etc.

Exhibit No. 4—Ordnance Safety Manual. The manual prepared by the Office of Chief of Ordnance, United States Army and purporting to be "regulations governing the manufacture, storage, loading and handling of military explosives and munitions at establishments of the Ordnance Department, U. S. Army." This manual designed to apply to all establishments, both government owned and operated and government owned but privately operated. The de- [fol. 39] tailed provisions are not shown, but the manual controlled the manufacture, storage, etc. of explosives and

munitions at the Arkansas Ordnance Plant insofar as the provisions of said manual were applicable.

Exhibit 5—consists of a series of letters, indorsements thereto, and telegrams relating to effort of the Operator of the Plant, Ford, Bacon & Davis, Inc., to increase the beginning wage rate of janitors and janitress'. Letter to Commanding Officer, Arkansas Ordnance Plant from Ford, Bacon & Davis, Inc., transmittal of same to Office, Chief of Ordnance, and information that War Department Wage Administration Agency, Washington, D. C. had denied request; appeal by Ford, Bacon & Davis from the denial. The War Labor Board had designated the War Department Wage Administration Agency to handle wage matters arising in facilities concerning the War Department and had delegated the Agency the powers given to the War Labor by executive order, acts of congress, etc.

Exhibit 6—series of letters showing effort on part of Ford, Bacon & Davis to increase beginning wage rate of "laborers". Denial of same by War Department Wage Administration Agency wherein it was said:

"Under authority granted to the War Department Wage Administration Agency in connection with Executive orders No. 9250 and 9328 by the National War Labor Board (General Order No. 14) and by the Commissioner of Internal Revenue (Letter of 24 December 1942) approval is denied the request of Ford, Bacon & Davis, Incorporated, Operating contractor at the Arkansas Ordnance Plant to increase the rate range for the job classification "Laborer", from $.40-.43-.47-.51-.55 per hour to $.51-.59-.62-.66 per hour.

Exhibit 6a—Inter-office Communication from Chief Project Auditor to Project Comptroller advising that the Government could not reimburse Ford, Bacon & Davis, Inc., for wages paid to three named individuals until authority of employment had been signed by Commanding Officer.

Exhibit 7—Letter from Assistant Commanding Officer to Commanding Officer advising installation of certain valves on machinery used in the operation of the plant.

Exhibit 8—Request of Operator to purchase and install certain gages transmitted to Field Director of Ammunition Plants for funds to be allocated.

[fol. 37] Exhibit 9—Letter from Contracting Officer's Representative to General Manager of Ford, Bacon & Davis at the Arkansas Ordnance Plant transmitting denial by Field Director of Ammunitions Plants of request by Operator for a certain named project.

Exhibit 10—Shipping Order. Regular form O.O. No. 2997 provided for use by the Chief of Ordnance to direct the shipment of ordnance items from Ordnance Plants. This particular form directed the Commanding Officer, Arkansas Ordnance Plant to ship 25 packing boxes to Defaware Ordnance Depot in New Jersey:

Exhibit 11—US Government Bill of Lading. Regular form, being Standard Form No. 2105a.

Exhibit 12—Same as exhibit 11.

Exhibit 13—Operation Manual. Operation Manual No. 10, prescribing in detail the operations in the assembly of Fuze, Bomb, Tail, An-M100A1.

Exhibit 14—Operation Manual No. 11 prescribing the method of conducting Static tests on M54 Fuze, time and Superquick.

Exhibit 15—Operation Manual No. 11, as above, but Appendix B, prescribing the method of calculating the proper proportions of fast and slow powder for a pilot lot.

The above exhibits were all of the exhibits attached to the affidavits in support of the Motion for a Summary Judgment.

[fol. 38] Response to Motion for Summary Judgment

Come the plaintiffs and for their response to the motion of the defendant for summary judgment, plead:

1. Denies each and every material allegation of the motion not specifically admitted herein.

2. (a) That plaintiffs were engaged in commerce and in the production of goods for commerce within the mean-

ing of those terms as used in the Fair Labor Standards Act. (b) That the plaintiffs were not employees of the United States Government, but were employees of the defendant. (c) That (1) the provisions of the Portal-to-Portal Act of 1947, and each and every provision thereof, do not apply to this action; and (2) that if the Portal to Portal Act of 1947, or any provision thereof, applies to this action then said Portal-to-Portal Act is void and unconstitutional for the reason it and each and every provision thereof contravene Articles I, III and VI and Amendments V, IX and X of the Constitution of the United States.

3. That the issue set out in paragraph 2 (a) above, to-wit:

That plaintiffs were not engaged in the production of goods for commerce has been decided heretofore adversely to the contentions of the defendant and is res judicata. That plaintiffs specifically plead res judicata on the issue of commerce.

4. That defendant held itself out as the employer of these plaintiffs and led and induced them to believe and act thereon and is now estopped to deny it was their employer.

5. That defendant represented to its employees, including these plaintiffs, that it was subject to the provisions of the Fair Labor Standards Act and that the employees at the Arkansas Ordnance Plant were entitled to the benefits, rights and provisions of the said act and came within the purview of said act and the defendant is now estopped to deny same.

6. Admits there is no issue of law or fact on (1) commerce, (2) employee relationship of plaintiffs and defendant, and (3) effect of the Portal-to-Portal Act of 1947.

7. That the affidavits of Gerland P. Patten, Willis Townsend, Davis Cluis, Wayne W. Owen, William M. Dabbs, John D. Cash, Frederick Sloan and Ada B. Perkins with [fol. 39] their attachments, are attached hereto and made a part hereof. These affidavits and their attachments, together with interrogatories and responses thereto and requests of admissions of fact and the admissions made in

response thereto and all exhibits attached to same together with the record in the case are in support of this response to the motion for summary judgment.

8. Plaintiffs pray that the motion for summary judgment be denied, that the court find and enter an order that the issues of commerce and employee relationship have heretofore been determined adversely to the defendant and that the Fair Labor Act is applicable to the activities of the defendant, and that the plaintiffs were employees of the defendant, and for all proper relief.

WAYNE W. OWEN.

Service of the above pleading acknowledged this 11th day of August, 1947.

OWENS, EHRMAN & McHANEY,
By: John M. Lofton, Jr
Attorneys for the Defendant.

(Endorsed): Filed in U. S. District Court on August 11, 1947.

[fol. 40] Affidavit of Gerland P. Patten

The affiant states:

That he was familiar with the method of hiring employees and the operations of the Arkansas Ordnance Plant at Jacksonville insofar as the production lines were concerned. When an employee was hired, a written document, called a Report of Hire, was issued. This Report of Hire contains his name, badge number, age, address, Social Security number, rate of pay, date of birth, marital status, classification, job location, whether to be paid by the hour, week or month, if employment is permanent or temporary, when to start and to whom to report. This Report of Hire was signed by an authorized employee of the Personnel Department of Ford, Bacon & Davis and the employee was required to sign same. The employees certificate required acceptance of employment as set out in the form and that he did not advocate and was not a member of any organization that advocated the overthrow of the Government by force.

That each employee was given a manual designated, "Employees Manual," which contained instructions relative to working time and places. The manual provided that the employee must be at his respective place of work and leave same at the scheduled starting and quitting time unless otherwise instructed by his foreman and that "employees will report for work and leave at the time specified by their respective supervisors." Non-supervisory employees were to be paid one and one half time for all work in excess of 40 hours per week. Also time and one-half for a few designated holidays and double time for the seventh consecutive day. It required all matters of employee relations and welfare to be taken up first with the supervisor then on to higher levels to the general manager.

Affidavit of Willis Townsend

The affiant states:

That he was employed at the Arkansas Ordnance Plant at Jacksonville from May 1, 1942, until June 11, 1945. That he was an investigator under the supervision of the Protection Manager who was Head of the Plant Protection Department. For a time he was the Chief Investigator in his Department and he personally investigated all employees who were employed by Ford, Bacon & Davis, which were some 7?,000, making investigations of accidents [fol. 41] on the grounds and all incidents of a questionable nature which might endanger the welfare of the employees.

His department and the personnel therein received their instructions over the signature of the general manager of Ford, Bacon & Davis. The reports of the investigations of employees to be hired and of other incidents were not given to the Ordnance Department of the United States Army unless it involved an automobile owned by the Government or unless it involved a matter of military security.

Many requests for investigations of employees coming from other states were sent to the Retail Credit Company offices and Hooper Holmes Bureau offices all over the United States and these reports were made and returned.

to Jacksonville. A file of fingerprints and police records were received by the investigators of Ford, Bacon & Davis and the fingerprints were sent to the F. B. I. in Washington.

Hospitalization insurance was carried on all employees and was carried by the Prudential Life Insurance Company with Ford, Bacon & Davis, Inc., paying the premiums in its own name.

In August or September of 1943, representatives and investigators of the Wage and Hour Division of the United States Department of Labor made an investigation of the duties of the investigators and fire inspectors and made a decision that said employees should be classified as non-exempt, non-supervisory under the Fair Labor Standards Act and should be paid overtime for all hours over 40 which they worked per week. On October 31, 1943, an order to that effect was issued by the Plant Comptroller and with the consent of the General Manager of Ford, Bacon & Davis, Inc., all investigators were paid for all time over 40 hours per week at the rate of one and one-half times the regular rate. Later the accumulated bank time of these men who had been improperly classified as supervisory was credited to them and paid.

Affidavit of David Cluis

The affiant states:

That he was employed at the Arkansas Ordnance Plant at Jacksonville from January 1, 1943, as an investigator until August 1 of the same year when he was promoted to the office of Industrial Relations Manager in the Personnel Department where he served for a long time. As In- [fol. 42] dustrial Relations Manager he did not receive any orders, instructions or directions from the Government or any department thereof or the Ordnance Department of the United States Army nor did he make any reports to them. All of the instructions and directions concerning the functions and activities of the Industrial Relations Department came from the General Manager of Ford, Bacon & Davis through the Head of the Personnel Department.

The functions and duties of the Industrial Relations Manager was to represent employees of the plant with the management of Ford, Bacon & Davis, Inc., settle grievances, make investigations of grievances, transfer, termination of employees or their reassignment. The Personnel Department had charge of the employment of personnel for the Arkansas Ordnance Plant. Employment was upon receipt of employment requisitions from various department heads. There was no place on the requisitions for approval by the Ordnance Department of the Army and no approval was made. Blanket requisitions were made for certain employees over the signature of the department head needing same and individual requisitions were made for individual employees. Any employees receiving increases or decreases in their pay, a change of status form was made out and on the change of status form, for the benefit of the Accounting and Pay Roll Departments, the letters "S" or "NS" were placed, indicating either supervisory or non-supervisory; also, letters "FL" or "WH," indicating applicability of the Fair Labor Standards Act or Walsh-Haley Act.

Affidavit of Wayne Owen

The affiant stated:

That he was a practicing attorney in Little Rock, member of the firm of Talley, Owen & Talley, and represented many plaintiffs in actions against Ford, Bacon & Davis for overtime worked at the Arkansas Ordnance Plant. They claimed compensation due them under the provisions of the Fair Labor Standards Act and compromises were reached wherein most of the plaintiffs were paid sums claimed by them to be due them under the act.

Affidavit of William M. Dabbs

The affiant stated:

That he lived in Little Rock, was employed by Ford, Bacon & Davis at the Arkansas Ordnance Plant on October 12, 1942, and sent to foreman's school. Upon graduation, he was made apprentice foreman and assigned to one of

the production lines later being promoted to foreman, assistant line superintendent and line superintendent. He was with the plant on one of the production lines until is [fol. 43] closed in 1945. As line superintendent, he had charge of and responsibility of all of the activities of a production line; personnel on the lines varied from 500 to 3,000, depending upon the line and its activity.

The activities were production, inspection and back line activities. On a production line all of the processes and operations necessary to load, assemble or otherwise process munitions were performed. The materials and supplies were received on the line; powder was processed and made ready for use; inert components inspected; materials, powder and supplies assembled in the various operating places on the line, and the component loaded or assembled; the loaded or assembled component was inspected, packaged, packed and transported from the line to the storage area.

On the front line where the components were assembled or loaded, the personnel were required to be at their places of productive activity at 7 o'clock and remain there until 3 p. m., the second shift from 3 p. m. to 11 p. m. and if there was a third shift, from 11 p. m. until 7 a. m. The personnel on the front line were required and were instructed by their supervisors to present themselves at the production line in sufficient time for them to be admitted by the guards to the production area, to clock in, go through the change house and to assemble themselves at a designated place five minutes prior to the begining of the scheduled working hours, which were 7, 3 or 11. At the conclusion of the scheduled working hours, 3, 11 or 7 o'clock, the personnel left their respective work places under close supervision in semi-military formation and went through the change house, performing certain duties and activities required of them by their employer, clock out and were checked out of the production area gate where they got in buses or private vehicles, crossed the plant area and left the company's premises.

It was necessary for the employees to stand in line for considerable time awaiting their turn to clock out as there were insufficient time clocks; due to the large number of employees and limited facilities, it was necessary for them to

spend considerable time in change houses awaiting their turn to do the things required of them by their employer. Certain of the employees, as set out in the complaint which has been filed, were required to report to their places of work a considerable time prior to their scheduled work hours and to perform certain functions required of them [fol. 44] by their employer and to remain at the scheduled work place for some time after the end of their scheduled work hours to perform activities required of them by their employer.

Where the explosives were received, processed, made ready for use and dispatched to the front line, the employees were required to wear special clothing, take special precautions and report at specified hours prior to the beginning of their scheduled work time. They likewise were required to go through the activities mentioned above.

The employees received pay only for the scheduled work hours, 7 to 3, 3 to 11 and 11 to 7.

At no time were the employees permitted to leave the production area after passing through the gate nor to clock out after going through the clock house except in actual emergency and then only with the permission of their supervisors. From the moment they were admitted to the production area, they were under the immediate and direct supervision and control of Ford, Bacon & Davis, their employer.

At no time did the Government or the Ordnance Department of the United States Army or any member thereof exercise or attempt to exercise jurisdiction over the conduct, behavior and activities of the employees on the line. The manner and method of the performance of the duties assigned to the production lines were under the control of Ford, Bacon & Davis and this control and direction was exercised by the publication of rules and regulations, orders, bulletins and manuals as well as verbal orders given daily.

Affidavit of Frederick E. Sloan

The affiant stated:

That he lived in Little Rock, Arkansas, and was in the employ of Ford, Bacon & Davis at the Arkansas Ordnance

Plant from April 20, 1942, until July 30, 1945. He was a member of the Inspection Department and was promoted in order from inspector, foreman, line inspector and head inspector. He was assigned to one of the lines as head of the Inspection Department to see that the components loaded, assembled or in any way handled on that line conformed to the specifications and requirements. Also to see that the processes and operations established for the processing, loading, assembling and otherwise handling items of ordnance were done and performed in the prescribed method and manner.

[fol. 45] All of the regulations, manuals, procedures and specifications were issued over the signature of the officials of Ford, Bacon & Davis, except the drawings containing the specifications of the ordnance item and these drawings originated and were approved in the Office of the Chief of Ordnance of the United States in Washington, D. C.

At no time did the Ordnance Department of the United States Army or any of its personnel direct, supervise, instruct or attempt to direct, supervise or instruct the activities of the Inspection Department on the production lines. The component being loaded, assembled or otherwise handled on the production lines was inspected and either accepted or rejected by the Inspection Department of Ford, Bacon & Davis and if rejected sent to the barrain grounds and destroyed. If the completed component was accepted, it was assembled in case lots and offered to the United States Army as a completed lot of munitions. The Ordnance Department either accepted or rejected the lot as such the same as it would if it had been offered by a private industry such as Chrysler making tanks or Hercules making powder.

The line inspectors were furnished with wage classifications and rates of all employees at the plant. These wage classifications and rates gave the classification number, the classification nomenclature, symbols indicating supervisory, non-supervisory, Fair Labor Standards Act or Walsh-Haley Act and the rate of pay whether by the hour or by the week. The schedule of classifications and rates of pay were not secret information but were to be freely discussed

with employees and we were instructed to so discuss it with any employees seeking information or complaining.

Affidavit of Ada B. Perkins

Ada B. Perkins stated:

That she was an employee of Ford, Bacon & Davis at the Arkansas Ordnance Plant from the 8th day of August, 1944, until August of 1945, when the plant closed and that she was an operator on a production line. That there was exhibited to her the complaint filed in the District Court of the United States, Eastern District of Arkansas, Western Division, wherein Julia Rhoda Aaron, et al, were plaintiffs and Ford, Bacon & Davis was defendant. That she read same carefully and from her own personal knowledge stated that all allegations of fact contained therein were true. The complaint referred to in this affidavit is the complaint set out in full in the record on this appeal.

[fol. 46] Affidavit of John D. Cash

The affiant stated:

That he was in the employ of Ford, Bacon & Davis at the Arkansas Ordnance Plant from January, 1942, until the 10th day of March, 1944, when he entered the Marine Corps, serving therein until October, 1944, when he was released because of his age, returned immediately to the Arkansas Ordnance Plant and resumed his duties and remained there until the plant closed in 1945. That he served in various capacities in the Inspection Department and was made Assistant Chief Inspector of the Inspection Department in October, 1942, and served in that capacity until March, 1944, when he entered the Marine Corps. As such Assistant Chief Inspector he was in charge of the Inspection Department on all production lines at the Arkansas Ordnance Plant on the second shift. It was necessary and he was familiar with all of the specifications, requirements of all of the components loaded, assembled or otherwise handled on the line, the policies of his employer, Ford, Bacon & Davis, schedules, organization of the plant and

functions and responsibilities of the various departments. It was the function and responsibility of the Inspection Department of Ford, Bacon & Davis to inspect all materials that arrived at the plant for use in the loading or assembling of ordnance items, to see that they conformed to specifications, to make inspection of all ordnance items while in the process of being loaded or assembled, and to inspect the item after it was assembled or loaded. The purpose of the inspection was to see that the specifications and requirements, regulations and controlling the assembling, loading or handling of the items were adhered to. At no time did the Ordnance Department or any member thereof or the Federal Government or any department thereof direct or attempt to direct, control or instruct the employees of Ford, Bacon & Davis in the Inspection Department. All of the instructions, regulations, manuals, etc., governing the activities, functions, and responsibilities of the Inspection Department of Ford, Bacon & Davis came from the General Manager of Ford, Bacon & Davis through the Head of the Department.

From 75 to 85 percent of the quantity of ordnance items manufactured, assembled, processed or otherwise handled by the Arkansas Ordnance Plant consisted of detonator, primer and percussion elements. The detonators, primers and percussion elements constituted only an ingredient of some larger component. Alone they were useless and constituted nothing but a hazard. It was necessary that they be loaded into or assembled under some other item be-
[fol. 47] fore they could be used. In no sense were they finished products ready for use or consumption. These detonators, primers and percussion elements required further processing, handling, loading or assembling before they were ready for consumption or use. These detonators, primers and percussion elements were shipped to other places in other states of the Union for further processing and assembling before they were ready for consumption or use.

Much of the material processed, loaded or assembled at the Arkansas Ordnance Plant had a peacetime use.

Schedules of classifications and wage rates were issued to the different production lines. If any of the employees

in the Inspection Department on the production line were dissatisfied or had complaints they were required to take the matter up with their immediate supervisor and if it could not be disposed of to take it up with me, if it were second shift employee, and if not disposed of by me to then take it up with the department head, etc. There was much complaint long before the plant closed, by employees concerning the long hours they were compelled to be under the control and supervision of their employer and for which they were not paid. I invariably stressed that these complaints must await the termination of the war. That every effort must be devoted to the one job of winning the war. Various meetings were held on the lines from time to time stressing production for patriotic purposes; regular and intensive campaigns were carried on, speeches were made posters were issued calling attention of employees to the fact that nothing must be permitted to interfere with full production.

Ford, Bacon & Davis did not, in good faith, endeavor to discharge all obligations due employees under their contracts of employment at the Arkansas Ordnance Plant, nor were there any orders, regulations, rules, approvals or interpretations ever issued by the Ordnance Department of the United States Army or any other agency of the Government in which said Ordnance Department or agency claimed or attempted to interpret, administer, and enforce the Fair Labor Standards Act or any of its provisions.

[fol. 48] Motion to Consolidate

The plaintiffs and interveners in open court August 15, 1947 filed a motion to consolidate, said motion being to adopt the motion to consolidate therefore filed by the defendant, Ford, Bacon & Davis, Inc., and withdrawn by them August 15, 1947. Said motion was based on the contention that the cases presented common questions of law and fact on the issues of [commerce] and employer-employee relationship and to consolidate said causes would facilitate the disposition of said cases and avoid unnecessary costs.

Order to Consolidate

On August 15, 1947, the Court, upon the oral motion of plaintiffs and interveners in the cases listed on the caption of this appeal, consolidated the causes for the purpose of a hearing on the motion for summary judgment. That the cases should be consolidated under the style of Julia Rhoda Aaron et al., plaintiffs, vs. Ford, Bacon & Davis, Inc.; defendants civil action No. LR-1584, consolidated.

[fol. 49] Request for Admissions and Responses Thereto Filed in U. S. District Court on August 9, 1947.

The defendant, in response to requests of the plaintiff and intervenors, admitted:

That under its contract with the Government it was required to pay its hourly paid employees overtime at the rate of time and one-half for all time worked in excess of 40 hours a week.

That payment on the above basis was promised each employee at the time of his employment. The promise was not a part of the Report of Hire, which was made at the time of employment, but was contained in an employees manual of general information which was given to the employee at the time of his employment.

That the activity of the defendant was investigated several times by the Wage and Hour Division of the Department of Labor. Findings made by the Wage and Hour Division were sometimes furnished the defendant, but not always. The Wage and Hour Division of the Labor Department was evidently of the opinion the employees of the Arkansas Ordnance Plant were covered by the provisions of the Fair Labor Standards Act. But the defendant believes there was no general investigation concerning the question of coverage. The Ordnance Department of the Army, as a practical matter, instructed and approved the payment of all hourly paid employees at one and one-half or two times their regular hourly rate for all hours in excess of 40 hours worked during any one work week. To the request "you at all times led your employees to believe that you were and would pay them in accordance

with the terms of the wage and hour law," the response was made "the defendant denies that it has violated the provisions of the Fair Labor Standards Act."

That the Arkansas Ordnance Plant was operated by defendant, Ford, Bacon & Davis, Inc., under its contract with the Government. Munitions of war were loaded, assembled and processed by the defendant at the said Arkansas Ordnance Plant and shipped by the Government to points outside the State of Arkansas. The type and quantity of munitions loaded, etc., was specified by the Government. The defendant designed parts for and in some instances manufactured parts for the machines used at the plant. Some materials were scrapped and sold as salvage at f. o. b. the plant, Jacksonville, Arkansas, and some of this material, such as copper and brass scrap, was shipped in carload lots to private purchasers outside the State of Arkansas.

[fol. 50] Filed in U. S. District Court on August 9, 1947.

In response to interrogatories propounded to Ford, Bacon & Davis by the plaintiffs and intervenors herein, the said Ford, Bacon & Davis stated:

That goods, supplies and materials for use at the Arkansas Ordnance Plant were purchased outside of the State of Arkansas and shipped into the state. The purchases, except in a few instances, were previously approved by the Ordnance Department of the Army. Shipment was made on Government bill of lading and title to the goods was taken by the United States Government at the Arkansas Ordnance Plant at Jacksonville, Arkansas, after they had inspected and found acceptable by a representative of the Government.

That Ford, Bacon & Davis, the defendant and appellee herein, was charged with all the supplies, goods, machinery, equipment and materials used, processed, loaded, assembled and handled at the Arkansas Ordnance Plant at Jacksonville, Arkansas. The title to the above, after their acceptance by the Government at the Arkansas Ordnance Plant, at Jacksonville, Arkansas, was in the Government, but the responsibility was on the operator, Ford, Bacon

& Davis. Upon termination of hostilities, representatives of the Government made an inventory and inspection and finding all the machinery, equipment, goods, supplies and materials either consumed or on hand, relieved the operator, Ford, Bacon & Davis, of further responsibility.

The munitions loaded, assembled, processed and handled at the Arkansas Ordnance Plant at Jacksonville, Arkansas, were shipped outside of the State of Arkansas to other points in this country for further processing, handling or storage or to a port of embarkation for shipment overseas.

Some of the materials, goods and supplies used, processed, etc., at the Arkansas Ordnance Plant were scrapped. The scrap was usually sold locally in the manner provided by regulations of the Ordnance Department of the United States Army. Some of the scrap, at the direction of the Ordnance Department, was shipped outside of the state of Arkansas in carload lots to private concerns purchasing same.

That the operator, Ford, Bacon & Davis, working in cooperataion with the Ordnance Department, established wage classifications and rates for all classes of employees at the Arkansas Ordnance Plant. All non-supervisory employees at the Arkansas Ordnance Plant were to be paid time and one-half for all hours in excess of 40 hours during any work week. A copy of the classification and wage rate schedules are filed with the Clerk of the Dis-
[fol. 51] trict Court for the Eastern District of Arkansas and reference thereto may be had.

The date, bulletin number and order number of any and all regulations, rules, approval of interpretations of the operation of the Arkansas Ordnance Plant under the Fair Labor Standards Act in which the Ordnance Department of the United States Army attempted to interpret, the manner of the separations as it related to the Fair Labor Standards Act, are as follows: (1) Wage rates and job classifications of employees were approved by the Ordnance Department; (2) All Reports of Hire and change of status of employees were reported on accounting form to the Commanding Officer of the plant and it was necessary for him to approve them in order for the employer

to receive reimbursement; (3) The cards of the employee were checked by civilian employees of the Government, working for the Ordnance Department of the United States Army; (4) Pay rolls were prepared by the contractor and submitted to and audited by the Ordnance Department with a certificate showing such examination; (5) The Wage and Hour Division of the Department of Labor took up with the Ordnance Department any question of coverage of the Fair Labor Standards Act of employees of the Arkansas Ordnance Plant and as appears from one of the letters in the files of Ford, Bacon & Davis, the Ordnance Department submitted to the Wage and Hour Division of the Labor Department its plan of employment of the firemen at the Arkansas Ordnance Plant and the Wage and Hour Division of the Labor Department approved the suggested plan as being in accordance with the provisions of the Fair Labor Standards Act.

[fol. 52] Order For Summary Judgment

In The United States District Court

Eastern District of Arkansas

Western Division

Julia Rhoda Aaron et al., Plaintiffs,
No. L.R.-1584. v. Civil Action.
Ford, Bacon & Davis, Inc., Defendant.

On the 12th day of August, 1947, this cause came on to be heard on the motion of the defendant, Ford, Bacon & Davis, Inc., for a summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure, and the plaintiffs being present by their attorneys, Talley & Owen, Wayne W. Owen appearing, and Gerland P. Patten and C. H. Earl, and the defendant being present by its attorneys, Owens, Ehrman & McHaney, E. L. McHaney, Jr., appearing, and John M. Lofton, Jr., and the court, having considered the pleadings in the action, the affidavits in support of the motion filed by the defendant, the affidavits opposing the motion filed by the plaintiffs, the admissions of fact made by the defendant pursuant to the request of the plaintiffs under Rule 36 of the Federal Rules of Civil

Procedure, the responses to interrogatories propounded to the defendant by the plaintiffs, pursuant to Rule 33 of the Federal Rules of Civil Procedure, and the pleadings and orders of the court in the case of M. L. Mitchell v. Ford, Bacon & Davis, Inc., the same being Civil Action No. L.R.-855 in this court, which pleadings and orders are attached as exhibits to the affidavits filed by the plaintiffs in opposition to the motion, and upon the statement of counsel for the defendant that the affidavits in opposition to the motion raised disputed questions of fact in connection with the applicability to this action of the Portal-to-Portal Act of 1947, and upon the statement of counsel for plaintiffs that the affidavits filed by the plaintiffs in op-
[fol. 53] position to the motion raise no controverted questions of fact, and having heard oral argument, finds that there is no genuine issue as to any material fact and no controversial question of fact to be submitted to the trial court in connection with the first alleged ground for summary judgment set forth in paragraph 1(a) of defendant's motion for summary judgment, to-wit:

"That the plaintiffs were not engaged in commerce or in the production of goods for commerce within the meaning of those terms as used in the Fair Labor Standards Act; and"

The court further finds that the facts in this case concerning the grounds set forth in paragraph 1(a) of the motion for summary judgment are substantially the same as the facts in the case of Barksdale v. Ford, Bacon & Davis, Inc., Civil Action No. L.R.-1323 in this court, and the court adopts the opinion filed by it in said cause No. L.R.-1323 as its reasons for the entry of this judgment in so far as the reasons assigned in said opinion are applicable here, and orders that a copy of said opinion be filed herein and made a part of the record in this case.

And the court having concluded that defendant is entitled to judgment as a matter of law on the ground that plaintiffs were not engaged in commerce or in the production of goods for commerce and that it is not necessary to pass on any other issue raised in said motion for summary judgment, it is hereby Ordered, Adjudged and Decreed.

That plaintiffs take nothing, that the action be and it is hereby dismissed, that defendant have and recover from the plaintiffs its costs in this action, and that defendant have execution therefor.

Dated this 15 day of August, 1947.

HARRY J. LEMLEY,
United States District
Judge.

(Endorsed): Filed in U. S. Court August 15, 1947.

[fol. 54] (Opinion of District Court.)

Filed in Case No. 1584 Cons. by direction of Court, as his opinion in said 1584.

GRADY MILLER, Clerk,

By Eva H. Logan, D. C.

In the District Court of the United States, Eastern District of Arkansas, Western Division

Guy W. Barksdale, Plaintiff;
No. L.R.-1323. vs. Civil Action
Ford, Bacon & Davis, Inc., Defendant.

February 21, 1947.

Action by Guy W. Barksdale against Ford, Bacon & Davis, Inc., operators of the Arkansas Ordnance Plant under a cost-plus-a-fixed fee contract with the United States Government, for overtime compensation, liquidated damages and attorneys' fees, under the Fair Labor Standards Act.

Judgment for defendant.

Catlett & Henderson, Leon B. Catlett and E. DeMatt Henderson, all of Little Rock, Arkansas, for plaintiff.

Owens, Ehrman & McHaney, E. L. McHaney, Jr., and John M. Lofton, Jr., all of Little Rock, Arkansas, for defendant.

Lemley, District Judge.

This is an action under the Fair Labor Standards Act of 1938, 29 U. S. C. A. Sec. 201 et seq., for overtime com

pensation, liquidated damages and attorneys' fees, brought against the defendant Ford, Bacon & Davis, Inc., by the plaintiff Guy W. Barksdale and 26 other men who were employed in supervisory capacities in the operation of the Arkansas Ordnance Plant during the late war.[1]

[fol. 55] The Arkansas Ordnance Plant, situated near Jacksonville, Arkansas, was one of a large number of similar plants engaged during the war, under a cost-plus-a-fixed-fee contract, in the processing and assembling of ammunition for the United States, all supervised by the Ordnance Division of the War Department, and under the management of various corporations, in the present case the defendant, Ford, Bacon & Davis, Inc.

The plaintiffs[2] bottomed their action on the ground that they were engaged in the production of goods for commerce, within the meaning of Section 207 of the Act; no contention was made that they were engaged in commerce. The action as to all of them was defended on the ground that they were not covered by the Act; and as to all of them except Barksdale it was further contended that they were employed in bona fide executive or administrative capacities and hence exempt from the provisions of the Act. In the case of Barksdale, the defendant admitted that he was not an administrative employee, nor employed in a bona fide executive capacity since his hours of work of the same nature as that performed by those under him exceeded twenty per cent.

The issue of fact with respect to the contention that all of the plaintiffs except Barksdale were exempt employees was submitted to a jury, the Court reserving its decision on the question of coverage. A verdict was rendered for the defendant, thereby disposing of the case as to all of the plaintiffs except Barksdale. His case has not been submitted to the Court without the intervention of a jury, and the Court, based on the defendant's admission above referred to and evidence which is virtually undisputed, has made and filed herein its findings of fact. The findings [fol. 56] pertinent to this opinion are:

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[1] The case was originally styled Jim Bradford, et al. vs. Ford, Bacon & Davis, Inc.

[2] The word "plaintiffs" as used in this opinion also includes interveners.

Findings of Fact

1. * * *

6. The Arkansas Ordnance Plant was an ordnance facility owned by the United States Government. It was constructed during the war for the production of munitions such as detonators, percussion elements, artillery primers, fuzes, boosters, and powder train fuzes, for use by the Government in the prosecution of the war.

7. The United States, by written contract, retained the defendant, Ford, Bacon & Davis, Inc., to recruit labor and other personnel for and to manage the operation of the Ordnance Plant. The defendant was paid a fixed fee for this service, and the Government paid all expenses of operation, including the cost of labor and materials.

8. At all times involved in the complaint, the premises upon which plaintiff was employed, the tools and equipment which he and all others working on the premises were using in their employment, and the property and products with which they dealt in such employment were all the property of and belonged to the United States.

9. The component parts of the detonators, percussion elements, artillery primers, fuzes, boosters, powder train fuzes, and other products with which employees at the plant dealt were shipped to the plant as the property of the United States "for military use," and title to and possession thereof remained in the United States during all times relevant hereto.

10. The finished products of said plant were the property of the United States and were by it shipped under Government bills of lading to military facilities without the State of Aakansas for use by the armed forces of the United States in the war with Germany, Italy, Japan, and other nations. Some shipments went directly overseas, and [fol. 57] others went to military facilities located within the United States.

11. The defendant at no time had title to the finished products of the plant, and at no time had title to any of the component parts of such products, or of the materials, supplies, machinery, equipment, or other property used in connection with the contract, title thereto and possession

thereof being at all times in the United States and subject to its sole control.

12. The Government did not purchase munitions from the defendant.

13. The defendant did not sell munitions to the Government or to any other party.

14. No munitions or other products were manufactured or processed at the Arkansas Ordnance Plant except from materials belonging to the Government, and all such munitions and other products were by the Government used in the prosecution of the war.

15. The United States furnished and shipped to the Arkansas Ordnance Plant approximately 95% of all materials, supplies, machinery, equipment, and other property used in connection with the contract for operation of the Arkansas Ordnance Plant. Title to the remainder of the materials, supplies, machinery, equipment, or other property, which were purchased after approval by the Government through the agency of the defendant, vested in the United States at their points of origin, and they were shipped to the Arkansas Ordnance Plant on Government bills of lading, marked "Government property for military use."

16. A Government Finance Officer in Washington, D. C., paid the freight on such bills of lading.

17. The United States had title to and possession of all materials, supplies, machinery, equipment and other property used in connection with the contract for operation of the Arkansas Ordnance Plant at all times relevant hereto.

[fol. 58] 18. The United States maintained an Accountable Property Officer to be accountable for all property used in connection with the contract between the Government and the defendant.

19. Prior to the time the plant actually began operating the United States advanced to the defendant a large sum of money to defray anticipated operating expenses. As money was withdrawn from this fund it was replenished by the Government. The defendant was not required to use

any of its own money in carrying out its contract with the Government.

20. The Government contracted for electric power, and telephone, telegraph, and teletype service at the plant, and paid such bills directly. The defendant was appointed an agent of the Government for the purpose of causing official business messages to be transmitted.

21. The plant was under the direct control and supervision of the Chief of Ordnance, United States Army. A Commanding Officer appointed by the Chief of Ordnance was on duty at the Arkansas Ordnance Plant at all times relevant hereto, and exercised full and complete control over the property and the installations thereon.

22. The United States had exclusive jurisdiction over the premises embracing the Arkansas Ordnance Plant.

23. The Government retained the right to approve or disapprove the employment of all personnel and exercised this right.

24. The Government approved all wage and salary rates, and all promotions or other changes of status of employees were required to be approved in advance by the Government.

25. All munitions manufactured or processed at the plant were manufactured or processed under the direct supervision and control of the Government.

26. The Government specified the manufacturing processes to be used. It directed the type and quantity of munitions, the specifications thereof, and the rate of production. Inspections were made by the Government during each step of their manufacture or processing. Detailed [fol. 59] rules and regulations governing safety and methods of production were promulgated by the Government. The defendant was required to comply with these rules and regulations, and Government-paid employees were present to report on compliance.

27. The Government, from time to time, sent to the defendant production schedules directing the defendant to [product] munitions of certain designated specifications. The defendant was required to meet these schedules. It

had no discretion as to the type of munitions to be made, the quantity thereof, or the method or process used in their manufacture, and the defendant produced no munitions except as required by Government directive.

28. On occasion the Government transferred production schedules from other ordnance plant to the Arkansas Ordnance Plant, for completion. In such cases, if the original plant had made any contracts for materials and supplies on account of such schedules, the defendant was required to take over such supply contracts and to pay the vendors in accordance therewith from Government funds.

29. The defendant was not penalized if the materials manufactured or processed at the plant did not meet specifications and could not be used. Under the contract between the defendant and the Government, the defendant was allowed all costs of reworking rejected munitions and all costs of material finally rejected.

30. Of the direct materials used in the manufacture of munitions, the Government furnished materials of the approximate value of $275,768,000.00, and the defendant purchased and paid for with Government money materials of the approximate value of $9,574,602.34.

31. The purchase of materials, supplies, machinery, tools, equipment, or other property acquired through the agency of the defendant was first approved by the Government. The Government took title to such goods at their points of origin, and the goods were shipped on Government bills of lading to the contracting officer in care of the defendant.

32. The Government audited in advance all time cards [fol. 60] and pay rolls, and witnessed the actual payments to employees.

33. The defendant paid wages and salaries of employees by check against a bank account furnished by the Government.

34. No sales tax was paid on materials purchased for use at the Arkansas Ordnance Plant, no property taxes on real or personal property of the Arkansas Ordnance Plant were paid to the State or the county, and no license or

registration fees were paid on motor vehicles used in connection with the operation of the plant.

35. Employees traveling on business connected with the operation of the plant traveled on tax-free transportation tickets and for that purpose were authorized to state that they were on Government business.

Opinion

Based on these findings of fact, the defendant contends that the plaintiff is not within the coverage of the Act because (1) the defendant was merely an agent of the Government in the assembling and processing of said munitions, and hence the plaintiff was at all times an employee of the United States and as such exempt from the provisions of the Act, and (2) because the plaintiff was not engaged "in the production of goods for commerce" within the meaning of the Act, inasmuch as the term "goods" as used in said phrase does not include goods after their delivery into the actual physical possession of the ultimate consumer thereof, other than a producer, manufacturer or processor thereof, and the Government was the ultimate consumer; and because the term "commerce" used in said phrase does not include the shipment across state lines by the Government of Government-owned munitions of war to military facilities, to be used in the prosecution of the war; such transaction not constituting "commerce" but an administrative act of the Government exercised in its sovereign capacity.

The provisions of the Act peculiarly applicable to these contentions are as follows:

[fol. 61] "No employer shall * * * employ any of his employees who is engaged in * * * the production of goods for commerce" without complying with the provisions of the Act. Sec. 207(a).

"'Employer' includes any person acting directly or indirectly in the interest of an employer in relation to an employee but shall not include the United States * * *." Sec. 203 (d).

"'Goods' means goods (including ships and marine equipment), ware, products, commodities, merchandise, or

articles or subject of commerce of any character, or any part or ingredient thereof, but does not include goods after their delivery into the actual physical possession of the ultimate consumer thereof other than a producer, manufacturer, or processor thereof." Sec. 203(i).

"'Commerce' means trade, commerce, transportation, transmission, or communication among the several States or from any State to any place outside thereof." Sec. 203(b).

We will proceed to a discussion of the defendant's second contention, based on the construction of the words "goods" and "commerce" as used in the [prase] "production of goods for commerce," since the conclusions we have reached in that regard render it unnecessary for us to pass upon [its] first.

Section 3(i) of the Act, 29 U.S.C.A. Sec. 203 (i), provides that the term "goods" as used in the phrase "production of goods for commerce", "does not include goods after their delivery into the actual physical possession of the ultimate consumer thereof other than a producer, manufacturer or processor thereof." The Arkansas Ordnance Plant was in its entirety the property of the United States. Practically all of the materials that went into the munitions were furnished by the Government and were shipped to the plant as the property of the United States, for military use. This included powder, metal and other materials that formed a part of the munitions. This was known as free issue material. The remaining materials, which were used in the main in the fabrication packing and shipment of the munitions, were purchased by the defendant from outside sources, and all these materials became the property of the Government at the point of purchase, and were shipped from the point of purchase to the "Ordnance Property Officer, care of Ford, Bacon & Davis, Inc., Arkansas Ordnance Plant, Jacksonville, Arkansas." Thus the plaintiff was at all times working on goods of the Government, with machines of the [fol. 62] Government, and on Government property, the title to which and the possession of which remained in the

United States at all times. After these goods were worked on by the plaintiff, the United States shipped the same under Government bill of lading to military facilities outside of the state. If it can be said that the goods were in the constructive rather than actual possession of the Government while they were being processed, they were certainly in the actual physical possession of the Government when they were shipped. The goods in question were munitions of war and were manufactured for the purpose of being consumed by the United States in the prosecution of the war. Hence the United States in our opinion was the ultimate consumer thereof within the meaning of the Act, and the plaintiff was not engaged in the "production of 'goods' for commerce."

This point appears not to have been raised in the cases relied upon by the plaintiff, which will be hereinafter referred to, and there is but little authority thereon.

In Divins et al. v. Hazeltine Electronics Corporation et al., D.C., S.D.N.Y., C.C.H. 11 Labor Cases, Paragraph 63,320, the plaintiffs were employed by the defendant to install on warships, and service, radar equipment which was the property of the United States Navy. The equipment had been previously delivered to the United States and was in the actual possession of the United States at all times, and plaintiff's services were utilized in connection therewith. The case was submitted to the Court on defendants' motion for summary judgment, which motion was sustained on the ground that the plaintiffs were not engaged in the production of goods for commerce because the United States was the ultimate consumer of the equipment upon which the plaintiffs were working. We quote at length from the Court's opinion:

"The controversy here centers principally around the question whether paintiffs were engaged in the production of goods for interstate commerce. And this turns upon whether the radar equipment, the goods, upon which plain- [fol. 63] tiffs worked had been delivered to and was at the time in the actual physical possession of the ultimate consumer thereof. There is no claim that the actual physical possessor was a producer, or a manufacturer, or a processor of the equipment.

"Defendants allege in their moving affidavits that the radar equipment had been delivered to the United States prior to the times, and was in the actual physical possession of the United States at the times, that plaintiffs' services were utilized in connection therewith. Plaintiffs do not deny these allegations but describe them as bare conclusions and insufficient upon this motion to show such delivery and possession. However, in their answering affidavits they admit that they were employed by defendants to perform, and did perform, services in installing, servicing and maintaining radar equipment under contracts which defendants had with the United States, or with others who had made similar contracts with the United States, to render such services, and that their services were rendered at various United States naval establishments and upon various types of warships owned by the United States. I think that delivery and possession are sufficiently shown. If the facts be otherwise, plaintiffs should have made some attempt to show it.

"But instead of doing so, they rely upon the arguments that the radar equipment had not been fully completed at the time of its claimed delivery to the United States, for, if it had been completed, there would have been no necessity for plaintiffs to work upon it; that the equipment was useless and incapable of use unless and until it was installed and serviced by plaintiffs; that, so long as defendants' employees were working on the equipment, defendants still had the actual physical possession of it and there could be no delivery; and that the ships in which the equipment was being installed had not themselves been completed.

"All these arguments are specious. There is no requirement in Section 3(i) of the Act that the goods shall have been completed prior to delivery. This Section defines goods as including 'marine equipment, * * * or articles or subjects of commerce of any character, or any part or ingredient thereof.' Though the equipment may have been incapable of use until installed, it was, nevertheless, marine equipment. Many articles, such as gas stoves, electric refrigerators, etc., are completed articles but incapable of use until installed and connected. Plaintiffs do not claim

that the radar equipment was not completed before it was shipped from the plant; all that they claim is that it first had to be installed. The work of installing this equipment must have been a very small part of plaintiff's services, for in their answering affidavits they swear that 'approximately 50% of all my work was to grease and oil moving parts of the equipment * * * and almost all of my remaining work was actually radio servicing.' The argument that, so long as plaintiffs were working on the equipment, defendants still had actual physical possession of it, is a non sequitur. Whether the ships had themselves been completed is of no consequence in this connection."

[fol. 64] "I have no doubt that the radar equipment had been delivered to, and was in the actual physical possession of the United States. Nor have I any doubt that the United States was the ultimate consumer thereof.

"Plaintiffs also claim that they were engaged in commerce, as distinguished from being engaged in the production of goods for commerce, because the ships in which the radar equipment was installed, were 'used in the conduct of the war and were thus engaged in interstate commerce,' and, 'whether in peacetime or in wartime, ships are vital instrumentalities of commerce.' I do not think that this argument is sound. Prosecution of a war is not commerce. War is the negation of commerce. Often the purpose of a war and the result, usually, is to impair or destroy commerce, not to carry it on. True, in the prosecution of the war warships transport men, munitions, food for crew and troops and supplies for civilians. Literally speaking, this is commerce but it is purely incidental to the main purpose for which the warships are being used."

* * * * * * *

"In my opinion plaintiffs are not within the coverage of the Act because they were not engaged in commerce—and, so far as they were engaged in the production of goods for commerce, the goods upon which they worked were in the actual physical possession of the ultimate consumer which was not a producer, manufacturer, or processor thereof.

"The motion for summary judgment should be granted. Settle order on two days' notice."

Nor do we think that the term "Commerce" as used in said phrase can logically be construed to include a shipment across state lines by the Government to its military facilities of Government-owned munitions of war to be used in the prosecution of the war.

The authorities on this point are in conflict, and it is an open question in the Eighth Circuit. The point was raised and argued in the appellees' brief (which we have seen) in Smith et al. v. Porter et al., 143 F.2d 292, wherein the District Court held that the plaintiffs were exempt employees under the Act, and the plaintiffs appealed. The Circuit Court of Appeals affirmed the District Court's decision on the merits, and made no reference to this question in its opinion.

In the Arkansas State Courts, such Governmental transportation is construed not to be "commerce," but an administrative act of the sovereign.

[fol. 65] In this early case of Matlock v. Sanderson & Porter, C.C.H. 7 Labor Cases, Paragraph 61,806, Judge Parham of Jefferson Circuit Court said:

"In addition, this Court is of the opinion that the manufacture of munitions of war by the Government and the transportation thereof by the Government to points where needed, either in the United States or abroad, is not commerce as defined by the Fair Labor Standards Act, but is an administrative act by the sovereign."

The Supreme Court of Arkansas in the late case of H. B. Deal & Co., Inc. v. Leonard et al., ...Ark....., ...S. W. 2d...., decided October 21, 1946, held that employees of a corporation engaged in the construction of the Ozark Ordnance Works, near El Dorado, Arkansas, 'which plant was designed and constructed by the Government for the manufacture of ammonia and ammonium nitrate to be used in the manufacture of munitions of war, and which product was to be shipped by the Government outside of the State) were not engaged in the production of goods for commerce. We quote from the opinion of the Court:

"But appellees insist that, if they were not engaged in commerce, they were engaged in the production of goods for commerce. This argument is based on the fact that the plant was to be used in the manufacture and shipment of ammonium in commerce when completed, which is, in our judgment, a false assumption, since the Government would use the product of the plant for the manufacture of munitions to be used in the prosecution of the war in which we were then engaged, and, while it would cross state lines, the Government is the sum of all the states and of itself knows no state lines in the manufacture and shipment of war material. Moreover, the Act does not purport to apply to the Government. It applies to employers of labor who are engaged in commerce. It says: 'No employer shall . . . employ any of his employees who are engaged in commerce,' etc. Clearly, it has no reference to the Government."

In the recently decided case of Kennedy et al. v. Silas Mason Co. C.C.H. 11 Labor Cases, Paragraph 63,123, November 26, 1946, Judge Dawkins of the United States District Court for the Western District of Louisiana, had under consideration an action brought under the Fair Labor Standards Act by certain plaintiffs against the defendant company, a cost-plus-fixed-fee Government contractor, based upon labor performed by them in the operation of the Louisiana Ordnance Plant. The facts were similar to [fol. 66] those in the instant case. Judge Dawkins held that the plaintiffs were not engaged in the production of goods for commerce. He based his decision on different reasoning from ours, but in the course of his opinion he said:

"Had defendant been engaged in the business of manufacturing munitions of war, either as a general proposition, or under contract by which it agreed to produce and sell to the Government, either at fixed prices or at prices to be set from time to time, the situation would have perhaps been different, and the Fair Labor Standards Act as well as other laws pertaining to labor, prices, material, etc., might have come into play. Overtime and other expenses of the producer or manufacturer from whom the Government purchased would simply have been added to the prices which the Government had to pay, just as was

done when it purchased materials, supplies, etc., for carrying on the war. In this latter situation both the employers and employees who made the goods, although for the Government, were engaged in commerce, within the meaning of the law, where the goods moved from one state to another or overseas. On the other hand, in these cases and all others like them where the Government, instead of going into the market and paying for manufactured or raw materials, chose to furnish its own materials and to have its munitions made and shipped from its own plants, paying all expenses in the form of reimbursements to the contractor, plus a fixed fee for the latters knowledge and skill in the operation of the plants, although declining to become responsible directly for labor, materials or other obligations of the contractor, it is my view, that the same did not constitute commerce. Of course, the Fair Labor Standards Act and all other laws did apply to purchases from private concerns of raw materials of unfinished parts and supplies from which the shells and munitions were made, before they were delivered to the Government, and in those cases where they had to move from one state to another for delivery to the Government. At the same time the finished shells and munitions made at the plant were the Government's property at all times and were physically delivered to it there before being shipped to the battlefronts."

The late Judge Merrill E. Otis, of the Western District of Missouri, in Trefs v. Foley Bros., Inc., C.C.H. 7 Labor Cases, Paragraph §1,743, made the following observation:

"I doubt if the Supreme Court of the United States will ever say that the production of goods for the use of the United States even although they are transported by the United States from one state to another, is a production of goods for interstate commerce. I doubt that very much, but it is unnecessary to pass upon that question in this case."

Th Circuit Court of Appeals for the Ninth Circuit has held that the shipment by the Government across state lines of Government owned gold and silver is an administrative act of the sovereign and is not interstate commerce.

[fol. 67] In National Labor Relations Board v. Idaho-Maryland Mines Corporation, 9 Cir., 98 F 2d 129, the facts were that the respondent was engaged in mining gold and silver in California, which minerals were sold and delivered to the Government at its mint at San Francisco in that state. Thereafter the Government shipped the product to its Denver, Colorado, mint. The question at issue was the applicability of the National Labor Relations Act, 29 U. S. C. A. Sec. 151 et seq., to the mining company's operations. The Act applies to the activities of employers which have the intent or necessary effect of burdening or obstructing commerce by: "(a) impairing the effeiency, safety, or operation of the instrumentalities of commerce: (b) occuring in the current of commerce; (c) materially affecting, restraining, or controlling the flow of raw materials or manufactured or processed goods from or into the channels of commerce, or the prices of such materials or goods in commerce; or (d) causing diminution of employment and wages in such volume as substantially to impair or disrupt the market for goods flowing from or into the channels of commerce.". 29 U. S. C. A. Sec. 151. The Court held under the foregoing facts that the respondent was not engaged in such an activity since the transportation in question was not "commerce" but an administrative act of the Government. In the course of its opinion the Court said:

"Nor is the Board's assumption of jurisdiction warranted by the fact that the United States, after purchasing respondent's product and commingling it with other gold and silver, ships the commingled product from its San Francisco mint to its Denver mint for safe keeping. Respondent does not make these shipments or cause them to be made. We regard such shipments, not as commercial transaction, but as administrative acts of Government. If, however, such acts may be said to constitute commerce, it is a commerce to which respondent's activities are not closely, intimately or substantially related, and which respondent's labor practices do not directly or substantially affect."

It has been contended, as will be hereinafter noted, that the foregoing statement: "we regard such shipments,

not as commercial transactions, but as administrative acts [fol. 68] of Government," is dictum, because the Court thereafter stated: "If, however, such acts may be said to constitute commerce, it is a commerce to which respondent's activities are not closely, intimately or substantially related, and which respondent's labor practices do not directly or substantially affect." The Ninth Circuit Court of Appeals, however, evidently does not so regard it, as evidenced by its reference thereto in the later decided cases of National Labor Relations Board v. Sunshine Mining Co., 110 F. 2d 780, and Fox et al. v. Summit King Mines, Limited, 143 F. 2d 926. In the Sunshine Mining Company case, supra, it reiterated its language used in the Idaho-Maryland case to the effect that it regarded such shipments, not as commercial transactions, but as administrative acts of Government, but distinguished that case from the one under consideration, using the following language:

"It is asserted that the situation in this case is exactly the same as in National Labor Relations Board vs. Idaho-Maryland Mines Corp., 9 Cir., 98 F.2d 129, 131. Without going into detail we deem it sufficient to say that the facts in that case are different from those found here. There the California mining concern sold its output to the United States in California, and the court in that case did not consider those transactions as commerce at all, but in relation thereto said: 'We regard such shipments, not as commercial transactions, but as administrative acts of Government.'"

And in Fox et al. vs. Summit King Mines, Limited, supra, wherein the Court was considering an action involving the applicability of the Fair Labor Standards Act to the Company's employees, and where it appeared that the mining company produced gold and silver in Nevada which it sent to the mint in San Francisco, California, by mail, the title to the product remaining in the company until delivery, the Court held the Fair Labor Standards Act to be applicable, and distinguished the Idaho-Maryland case on the facts, using the following language:

[fol. 69] "Appellee cites the case of National Labor Relations Board vs. Idaho-Maryland Mining Corporation, 9

Cir., 98 F.2d 129, in which a contrary conclusion was reached by this court. That case has no bearing upon the case at bar because the facts in the former case were different. The Idaho Maryland Mine was located in California; the product was produced in California and was sold to a government mint located in California. Thus, the product produced by the mine did not cross state lines at any time before it reached the mint when it became the property of the United States Government. We did hold in the above case that the subsequent shipment of the gold and silver by the mint to Denver for safe-keeping was an administrative act of the Government and not such a commercial transaction as would render the respondent's activities subject to the National Labor Relations Act, but those shipments across State lines were made after the gold and silver became the property of the Government, while in the case at bar the interstate shipment occurred while the product was still the property of the mine and before it reached the mint."

This principle has likewise been recognized by the Circuit Court of Appeals of the Fourth Circuit. This conclusion is justified by an analysis of the opinion of the District Court in Holland, Administrator, vs. Haile Gold Mines, Inc., 44 F. Supp. 641, and of the Circuit Court of Appeals in Walling, Administrator, vs. Haile Gold Mines Inc., 136 F. 2d 102. The case last cited involved an appeal from the decision in the former.

In the District Court the plaintiff, as Administrator of the Wage & Hour Division of the Department of Labor, sought to enjoin the mining corporation from violation of certain provisions of the Fair Labor Standards Act. It appeared that the mining corporation operated a gold mine near the city of Kershaw, South Carolina, whose employees were engaged in the digging and crushing of rock from which gold was later extracted; that after the gold was obtained it was delivered to the United States Post Office at Kershaw, South Carolina, and from thence forwarded to the United States Mint at Philadelphia, Pennsylvania, in pursuance of orders of the United States Government. After delivery, the United States Treasury issued a check to the company for the bullion. The District Court denied the injunction on the [ground] that, since the shipment of

the gold from the Post Office in Kershaw, South Carolina, to the mint in Philadelphia, Pennsylvania, was made pursuant to orders of the United States Government, such constituted an administrative act of the Government rather [fol. 70] than a shipment in commerce. Upon appeal of the Administrator, the Circuit Court of Appeals reversed the District Court upon the merits, stating:

"* * * the Post Office in transporting the gold to the United States Mint in Philadelphia, was not the agent of the Mint, and the gold did not become the property of the Government until it has arrived at the Mint in Philadelphia, was duly receipted for, inspected and paid for by United States Treasury check. We therefore feel that the business conducted by Haile constituted interstate commerce within the Act and was not a mere administrative act of the Government."

The Court did not expressly so state, but the clear inference is that has the fact been that the Government owned the gold at the time the shipment was made from South Carolina to Philadelphia, such shipment would have been held to be an administrative act of the Government, and not one in interstate commerce.

A similar situation is presented in Ritch et al. vs. Puget Sound Bridge & Dredging Co., Inc., et al., 9 Cir., 156 F. 2d 334, read in connection with Ritch et al. vs. Puget Sound Bridge & Dredging Co., Inc., et al., D. C., W. D. Wash., 69 F. Supp. 670; and a like inference may be drawn.

As heretofore stated, the authorities are in conflict on the question as to whether or not the transportation across state lines by the United States to its military facilities of Government-owned munitions of war to be used in the prosecution of the war, is commerce, or, on the other hand, is an administrative act of the Government. Such transportation was held to be commerce and not an administrative act in Timberlake et al. vs. Day & Zimmerman, Inc., D. C., S. D. Iowa, 49 F. Supp. 28; Cmthun vs. Day & Zimmerman, Inc., S. Ct. Iowa, ... Ia. ....., 16 N. W. 2d 258; and Bell et al. vs. Seton Porter et al., 7 Cir., ... F. 2d ....., Dec. 10, 1946.

In the Timberlake case, the District Court treated the question as one of first impression, and cited no definite

[fol. 71] authority to sustain its position. It referred to National Labor Relations Board vs. Idaho-Maryland Mines Corporation, supra, and National Labor Relations Board vs. Sunshine Mining Co., supra, but stated that neither of these cases had "squarely" decided that such shipments were not commercial transactions but administrative acts of Government, and it regarded as dictum the holding to this effect in National Labor Relations Board vs. Idaho-Maryland Mines Corporation, supra.

In Unthan vs. Day & Zimmerman, Inc., supra, the Supreme Court of Iowa cited Timberlake et al. vs. Day & Zimmerman, Inc., supra, and also Clyde et al. vs. Broderick et al., 10 Cir., 144 F. 2d 348, wherein the Court in the course of its opinion said: "There is nothing in the Fair Labor Standards Act which indicates an intent or purpose to exempt from its coverage employees who activities relate to the movement in interstate commerce of personally owned goods of an employer or goods moving interstate for the convenience of the United States Government. The Act creates no such exemptions and we cannot."

In the Clyde case, the plaintiffs were employees of Broderick and Gordon, contractors engaged in the construction of an ammunition plant at Salt Lake City, Utah, pursuant to a contract with the United States Government and the Remington Arms Company. During the construction period, equipment, tools, and other supplies, either owned by the defendants or rented or purchased by them for use on the project, were transported on their order from points outside into the State of Utah, and after use on the plant were boxed, crated and shipped to points outside of the state. The lower court dismissed the action on the ground that the employees were not engaged in commerce or in the production of goods for commerce. The Circuit Court of Appeals reversed the case, and in doing so used the foregoing language cited by the Supreme Court of Iowa. The action in no sense involved a shipment by the Government in its sovereign capacity of Government property across state [fol. 72] lines. There is quite a difference between such a shipment and a shipment made "for the convenience of the Government." All of the shipments in the mining cases heretofore cited by us were made "for the convenience of the Government."

The Iowa Court laid stress on the statutory definition of "commerce" found in Section 203 (b) of the Fair Labor Standards Act, which has been hereinbefore set out, and pointed to the fact that it included "transportation * * * from any state to any place outside thereof," and reached the conclusion that this language included the shipment by the Government across state lines of Government-owned bombs. There is nothing particularly new in this definition of commerce. The National Labor Relations Act, upon which the suits in National Labor Relations Board vs. Idaho-Maryland Mining Corporation, supra, and National Labor Relations Board vs. Sunshine Mining Co., supra, were based, defines commerce as follows: "The term 'commerce' means trade, * * * commerce, transportation, * * * among the several states or between * * * any foreign country and any state * * *."; and the word "transportation" has been repeatedly used in definitions of commerce laid down by the Supreme Court of the United States without in any sense conveying the impression that it meant transportation by the United States of its own property across statelines. For example: in Carter vs. Carter Coal Co., et al., 298 U. S. 238, 298, ... S. Ct. ...., ..., ... L. ed. ...., ..., "As used in the Constitution, the word 'commerce' * * * includes Transportation, * * * of commodities between the citizens of the different states."; and in Addyston Pipe & Steel Co. vs. U. S., 175 U. S. 211, 241, ... S. Ct. ...., ..., ...L. Ed. ...., ..., "As has frequently been said, interstate commerce consists of intercourse and traffic between the citizens or inhabitants of different States, and includes * * * the transportation of persons and property * * *."[3]

[fol. 73] The Iowa Supreme Court also cited Walling vs. Patton-Tully Transportation Co., 6 Cir., 134 F. 2d 945. In this case the defendant, a cost-plus-a-fixed-fee Government contractor, was engaged in dike and revetment construction on the Missouri and Mississippi Rivers, and the Court held that inasmuch as this work was done on an instrumentality of commerce, the defendant and its employees were engaged in commerce. The case in our opinion is not in point with the issue under discussion.

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[3]Emphasis on the word "transportation" wherever used in this paragraph has been supplied.

In Bell et al. vs. Seten Porter et al., supra, the Seventh Circuit Court of Appeals had under consideration an appeal from a District Court which had held that the eight hours sleeping time of firemen employed by the defendant (a Cost-plus-a-fixed fee Government contractor engaged in manufacturing munitions of war in the operation of the Elwood Ordnance Plant at Elwood, Illinois), was compensable working time under the Fair Labor Standards Act. The Court reversed the decision of the District Judge, with instructions to dismiss the complaint, on the ground that the sleeping time in question was not compensable as a matter of law. The Court went further and concluded that the plaintiffs were engaged in the production of goods for commerce, inasmuch as the Government-owned munitions upon which they were working were thereafter transported by the Government across state lines, citing Unthan vs. Day & Zimmerman, Inc., supra, and Timberlake et al. vs. Day & Zimmerman, Inc., supra, and Clyde et al vs. Broderick et al., supra, all of which decisions have been discussed herein. No reference was made to the decision of the Supreme Court of Arkansas in H. B. Deal & Co., Inc. vs. Leonard et al., supra, or to any of the gold and silver mining cases hereinbefore discussed, or to any of the District Court opinions, to which we have referred as authority for our holding. The Court referred to the statutory definition of "commerce," and in construing that term so as to cover the shipment involved, cited Atlantic [fol. 74] Co. vs. Walling, 5 Cir., 131 F. 2d 518, wherein the Fifth Circuit Court of Appeals held that where the definition of "commerce" in the National Labor Relations Act included the restatement of that word along with the statement of other indices of commercial intercourse, Congress intended to enlarge the meaning of the word to include such transactions as *had theretofore been known and acknowledged as constituting commerce* in the constitutional sense. (Italics supplied.) There have been no cases cited to us, and we have found none, which were decided by any court prior to the enactment of the Fair Labor Standards Act, and which tended in any sense to hold that a shipment by the United States in its sovereign capacity of its own property across state lines, constitutes commerce.

With due respect to the courts holding to the contrary, we cannot agree that the shipment involved here is anything other than an administrative act of the Government.

Since the defendant, Ford, Bacon & Davis, Inc., in processing and assembling munitions of war for the Government at the Arkansas Ordnance Plant, was not engaged in the production of goods for commerce within the meaning of the Fair Labor Standards Act, it follows that the plaintiff working under it was not so engaged, and is therefore not within the coverage of the Act, and that his complaint should be dismissed.

HARRY J. LEMLEY,
United States District Judge.

[fol. 75] Notice of Appeal to the Circuit Court of Appeals

In the United States District Court, Eastern District of Arkansas, Western Division.

Julia Rhoda Aaron, et al., Civil Action No. L. R. 1584; Monnie Adams, et al., Civil Action No. L. R. 1578; Mary B. Alexander, et al., Civil Action No. L. R. 1545; Carroll Arrington, et al., Civil Action No. L. R. 1492; Willie K. Hobbs, et al., Civil Action No. L. R. 1469; Dan P. Moore, et al., Civil Action No. L. R. 1244; and H. J. Story, et al., Civil Action No. L. R. 1382; Plaintiffs vs. Ford, Bacon & Davis, Inc., Defendant, Consolidated and now known as

Julia Rhoda Aaron, et al., Plaintiffs,
No. L. R. 1584 vs. Civil Action Consolidated
Ford, Bacon & Davis, Incorporated, Defendant.

Notice is hereby given that Julia Rhoda Aaron and all other plaintiffs and interveners listed in the complaints and interventions in the District Court and their names appearing of record in the cases in said Court in the above captioned causes filed in the United States District Court for the Eastern District of Arkansas now pending in said court hereby appeal to the Circuit Court of Appeals for the Eighth Circuit from the order granting the defendant a summary judgment made and entered in the said United States District Court in the above captioned actions on the 15th day of August, 1947.

Plaintiffs and interveners whose actions were dismissed by the said order of summary judgment number approximately eighteen hundred (1800), and the naming of each in this notice of appeal, because of the numerous persons, is hereby done by reference to the complaints and interventions filed in the above captioned actions in the said United States District Court for the Eastern District of Arkansas.

TALLEY & OWEN and
GERLAND P. PATTEN,
Attorneys for Plaintiffs.

By Gerland P. Patten

[fol. 76] The within and foregoing Notice of Appeal was duly served upon the defendant by mailing a true copy thereof to its attorneys of record, Messrs. Owens, Ehrman & McHaney, Pyramid Building, Little Rock, Arkansas, on this the 10 day of September, 1947.

TALLEY & OWEN,
GERLAND P. PATTEN,
Attorneys for Plaintiffs.

By Gerland P. Patten,
Pyramid Building,
Little Rock, Arkansas.

(Endorsed): Filed in U. S. District Court on September 10, 1947.

[fol. 77] Bond for Costs on Appeal

Know All Men By These Presents:

That we, Julia Rhoda Aaron, et al., plaintiffs in the cases consolidated *herein and being numbered* 1584, as principal, and Maryland Casualty Company, as surety, are held and firmly bound unto Ford, Bacon & Davis, Inc., in the full and just sum of Two Hundred Fifty and No/100 ($250.00) Dollars, to be paid to the said Ford, Bacon & Davis, Inc., its successors and assigns; to which payment, well and truly to be made, we bind ourselves, our successors and assigns jointly and severally by these presents.

Whereas, on August 15, 1947, in an action depending in the United States District Court for the Eastern District

of Arkansas between Julia Rhoda Aaron, et al., as plaintiffs and Ford Bacon & Davis, Inc., as defendant, a judgment was rendered against the said Julia Rhoda Aaron, et al., consolidated, and the said Julia Rhoda Aaron, et al., in said consolidated case having filed a notice of appeal from such judgment to the United States Circuit Court of Appeals for the Eighth Circuit;

Now, the condition of this obligation is such, that if the said Julia Rhoda Aaron, et al., in said consolidated case No. 1584 shall prosecute their appeal to effect and shall pay costs if the appeal is dismissed or the judgment affirmed, or such costs as the said Circuit Court of Appeals may award against the said Julia Rhoda Aaron, et al., if the [fol. 78] judgment is modified or in any other event, then this obligation to be void; otherwise to remain in full force and effect.

JULIA RHODA AARON, et al., Principal.

By: Talley & Owen and Gerland P. Patten.

By Gerland P. Patten, Their Attorneys.

MARYLAND CASUALTY CO., Surety.

By Frank C. Mebane, Attorney in Fact.

(Endorsed): Filed in U. S. District Court on September 10, 1947.

[fol. 79] Statement of Points

The appellants will rely upon the following points:

1. Appellants were employees of appellee, not of the United States.

2. In the performance of the contract between appellee and the United States, appellee was an independent contractor.

3. Appellants were engaged in the production of goods for commerce within the meaning of the Fair Labor Standards Act.

4. The fact that munitions of war were manufactured at the Arkansas Ordnance Plant does not exempt appellee from liability under the Fair Labor Standards Act.

5. The Fair Labor Standards Act does not grant immunity to appellee on the theory that the United States was the ultimate consumer of the manufactured products of the Arkansas Ordnance Plant.

GERLAND P. PATTEN,
Attorney for Plaintiffs and Interveners.

(Endorsed) Filed in U. S. District Court on October 30, 1947.

[fol. 80] (Order Extending Time to File Transcript on Appeal.)

The motion of the plaintiffs and interveners in the above captioned causes for additional time in which to file their record on appeal and docket their action coming on to be heard and the court being well and sufficiently advised as to the law and facts doth find that said motion should be granted.

It is, therefore, considered and ordered that the plaintiffs and interveners in the above captioned causes be and they are hereby given thirty (30) days additional time from the 18th day of October, 1947, in which to file their record on appeal and docket their action in the United States Circuit Court of Appeals for the 8th Circuit.

HARRY J. LEMLEY,
U. S. District Judge.

Date: October 14, 1947.

Approved:

E. L. McHaney, Jr.,
Attorneys for Defendant.

G. P. Patten,
Attorney for pls:

(Endorsed): Filed in U. S. District Court on October 16, 1947.

[fol. 81] (Clerk's Certificate to Abstract of Record.)

I, Grady Miller, Clerk of the District Court of the United States for the Eastern District of Arkansas, in the 8th Circuit, do hereby certify that the foregoing writing annexed to the certificate are true, correct and compared copies of the original remaining of record in my office, at Little Rock, Arkansas; and that the said copies constitute a complete transcript of record on appeal in the case Julia Rhoda Aaron, et al., Consolidated case No. L.-R. 1584, vs. Ford, Bacon & Davis, Inc. as per the agreed statement.

In Witness whereof, etc.

(Sgd) GRADY MILLER,
Clerk.

By Eva H. Logan,
Deputy Clerk.

Abstract of Record filed Nov. 22, 1947, E. E. Koch, Clerk.

SUPPLEMENTAL RECORD OF APPELLEE.

United States Circuit Court of Appeals

EIGHTH CIRCUIT

No. 13,660

CIVIL.

JULIA RHODA AARON AND ALL OTHER PLAINTIFFS AND INTERVENERS LISTED IN THE COMPLAINTS AND INTERVENTIONS IN THE DISTRICT COURT IN CIVIL ACTION NO. L. R. 1584 CONSOLIDATED, APPELLANTS,

vs.

FORD, BACON & DAVIS, INCORPORATED, APPELLEE.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF ARKANSAS.

United States Circuit Court of Appeals

EIGHTH CIRCUIT

No. 13,660

CIVIL

JULIA RHODA AARON AND ALL OTHER PLAINTIFFS AND INTERVENERS LISTED IN THE COMPLAINTS AND INTERVENTIONS IN THE DISTRICT COURT IN CIVIL ACTION NO. L. R. 1584 CONSOLIDATED, APPELLANTS,

vs.

FORD, BACON & DAVIS, INCORPORATED, APPELLEE.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF ARKANSAS.

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[fol. 16] (Motion of Defendant for Summary Judgment)

(Filed in U. S. District Court on July 22, 1947)

Comes the defendant, Ford, Bacon & Davis, Inc., and moves the court as follows:

1. That it enter, pursuant to Rule 56 of the Federal Rules of Civil Procedure, a summary judgment in defendant's favor dismissing this action on the following grounds:

(a) That the plaintiffs were not engaged in commerce or in the production of goods for commerce within the meaning of those terms as used in the Fair Labor Standards Act; and

(b) That the plaintiffs were employees of the United States and as such were not covered by the Fair Labor Standards Act; and

(c) That, by virtue of the provisions of the Portal-to-Portal Act of 1947, the plaintiffs may not recover herein.

2. Defendant states that there is no genuine issue as to any material fact relating to either of the grounds for summary judgment mentioned in paragraph 1 above, and that the defendant is entitled to a judgment as a matter of law.

3. This motion is based upon the affidavits of Ellis Brown, W. F. Whittle, A. R Clarke, and Clifford Shaw, attached hereto, marked "Exhibit 'A'", "Exhibit 'B'" and "Exhibit 'C'" and "Exhibit 'D'", respectively, and made a part hereof.

OWENS, EHRMAN & McHANEY.

By E. L. McHaney, Jr.,
Attorneys for Defendant.
923 Pyramid Building,
Little Rock, Arkansas.

[fol. 17]

Exhibit "A"

(Affidavit of Ellis Brown)

State of Arkansas,
County of Pulaski.—ss.:

The affiant, Ellis Brown, being first duly sworn, deposes and states:

My name is Ellis Brown, and I reside at Skyline Drive, Park Hill, North Little Rock, Arkansas. I am an auditor, and at the present time am employed by the Lion Oil Refining Company.

I was a civilian employee of the War Department at the Arkansas Ordnance Plant during the period the plant was in operation. I started out as principal accounting clerk. Then in 1943 I became an assistant field auditor, and in 1944 I became field auditor. When I started out my duties included the checking of the contractor's records manually from a financial standpoint to verify expenditures made by the contractor. I also verified their purchases. If the records were found to be correct, it was my duty to O. K. purchases for payment.

The procedure for the purchase of materials by Ford, Bacon & Davis was as follows: First, requests for bids were sent out to various vendors. When bids were received a purchase order was prepared and delivered to a Government representative for approval. After approval by a representative of the Government or of the War Department purchase orders were issued to the vendors. When the material was delivered to the plant it was inspected and checked by the contractor and by representatives of the Government. If everything was found in proper order the contractor was authorized to issue checks in payment. The bank account upon which these checks were drawn was furnished by the Government for this purpose. Ford, Bacon & Davis was not required to use its own funds in making these purchases.

[fol. 18] A substantial portion of the materials purchased by Ford, Bacon & Davis was purchased outside the State of Arkansas and shipped to the plant. The material that was

processed at the plant was shipped to various military facilities inside and outside the State. This processed material was munitions of war, and, so far as the Arkansas Ordnance Plant was concerned, was a finished product. Some of this material that was shipped to other ordnance facilities was incorporated into other munitions. The material that was shipped away from the plant was loaded for shipment by persons on the payroll of Ford, Bacon & Davis. This loading was supervised by representatives of the Government.

The material shipped from the plant was shipped by the Government on Government Bills of Lading at reduced freight rates allowed for shipment of Government property. No transportation tax was paid on such shipments. Ford, Bacon & Davis, on behalf of the United States, was manufacturing fuses, detonators, primers, and numerous small items which later probably went into other items, but, so far as the Arkansas Ordnance Plant was concerned, our schedules called for the manufacture of these items only. The detonators and other items were used to discharge or explode various munitions and powders. Many of them were shipped directly overseas as completed items and were not attached to an explosive or bomb until ready for use. A great deal of it went directly overseas in this manner. It could be used in connection with innumerable types of explosives.

The Government set up several distinct funds to pay for various activities at the Arkansas Ordnance Plant. We would receive what we caled an "allotment" from Washington, setting forth earmarked funds to finance various phases of the work at the plant. Some funds were general and others were earmarked for specific activities. These funds were officially known as "Procurement Authorities," and were set up in Washington to cover the operation of the Arkansas Ordnance Plant. For example, the Government originally set up a fund for the specific purpose of [fol. 19] purchasing equipment for the Arkansas Ordnance Plant in the sum of $3,495,000.00. When Ford, Bacon & Davis would purchase equipment the checks were paid from this fund that had been set up by the Government.

The fund was replenished from time to time on a revolving basis so that a constant fund was available.

The component parts for the products manufactured at the Arkansas Ordnance Plant were furnished by the Government. The Government would set up schedules for production and would forward the necessary material to the plant without request by Ford, Bacon & Davis. These schedules were set up in Washington by the Ordnance Department and were distributed to the various plants under their jurisdiction. These schedules were not submitted to Ford, Bacon & Davis for either approval or rejection. Production schedules were accompanied by bills of materials which informed us what materials would be furnished by the Government direct, and what materials should be procured by us for the Government. The materials furnished by the Government were called "free issue materials" and were forwarded to the plant automatically.

"Free issue material" was paid for directly by the Government. The defendant, Ford, Bacon & Davis, had nothing whatever to do with its procurement. A substantial portion of the equipment at the plant was furnished by the Government as "free issue material". The material purchased through the facilities of Ford, Bacon & Davis was shipped to the Ordnance Property Officer, who was an Army officer. A great deal of this property was shipped to the plant on Government bills of lading, the freight bills being paid by the Government direct to the carrier.

In order to take advantage of savings through land grant rates, instructions were issued to the Ordnance Department to take title to all property procured by the contractor at the point of origin—that is, the vendor's plant. If the property was shipped to the plant on a commercial bill of lading it was converted to Government bills of lading, unless the savings in freight involved did not justify the extra work. In order to ship on Government bills of lading and take advantage of lower rates we had to show that the material was military property of the United States from its point of origin to the Arkansas Ordnance Plant.

[fol. 20] The Ordnance Department had to approve all expenditures before payment was made.

The Ordnance Department issued what is known as the "Ordnance Safety Manual", and the contractor, Ford, Bacon & Davis, Inc., was required by the Government to comply with the directors contained in the manual. The regulations in the safety manual were established for military establishments of the United States Army.

The defendant, Ford, Bacon & Davis, did not pay State sales tax on purchases made in Arkansas. An agreement between the Government and the State of Arkansas eliminated the necessity of paying such taxes.

The contractor made communications by telephone and teletype tax-free at Government rates. The Signal Corps of the United States Army made arrangements with the telephone company for this service. Telegraph service was handled differently at different times. In the beginning all such communications were at Government rates. Some time later it was changed by directive, and commercial rates were paid.

The following letter contained our instructions with reference to telegraph and telephone charges:

"War Department
Office of the Chief of Ordnance
Washington

Attention of
SPOGL

August 25, 1942

Ordnance Fiscal Circular
No. 70, Change No. 2

Subject: Telegraph and Telephone Charges in Connection with Cost-Plus-a-Fixed-Fee Contracts

To: All contracting and Purchasing Officers,
Ordnance Department

1. Instructions contained in paragraphs 2 through 7 inclusive of Ordnance Fiscal Circular No. 70, dated July 11, 1942, are equally applicable to telegrams, cables and radio messages sent in connection with the performance of cost-plus-a-fixed-fee subcontracts executed under Ordnance Department cost-plus-a-fixed-fee prime contracts. The procedure outlined therein will be followed in the pay

ment by the Government of charges for telegrams, cables and radio messages sent in connection with the performance of such cost-plus-a-fixed-fee subcontracts. Monthly invoices, after certification by the subcontractor, will be forwarded for payment through the contracting officer or his representative.

[fol. 21] 2. Instructions contained in paragraphs 9 through 12 inclusive of Ordnance Fiscal Circular No. 70, are not intended to apply to payment for telephone service at New Ordnance facilities where bills are rendered pursuant to contracts between the Signal Corps and telephone companies, since no question of tax exemption is involved. It is intended that telephone bills will be paid by the contractor, with reimbursement by the Government, only where the bills are rendered under contracts between contractors and telephone companies.

3. Cost-plus-a-fixed-fee contracts should contain appropriate provisions in accordance with the principles states in paragraph 2 above. Contracts providing for the operation of New Ordnance Facilities where contracts for telephone service will be entered into between the Signal Corps and telephone companies should contain the following provision:

"The Government will pay direct for all telegrams, telephone communications (including teletype and facsimile when authorized by the contracting officer to be installed), cablegrams, radiograms, and similar messages that may be sent by the contractor pertaining directly to the contract for work to be done or materials to be furnished thereunder, and the contractor is hereby designated as an agent of the Government for the purpose of causing to be transmitted any such messages.

Cost-plus-a-fixed-fee contracts which will be performed in the contractor's plant, the telephone service to be rendered under a contract between the contractor and the telephone company, will include the provisions set forth in paragraph 8 of Ordnance Fiscal Circular No. 70 (substantially same as above except that words 'telephone communications' are omitted from second line); this type of contract should con-

tain a specific provision for reimbursement by the Government for telephone charges paid by the contractor.

By order of the Chief of Ordnance:

IRVING A. DUFFY,
Colonel, J. A. G. D.
Assistant

42-12366"

I was also employed by the Ordnance Department during the period when the Arkansas Ordnance Plant was under construction. During this time the Government, at its own expense and without any charge to the contractor, sent many of the key personnel who were to operate the plant to the Picatinny Arsenal and other Government-owned arsenals for training. Other personnel were sent to the Hercules Powder Company under contract for training.

[fol. 22] The Government contracted with the Arkansas Power & Light Company for the furnishing of electric power to the Arkansas Ordnance Plant. Ford, Bacon & Davis had nothing to do with this.

During the period of operations, in many instances, the Government transferred schedules for production from other plants to the Arkansas Ordnance Plant for completion. For instance, we would take over schedules from Picatinny Arsenal because they were not equipped to get into real mass production. At the time the transfer was made from Picatinny to the Arkansas Ordnance Plant there might have been a number of uncompleted contracts for the purchase of material necessary for the manufacture of the particular item in question. These uncompleted contracts of purchase were automatically transferred to us, although we had nothing to do with entering into them. We were required to buy up the unfinished portion of that contract and pay the bill. The contractor, Ford, Bacon & Davis, Inc., had no choice in the matter, but was required to accept and finish the schedule.

The component parts of the products manufactured at the plant were furnished by the Government. For example, in detonators some of the component parts are the cups, paper disks, aluminum disks, and powder. Ford, Bacon &

Davis put these parts together according to specifications furnished by the Government. The Government furnished enough materials for the required work. The employees doing the work were paid on Ford, Bacon & Davis checks. Free issue material is material furnished by the Government without any money charge for it.

A Government bill of lading must go to Washington to a Finance Officer in order for the railroad to receive its money, as the Finance Officer in Washington is the only man who has a schedule of the rates to apply to Government bills of lading. When it became more costly for the Government to issue Government bills of lading than at commercial rates, then we paid commercial rates. Most of the material coming into the plant and leaving the plant traveled on Government bills of lading. The portion paid for at commercial rates was fairly minor.

[fol. 23] The Government made the contract for power with the Arkansas Power & Light Company, and the Government paid the bills.

If property was shipped into the plant to the Commanding Officer for the account of Ford, Bacon & Davis and was rejected it would be returned to the vendor.

In the beginning, the Government set up an advance revolving fund for Ford, Bacon & Davis. Ford, Bacon & Davis would make purchases which were supervised by the Government. The material would come in and be inspected and a receiving report would be issued. Invoices would be sent to what we called our reimbursement-disbursement section and paired with the receiving reports. If correct, and after auditing by both the contractor and the Government, a 1034 voucher would be issued. That voucher had to be approved by representatives of the Government and also by the Commanding Officer. Both the Field Auditor and the Commanding Officer signed the voucher. That went to an Army Finance Officer. He issued a check to Ford, Bacon & Davis in the amount of the voucher to replenish their revolving fund. This reimbursement was from an appropriation earmarked for the use of this plant and supervised by the Military at the plant. Ford, Bacon & Davis did not use any of its funds in financing the work carried

on at the plant. Government funds were used all the way through.

The Government issued what is known as "Ordnance Procurement Instructions". My department followed these instructions wherever they were applicable. A copy of the instructions was delivered to Ford, Bacon & Davis and they, too were required to comply with all applicable instructions.

The United States paid directly without using the facilities of Ford, Bacon & Davis all freight on Government bills of lading, all accounts due the Arkansas Power & Light Company, all telephone and teletype charges, and all charges against free issue material.

[fol. 24] Throughout the entire period of operations there was maintained at the plant a commanding officer or representative of the contracting officer. He was an army officer or representative of the contracting officer. He was an army officer assigned to the Ordnance Department, and it was his duty to supervise the operation of the plant. A number of Military personnel were stationed at the plant at all times. We required the maintenance of guards and the use of other safety precautions, pursuant to the directions and regulations of the Ordnance Department. The Contracting Officer specified the location of fences around the plant and around the various areas within the plant. A number of safety inspectors were maintained at the plant by the Government, checking upon safety regulations at all times.

Title to the [land] on which the Arkansas Ordnance Plant was located was in the Government, and the Government owned all materials, tools, improvements, machines and other property located on the Ordnance premise.

ELLIS M. BROWN,
Affiant.

Subscribed and sworn to before me this 20 day of June, 1947.

EVA LASTER,
Notary Public.

My commission expires August 9, 1947.

Exhibit "B".

[fol. 25] (Affidavit of W. F. Whittle.)

State Of Arkansas,
County Of Pulaski.—ss.:

The affiant, W. F. Whittle, being first duly sworn, deposes and states:

My name is W. F. Whittle, and I reside at 124 South Oak, Little Rock. I am employed by the defendant, Ford, Bacon & Davis, and am in charge of their local office. I have been with the company since January, 1942. My first employment was as cost accountant at the Arkansas Ordnance Plant. Later I became paymaster. In the latter capacity I had charge of the records pertaining to time and pay rolls.

The Arkansas Ordnance Plant was operated under a cost-plus-a-fixed-fee contract between Ford, Bacon & Davis, Inc., and the United States Government. A copy of this contract is attached hereto as Exhibit 1. That is a type of contract which provides a method whereby the Government may hire management to operate one of its plants. The defendant, Ford, Bacon & Davis, Inc., did not finance the project in any way, and had no investment in it. All money for the operation of the plant was advanced by the Government. Employees were paid from funds advanced by the Government and all other expenditures made by the contractor were from advanced funds. The plant itself, and all improvements, tools, machines, and other property belonged to the Government.

In the beginning, the Government advanced a fixed amount to the contractor to be disbursed in accordance with the contract. This money was deposited in a local bank by the contractor and on disbursement the contractor then submitted vouchers to the Government for reimbursement on a revolving basis. The money was replenished by the Government to keep the funds at a sustained level. Throughout the period of operations the defendant, Ford, Bacon & Davis, in behalf of the Government, expended for materials the sum of $15,495,437.44. During the same period the Government furnished direct materials of the ap-

proximate value of $275,854,254.21. For direct materials the defendant expended $9,574,602.34, and the Government furnished material of the approximate value of $275,768,000. The contractor disbursed for the Government $84,220,301.78, and the total Government expenditure was $279,714,018.32. A statement of production costs is attached hereto as Exhibit 2.

[fol. 26] All purchases were audited by the Ordnance Department and approved for payment on 1034 Public Reimbursement Vouchers (standard Government form).

Of the productive materials, the Government furnished as free issue in excess of 90% of all materials used.

The records do not reflect the payment of any state sales tax on materials used at the plant. We were exempt from payment of sales tax by agreement between the Government and the State of Arkansas. The reason for the agreement was that the material was for the exclusive use of the United States and was not subject to the State tax. A copy of the ruling of the State Revenue Department is attached as Exhibit 2a. If any sales tax was paid it was in connection with very small purchases.

We were issued a set of Ordnance Procurement Regulations and Instructions by the Government. We were required to comply and did comply with these instructions. (Excerpts from these instructions are attached hereto and marked Exhibit 3.)

The Government required that materials ordered through Ford, Bacon & Davis be shipped to the Contracting Officer at the Arkansas Ordnance Plant. The Contracting Officer was an Army officer stationed at the plant to represent the Government. A copy of a standard form of Purchase Order is attached as Exhibit 3a.

In the great majority of cases where materials were shipped to the plant on commercial bills of lading a conversion was made to Government bills of lading. The only exceptions to this rule were in instances where there was no saving involved or where the saving would be of a minor nature. At the start of operations the Government, through the Ordnance Department, maintained a transpor-

tation and audit section at the plant to make conversions of commercial bills of lading to Government bills of lading. In order to make such a conversion the Government had to state that the property was Government property for Military use. All materials moving out of the plant were shipped on Government bills of lading.

[fol. 27] The Government, in its contract, retained the right to discharge any employee at the plant. The Government did exercise control over the hiring of personnel, and with certain types of personnel it was necessary that the Contracting Officer approved the hiring or firing in writing.

I estimate the maximum number of Army officers on the post was 30, and in the latter days of operation it dropped to about 5 or 6. A commanding officer was always maintained at the plant and the Ordnance Department had on its own payroll a large number of civilian employees. The duty assignments of officers stationed at the Arkansas Ordnance Plant on December 2, 1942 are set out in Arkansas Ordnance Plant Memorandum No. 113, copy of which is attached as Exhibit 3b. The Ordnance Department issued an Ordnance Safety Manual providing for the safety and methods of operation of the Plant. We were required to comply with the provisions of this manual. The Arkansas Ordnance Plant was classified as an ordnance establishment. An ordnance establishment is defined by the manual as an establishment under the direct control of the Chief of Ordnance.

Our production schedules came from the Field Director of Ammunition Plants at St. Louis. I understand they originated higher up in Washington, but they came to us from the Field Director, who was an officer of the Army. Ford, Bacon & Davis had no discretion relative to the schedules of operation or production as issued to them by the Government. We were required to meet their schedules. It was not necessary for Ford, Bacon & Davis, Inc. to requisition materials. When the Field Director's Office made out schedules it also made out allotments of materials, and they came to the plant automatically. The Government from time to time directed changes in the types of munitions we were making. Also, from time to

time they changed our methods of operation. We had no discretion in these matters.

Ford, Bacon & Davis was required to comply with all applicable provisions of the Ordnance Safety Manual. Pertinent provisions of the manual are attached and marked "Exhibit 4".

Section 8405.2 of Ordnance Procurement Instructions provides that property shipped to or from the Government of the United States on Government bill of lading is exempt from the transportation tax (26 U.S.C.3475).

[fol. 28] O.P.I. Section 8500 exempts from the Federal excise tax the sale of any property for the exclusive use of the United States.

O.P.I. Section 9001.1 is as follows:

"The term 'New Ordnance Facility', as used in this Part, includes only the following facilities which are owned outright by the United States, are designated as a 'plant', a 'works', a 'depot', or a 'center' and are operated by Private contractors on a cost-plus-a-fixed-fee basis. At such times as any of the following revert to Government operation or are maintained by the Government in standby condition, they will no longer be considered a 'New Ordnance Facility' within the meaning of Part 9-Labor."

The Arkansas Ordnance Plant is listed thereunder as a new ordnance facility and was designated as such on September 10, 1942.

Ford, Bacon & Davis, Inc., was required to purchase certain items on what is known as "Treasury Procurement Schedules". Typerwriters came under this category. If we wanted a typerwriter it was necessary that we request the Ordnance Department to procure it for us. Ordnance would prepare the proper Treasury Procurement Schedule. The typewriter would then be delivered to Ford, Bacon & Davis, and the bill was paid directly by the Government.

O.P.I. Section 5010.7 sets up the procedure for such purchases.

OPI Section 5.009.1 provides for the designation of an Accountable Property Officer to be accountable for all property used in connection with the contract. Pursuant to that provision, the Ordnance Department designated an Army officer as property officer. He was accountable for all property and material purchased or used at the plant. The Government had title to and possession of all property used in connection with the operations of the Arkansas Ordnance plant.

The Government had title to the land occupied by the Arkansas Ordnance Plant at Jacksonville, Arkansas, and all improvements thereon.

All time cards were submitted to the Pay Roll Audit Section of the Ordnance Department at the end of each week, for complete audit. In addition to this, the Ordnance Department made spot check audits daily throughout the week. On pay day the Ordnance Department would send out a man to watch the delivery of checks to employees. The Ordnance Department maintained a staff of men called "field checkers" who circulated among the various clock houses. They watched the employees in and clock [fol. 29] out and made spot check audits after the auditor for Ford, Bacon & Davis had computed the time. The Government auditor would stamp all the time cards to designate his approval.

At the beginning of operations a schedule of job classifications and wage rates was submitted to and approved by the Ordnance Department. Thereafter, we were required to submit all reports of hire, changes of status and all changes of classification or changes in wage rates to the Contracting Officer's Representative for his [writen] approval before any change of status could become official. Examples of the action taken by the Ordnance Department on two submissions relative to changes in established wage rates are attached as Exhibits 5 and 6.

The Ordnance Department exercised supervision over all of the contractor's activities. The copies of documents attached as Exhibits 7, 8 and 9 are examples of the close supervision and control exercised by the Ordnance Department over the operation of the Arkansas Ordnance Plant.

The Ordnance Department not only determined and controlled the result of work performed at the Arkansas Ordnance Plant but also reserved the right to and did control and direct the method of doing the work.

Section 57200 of the Ordnance Procurement Instructions states that the United States Government has acquired exclusive jurisdiction over the Arkansas Ordnance Plant under date of September 10, 1942.

When employees at the plant traveled on official business of the plant they traveled on tax exempt tickets. Travel authorization certifying that the men were traveling on Government business and for the interest of the Government would be issued by the Commanding Officer, along with tax exemption certificates.

I was first employed at the Arkansas Ordnance Plant as cost accountant with the duty of designing and installing a cost accounting system and organizing and instructing the personnel in the Cost Accounting Department. Cost accounting involved every phase of the operation at the plant. It was necessary to maintain a staff of employees in the field at all times, and I spent at least two days each week circulating over the plant.

[fol. 30] Part of the material used at the plant was purchased outside the State and shipped to the plant on Government bill of lading. This property was purchased by Ford, Bacon & Davis, Inc., for the Government. Although Ford, Bacon & Davis issued its checks in payment, the checks were against an advance fund set up by the Government for that purpose. All purchases were audited by the Government, sometimes before they were made and sometimes afterward, but in every case audited. With possible minor exceptions, no state sales taxes, state property taxes, or automobile license taxes were paid on the property used at the Arkansas Ordnance Plant. Title to all such property was in the Government. The Government required the payment of Federal old age benefit and unemployment compensation taxes. We also were required to have workmen's compensation insurance.

The purchase orders for property purchased through the facilities of Ford, Bacon & Davis contained the following

instructions: "ship to Ordnance Property Officer, care of Ford, Bacon & Davis, Inc., Arkansas Ordnance Plant, Jacksonville, Arkansas." A copy of the regular purchase order form is attached hereto as Exhibit 3a. The Government took title to all property purchased at its point of origin.

A substantial amount of materials was purchased outside the State of Arkansas and shipped to the Arkansas Ordnance Plant in the manner set out above.

All completed products made at the plant were shipped by the Government, on Government bills of lading, to a Government agent at an Ordnance installation in the United States or to a Port Transportation Officer, for overseas shipment. A photostat of a standard form of shipping order is attached as Exhibit 10. A photostat of a duplicate bill of lading covering a shipment to an Ordnance facility in the United States is attached as Exhibit 11, and one covering a shipment to a Port Transportation Officer is attached as Exhibit 12.

The control over the employees was a dual control. The Government's representatives at the plant had the right to prohibit the employment of any person or require any person to be discharged. If we did not like this representative's ruling we had a right to appeal, but as a matter of practice we never did appeal from any such ruling.

[fol. 31] All employees at the Arkansas Ordnance Plant were paid for all activities performed by them which were compensable by express provision of any written or non-written contract, custom or practice in effect at the time. There was no agreement, written or otherwise, to pay employees at the plant for time required to travel to and from their places of work nor was there any custom or practice to this effect. The same is true regarding lunch periods.

Ford, Bacon & Davis, Inc., in good faith endeavored to discharge all obligations due employees under their contracts of employment at the Arkansas Ordnance Plant. All employees were paid for work performed at the Arkansas Ordnance Plant in conformity with and in reliance on regulations, orders, rulings, approvals, and interpretations

of the Ordnance Department of the United States Army. The Ordnance Department approved and directed all wage and salary payments. This approval covered not only the hourly or weekly rate of pay but, in the case of hourly paid employees, the number of hours to be included in the work week.

W. F. WHITTLE,
Affiant.

Subscribed and sworn to before me this 20th day of June, 1947.

EVA LASTER,
Notary Public.

My commission expires August 9, 1947.

[fol. 32] Exhibit "C".

(Affidavit of A. R. Clarke.)

State Of Arkansas,
County Of Pulaski, ss.:

The affiant, A. R. Clarke, being first duly sworn, deposes and states:

My name is A. R. Clarke.

From August, 1941, until October, 1945, I was employed by Ford, Bacon & Davis, Inc., as personnel director at the Arkansas Ordnance Plant at Jacksonville, Arkansas. As the personnel director, I was in charge of the Personnel Department. One of the duties of the Personnel Department was the employment and termination of personnel at the plant.

The Secretary of Labor did not fix job classifications and wage rates for the Arkansas Ordnance Plant. The general manager of the plant appointed a committee consisting of

five or six department heads to set up proposed job classifications and wage rates for submission to the Ordnance Department. I was a member of this committee. This proposed schedule of classifications and rates was submitted to the general manager of the plant by the committee and in turn to the Contracting Officer's Representative. In some instances, the schedules were rejected or disapproved by the Ordnance Department, which at all times exercised final control over the schedules.

The schedules as finally approved provided for various job classifications, and the hourly, weekly, semi-monthly or monthly rates of pay for employees so classified. It indicated which employees should be paid for work over 40 hours per week and which should not. Ford, Bacon & Davis, Inc., was instructed and required to follow the approved schedule in the employment and pay of employees at the Arkansas Ordnance Plant. We were not permitted to deviate from the schedule. No wage or salary payments were made except upon specific approval of the Ordnance Department.

[fol. 33] All wage and salary payments to employees at the Arkansas Ordnance Plant were made by the contractor in good faith in conformity with and in reliance on regulations, orders, rulings, approvals, and interpretations of the Ordnance Department of the United States Army.

There was no express provision of any written or unwritten contract for the payment to employees at the Arkansas Ordnance Plant for time consumed in traveling to or from their places of work or for any period of time deducted as a lunch period, or for any activities except such as were performed during their assigned tour of duty.

I was required to make several trips to Washington for the purpose of obtaining approval to changes in the schedules of wages and classifications. These adjustments were made through the Ordnance Department at Washington. In all instances we had to receive the approval of the Contracting Officer's Representative at the plant before any new classifications or wage rates could be set up, or an existing classification or wage rate changed. In addition to

his approval, the approval of the Ordnance Department at Washington was necessary.

The Contracting Officer's Representative was an Army officer sent to the plant by the Government to exercise primary authority with respect to the administration of the contract and to supervise, as representative of the War Department, the carrying out of certain duties, among others being: The general supervision of the operation of the plant.

A. R. CLARK,
Affiant.

Subscribed and sworn to before me this 20th day of June, 1947.

C. ROBERT MOULTON,
Notary Public.

My Commission expires April 24, 1950.

[fol. 34] Exhibit "D".

(Affidavit of Clifford Shaw)

State of Arkansas,
County of Pulaski.—ss.:

The affiant, Clifford Shaw, being first duly sworn, deposes and states:

My name is Clifford Shaw, and I reside at 200 North State Street, Little Rock, Arkansas. I am at the present time employed by the Bush-Caldwell Company.

I was formerly employed by Ford, Bacon & Davis, Inc., in April, 1942, as Assistant Technical Adviser. I continued in that capacity until September 6, 1943, at which time I was made Assistant General Superintendent. I remained in this position until my termination in October, 1945.

My duties in both of the aforementioned positions consisted of supervising and directing the work necessary to

meet the production schedules sent to the company by the Ordnance Department of the United States Army.

The plant was engaged solely in the manufacture of munitions of war under the direction of the Ordnance Department.

The Ordnance department from time to time would forward production orders to the Arkansas Ordnance Plant. These orders directed the production of certain types and quantities of munitions. The Ordnance Department directed not only the specifications of the completed product, but also the manufacturing method or process to be used. The orders were accompanied by detailed drawings and specifications for the completed product. They also were accompanied by a step-by-step manufacturing procedure.

A copy of Operations Manual No. 10 is attached hereto as Exhibit 13. The step-by-step procedures set forth in this manual were the procedures that we were instructed to use by the Ordnance Department. A copy of that part of Operations Manual No. 11 showing static tests to be made on one item is attached as Exhibit 14.

A copy of that part of Operations Manual No. 11 setting forth the procedure for the mixing of powder is attached as Exhibit 15. All of the instructions set forth in the Operations Manuals attached as Exhibits 13, 14, and 15 were sent to the contractor by the Ordnance Department, and we were required to follow these instructions verbatim, unless the [fol. 35] Department of Ordnance first approved a deviation.

CLIFFORD SHAW,
Affiant

Subscribed and sworn to before me this 21st day of July, 1947.

EVA LASTER,
(Seal) Notary Public

My Commission expires August 9, 1947.

[fol. 36] Exhibit 1

Contract No. W-ORD-519
DA-W-ORD-6

Cost-Plus-a-Fixed-Fee
New Ordnance Facility
Construction and Operation Contract

War Department

Contractor: Ford, Bacon & Davis, Incorporated, New York, New York

Contract for: Architect-engineer services, construction of a new ordnance facility and installation of equipment therein, procuring production equipment, and options for training key personnel for and operating a new ordnance facility for the loading of fuzes, boosters, primers and detonators.

Place: At or near Jacksonville, Arkansas.

Estimated Cost of designing, engineering and constructing under Title I: $14,812,188.00.

Fixed-Fee for designing, engineering and constructing under Title I: $445,580.00.

Estimated Cost of procuring equipment under Title II: $6,000,000.00.

Fixed-Fee for procuring equipment under Title II: $40,000.00.

Estimated Cost of Training Key Personnel under Title III (Optional): $150,000.00.

Fixed-Fee for Training Key Personnel under Title III: $1.00.

Estimated Cost of operation under Title IV (Optional): $33,525,000.00.

Fixed-Fee for operation under Title IV: $540,000.00.

Payments to be made by Finance Officer, U. S. Army at St. Louis, Mo.

The new ordnance facility, services and supplies to be obtained by this instrument are authorized by, are for the purposes set forth in, and are chargeable to the following procurement authorities, the available balances of which are sufficient to cover the cost of the same:

ORD 27,028	P99	A0141-02
ORD 27,029	P99	A0141-02
ORD 50,183	P510-31	A0025-13
ORD 50,184	P531-32	A0025-13

This contract is authorized by the following laws: The Act of July 2, 1940 (Public No. 703, 76th Congress), the Act of March 11, 1941 (Public No. 11, 77th Congress), and the Act of June 30, 1941 (Public No. 139, 77th Congress).

L. H. CAMPBELL, Jr.
Brig. Gen., U. S. Army

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W-ORD-519
DA-W-ORD-6

[fol. 39]

Cost-Plus-a-Fixed-Fee
New Ordnance Facility
Construction and Operation Contract

This Contract, entered into this 15th day of July, 1941, by The United States of America, hereinafter called the Government, represented by the Contracting Officers executing this contract, and Ford, Bacon & Davis, Incorporated, a corporation organized and existing under the laws of the State of New Jersey, with its principal office in the City of New York in the State of New York hereinafter called the Contractor, witnesseth that:

Whereas, The Government desires to have the Contractor design, construct and equip, and at the option of the Government, train key personnel, prepare to operate and operate a new ordinance facility more particularly described in Title I hereof, for the loading of fuzes, boosters, primers and detonators; and

Whereas, The accomplishment of the above-described work under a cost-plus-a-fixed-fee contract, entered into after negotiations approved by the Secretary of War, and without advertising for proposals, is authorized by law; and

Whereas, As a result of such negotiations, the Secretary of War has directed that the Government enter into a cost

plus a fixed fee contract with the Contractor for the accomplishment of the above described work;

Now, Therefore, The parties hereto do mutually agree as follows:

[fol. 40] Title I

Design, Engineering and Construction

Article I-A—Description of New Ordnance Facility

1. The new ordnance facility, hereinafter referred to as the "Plant", and designated as Arkansas Ordnance Plant, shall comprise a plant at or near Jacksonville, Arkansas, upon a site to be furnished and made available by the Government, for the loading of fuzes, boosters, primers and detonators (hereinafter sometimes referred to as "Ammunition"), having an estimated daily capacity based on a twenty-four (24) hour day as follows:

(a) 1 Line loading 15,000 Power-train fuzes.

(b) 3 Lines loading a total of 150,000 each of artillery fuzes and boosters.

(c) 2 Primer Lines loading a total of 100,000 artillery primers (21 grain).

(d) 1 Line producing 500,000 percussion elements.

(e) 4 Detonator Lines loading a total of 800,000 detonators.

(f) 3 Lines loading a total of 25,000 each of bomb fuzes, boosters and auxiliary boosters.

2. Said Plant shall consist of loading buildings, administration buildings, shops, railroads, roads, steam lines, air lines, electric lines, telephone lines, fencing, lighting, power house, dormitories, water and sewer systems, staff dwellings, messhall, cafeterias, guard quarters, fire fighting equipment and housing thereof, and other buildings and equipment necessary or appropriate for a loading plant of the approximate capacity aforesaid, with storage buildings adequate for about 30 days' supply of incoming materials and about 60 days production of finished product.

3. Said Plant shall conform, insofar as is practicable, with typical designs, drawings, specifications, details, standards or instructions contained in Appendix "A" hereto attached and made a part hereof, which are on file in the offices of the Chief of Ordnance and The Quartermaster General and which shall be promptly furnished to the Contractor or which will be furnished hereafter by the Contracting Officer; Provided, however, that no portion of said Plant shall consist of a permanent type of construction unless specifically authorized in advance by the Secre- [fol. 41] tary of War; and Provided further, that nothing herein shall prevent the use of a type of construction sufficiently substantial for the use intended, in the judgment of the Contracting Officer, as evidenced by his approval of the plans and specifications.

Article I-B—Statement of Work

1. The Contractor shall, in the shortest reasonable time, furnish the labor, materials, tools, machinery, equipment, facilities, utilities, supplies not furnished by the Government, and services, and do all things necessary for the completion of the following work:

a. The construction of and the installation of equipment in the Plant described in Article I-A hereof, in accordance with the approved plans and specifications provided hereinafter.

b. The furnishing of all architectural and engineering services covering the design, preparation of drawings, plans and specifications, and field engineering and supervision necessary for the efficient execution and coordination of the construction and installation of equipment of said Plant as provided for hereunder, which services together with other provisions pertaining thereto are more particularly described and hereinafter set forth in Article I-E.

2. Supervision, direction and control of performance provided for in Article I-B shall be as follows:

a. The Contracting Officer appointed by the Chief of Ordnance will supervise the preparation of the general layout of the project and the detailed plans and working

drawings for the operating buildings and their equipment, including process steam generating plant and explosive storage buildings.

b. The Contracting Officer appointed by the Quartermaster General will supervise the preparation of the detailed plans and working drawings for roads, railroads, sewerage systems, water systems, electrical generating plants and transmission lines, heating plants, non-manufacturing buildings, such as offices, general warehouses and garages, and such miscellaneous construction as may be requested by the Chief of Ordnance. All designs must have the concurrence of the Contracting Officer appointed by the Chief of Ordnance.

c. Performance of the construction work of the entire project will be under the supervision of the Contracting Officer appointed by The Quartermaster General.

3. The Contracting Officer may, at any time, without notice to the sureties, if any, by a written order, issue additional instructions, require additional work or service, or [fol. 42] direct the omission of work or services covered by this Title I. No adjustment in the fixed-fee shall be made for any such changes unless the net total of such changes in the work or services results in more than a twenty-five percent (25%) increase or decrease in the capacity of the operating lines set forth in Section 1 of Article I-A of this Title I, or unless such changes in the work or services results in the addition or deletion of one or more of such operating lines. An equitable adjustment in the amount of the fixed-fee to be paid the Contractor shall be made for any increases or decreases in the work and services performed in connection with that portion exceeding the said twenty-five percent (25%) of such units, and the addition or deletion of one or more operating lines, and the contract shall be modified in writing accordingly. The adjustment of the fixed fee under this title shall be made upon the completion or termination of the work and services under this title, and shall be subject to the approval of the Secretary of War. Insert on reverse side of sheet. P. G. (There shall be no adjustment in the amount of the fixed fees as provided herein nor shall there be any claims for increased compensation because of any errors and or omissions

made in computing the original estimates of cost hereunder or where the estimated costs vary from the actual costs. P. G.)

Article I-C—Estimates

1. It is estimated that the total cost of the work under this Title I will be approximately Fourteen Million Eight Hundred Twelve Thousand One Hundred Eighty-eight Dollars ($14,812,188.00), excluding the Contractor's fee and the procurement of production equipment provided for in Title II hereof.

2. It is estimated that the completed Plant will be ready for utilization by the Government within ten (10) months after the approval date of this contract.

3. It is expressly understood that neither the Government nor the Contractor guarantees the correctness of any of the estimates set forth in this Article I-C. The estimated total costs set forth in this Article I-C are based upon the data now available and agreed to by both the Government and the Contractor, copies of which are on file in the offices of the Chief of Ordnance and The Quartermaster General.

Article I-D—Consideration

1. As consideration for its undertaking under this Title I the Contractor shall receive the following:

a. Reinbursement for expenditures as provided in Title V.

b. Rental for Contractor's equipment as provided in Title V.

c. A fixed-fee in the amount of Four Hundred Forty-five Thousand Five Hundred Eighty Dollars ($445,580.00) which shall constitute complete compensation for the Contractor's services, including profit and all general overhead expenses.

[fol. 43] 2. The Contractor's fixed-fee stipulated herein is based upon the understanding that the Contractor will subcontract portions of the work under this contract as follows (if none, so indicate):

Item	Kind of Work
1.	Plumbing, sprinklers, air conditioning.
2.	Heating, ventilating.
3.	Electrical Wiring.
4.	Steel purchased erected, special fence erected.
5.	Well drilling, overhead tanks.
5.	Bonded roofing if required.

If work of categories other than or in addition to those mentioned above is sublet, or if work included in any of the above categories is performed by the Contractor's own force, all with the written approval of the Contracting Officer, the fixed-fee of the Contractor shall be decreased or increased accordingly, by an equitable adjustment on the basis of the decrease or increase of services made necessary by such changes.

Articles I-E—Character And Extent Of Architectural And Engineering Services

1. The Contractor shall, in the shortest reasonable time, preform the following services:

a. Make all necessary topographical and other surveys and maps; arrange for and superyise necessary test borings and other subsurface investigations.

b. Prepare layout plan of the proposed project and obtain approval thereof.

c. Prepare preliminary studies, sketches, and reports, for all structures, utilities and appurtenances.

d. Adapt Government designs, drawings, specifications and standards for buildings and other structures as necessary to meet the requirements of the approved layout of the proposed project, and prepare detailed designs, specifications and drawings in required form for which Government designs are incomplete or unavailable.

e. Obtain necessary permits and approvals from all local, State and Federal authorities. Should it become

necessary in the performance of the work and services for the Contractor to secure the right of ingress or egress to perform any of the work required by this Title I hereof on properties not owned or controlled by the Government, the Contractor shall, if practicable, secure the consent of the owner, his representative, or agent, prior to effecting entry on such property. In the event the owner requires the payment of any fee for a license to enter upon and or use such property, the Contractor when so directed by the Contracting Officer, shall pay such fee and obtain a receipt therefor.

[fol. 44] f. Prepare estimates of the material quantities involved in the proposed project.

g. When preliminary drawings are approved by the Contracting Officer, prepare final designs, detailed working drawings and specifications in accordance with Government standards necessary for the effective coordination and efficient execution of the construction work and revise the drawings and specifications as required by the Contracting Officer. Drawings shall be prepared for permanent record, inked in on linen or as otherwise directed by the Contracting Officer, but in no case will these drawings be prepared in pencil or on paper; the specifications shall be mimeograph to produce the number of copies required by the Contracting Officer. There shall be included in the specifications all provisions which the Contracting Officer may direct to have incorporated therein relating to the advertising, negotiating, awarding of contract, conditions under which the work shall be done, and any special provisions required by statute or existing War Department regulations or instructions.

h. Prepare an estimate of the cost of the proposed project based on the approved designs, drawings and specifications therefor.

i. Assist the Contracting Officer in obtaining, analyzing and evaluating proposals or bids for a construction contract or contracts based upon the approved drawings and specifications.

j. Prepare record drawings in required form, or correct drawings and specifications to show construction as

actually accomplished; assist in preparation of the completion report for the project; and furnish for the approval of the Contracting Officer:

(1) Schedules and charts showing the sequence of operations in the construction of each of the several portions of the work.

(2) Estimates showing the amounts of critical and important materials and dates when such materials will be required on the site.

(3) Labor estimates showing the approximate number, trades and dates required to meet the schedule in (1) above.

(4) In addition to the requirement of Paragraph "r" of this Section 1 of Article 1-E, periodical progress reports as required by the Contracting Officer showing the progress of the work and any deviation from the schedule in (1) above.

k. Establish a permanently monumented base line, all Governing lines, bench marks and grades, tied into the North American Datum unless specifically exempted by written instructions of the Contracting Officer.

[fol. 45.] l. Supervise the work included in this Title I to insure the construction of every part of the work in accordance with the approved drawings and specifications referred to in Paragraph "d" of this Section 1 of Article 1-E, and within the areas and boundaries designated for the project.

m. Check and approve all shop and work drawings submitted in connection with the construction work to assure that they conform with approved drawings.

n. Make such field and laboratory tests of concrete and concrete aggregates and all other materials at the site or at any time or place as the Contracting Officer may require. Inspect and report to the Contracting Officer in writing as to the conformity or non-conformity of the workmanship and materials to specifications; and on the progress of the project.

o. Upon termination or completion of this contract, as determined by the Contracting Officer, and before final payment of the fixed fee, the Contractor shall correct all permanent tracings to the satisfaction of the Contracting Officer to show all changes in the actual construction from the original drawings.

p. Without additional compensation the Contractor, or any member of the organization, when requested, shall consult and advise with the Contracting Officer on any questions which may arise in connection with the work.

q. Perform all other architectural and engineering services within the scope of this contract, required by the Contracting Officer.

r. The Contractor shall promptly, after the execution of the contract, prepare and submit to the Contracting Officer, for approval, a schedule showing the order in which the Contractor proposes to carry on the work, with dates on which he will start the several salient features of the work and the contemplated dates for completing the same. The schedule shall be in the form of a progress chart at suitable scale so as to indicate with symbols the percentage completed at any time. The Contractor shall correct the progress schedule at the end of each week and shall immediately deliver to the Contracting Officer three copies of the same.

s. The Contractor shall furnish sufficient technical supervisory and administrative personnel to insure the prosecution of the work in accordance with the approved progress schedule. If, in the opinion of the Contracting Officer, the Contractor falls behind the progress schedule, the Contractor shall take such steps as may be necessary to [fol. 46] improve his progress and the Contracting Officer may direct him to increase working days per week, or hours of labor per day and failure to comply with such directions shall be deemed sufficient cause to terminate the contract.

t. When in the opinion of the Contracting Officer the Contractor's personnel and or overhead is excessive for the proper performance of this contract, reductions thereof shall be made as required by the Contracting Officer.

2. The Government shall furnish the Contractor such available schedules of preliminary data, layout sketches, and other available information respecting sites, topography, soil conditions, outside utilities and equipment, and shall make available to the Contractor such Government designs, drawings, specifications, details, standards and safety practices as are on hand in the office of the Chief of Ordnance and The Quartermaster General and are applicable to the design, construction, and equipping of the said Plant.

3. All of the Contractor's notes and other data concerning the design, construction and equipping of the Plant shall become the property of the Government and the Government shall have full right to use said notes and other data for any purpose it may desire, without any claim on the part of the Contractor for additional compensation. All such notes and other data shall be delivered to the Government whenever requested by the Contracting Officer and, furthermore, access to such notes and data shall be restricted to trusted and duly authorized representatives of the Government and of the Contractor.

4. Expert Technical Assistance. When in the judgment of the Contractor the complexity and nature of the project are such as to require expert technical assistance, or services, or advice in connection with special phases of the work such as site planning, manufacturing processes, or other problems of a highly technical character, the Contractor may employ directly or by a service contract with the consent and approval of the Contracting Officer, such supplemental professional services as are necessary for the proper design and execution of the project.

Article I-F.—Rates Of Wages—Non Rebate.

1. In accordance with the act of August 30, 1935 (49 Stat. 1011; 40 U. S. C. 276a and 276a-1), the following provisions shall apply to the work under this Title I:

a. The Contractor or his subcontractor shall pay all mechanics and laborers employed directly upon the site of the work, unconditionally and not less often than once a week, and without subsequent deduction or rebate on any

account, the full amounts accrued at the time of payment, computed at wage rates not less than those established by [fol. 47] the Secretary of Labor for the work herein specified, regardless of any contractual relationship which may be alleged to exist between the Contractor or subcontractor and such laborers and mechanics; and the scale of wages to be paid shall be posted by the Contractor in a prominent and easily accessible place at the site of the work. The Contracting Officer shall have the right to withhold from the Contractor so much of accrued payments as may be considered necessary by the Contracting Officer to pay to laborers and mechanics employed by the Contractor or any subcontractors on the work the difference between the rates of wages required by the contract to be paid laborers and mechanics on the work and the rates of wages received by such laborers and mechanics and not refunded to the Contractor, subcontractors, or their agents.

b. In the event it is found by the Contracting Officer that any Laborer or mechanic employed by the Contractor or any subcontractor directly on the site of the work covered by the contract has been or is being paid a rate of wages less than the rate of wages required by the contract to be paid as aforesaid, the Government may, by written notice to the Contractor, terminate his right to proceed with the work or such part of the work as to which there has been a failure to pay said required wages and prosecute the work to completion by contract or otherwise and the Contractor shall be liable to the Government for any excess costs occasioned the Government thereby.

2. The following provisions shall apply to the work under this Title I:

a. All wage rates, including compensation for overtime under Article I-G of this Title I, for laborers and mechanics engaged in work under this subcontract shall be approved in writing by the Chief of Branch or his duly authorized representative; and any amount paid by the Contractor to any laborer or mechanic in excess of the wage rate approved for such laborer or mechanic by the Chief of Branch shall be at the expense of the Contractor and shall not be reimbursed. When, in connection with the audit and

check by the Contracting Officer or his duly authorized representative, of the Contractor's payrolls prior to reimbursement as contemplated in Section 1 of Article I-D hereof, it is found that one or more laborers and or mechanics have been paid wages at rates in excess of the wage rates approved as herein provided, the reimbursement made to the Contractor on account of such payrolls will not include such excess payments.

b. The Contractor shall furnish to the Government representative in charge at the site of the work covered by this contract, or if no Government representative is in charge at the site, shall mail to the Federal agency contracting for the work, within 7 days after the regular payment date of [fol. 48] each and every weekly payroll, an affidavit in the form prescribed by regulations issued by the Secretary of Labor and published in the Federal Register of March 1, 1941; 6 F. R. 1211, or any modification thereof pursuant to the act of June 13, 1934, 48 Stat. 948 (U. S. Code title 40, sections 276 b and c), sworn to by the Contractor or the subcontractor concerned or by the authorized officer or employee of the Contractor or subcontractor supervising such payment, to the effect that each and every person employed on the work has been paid in full the weekly wages shown on the pay roll covered by the affidavit; that no rebates have been or will be made either directly or indirectly to or on behalf of the Contractor or such subcontractor from the full weekly wages earned as set out on such pay roll; and that no deductions, other than permissible deductions, as defined in the said regulations pursuant to said act of June 13, 1934, and as described in said affidavit, have been or will be made, either directly or indirectly, from the full weekly wages earned as set out on such pay roll.

The Contractor shall comply with all applicable requirements of the said regulations of the Secretary of Labor under the act of June 13, 1934, and the requirements of this Paragraph of the contract shall be subject to all applicable provisions of such regulations.

The Contractor shall cause appropriate provisions to be inserted in all subcontracts relating to this work to insure fulfillment of the requirements of this Paragraph.

Article I-G—Eight-Hour Law—Overtime Compensation.

No laborer or mechanic doing any part of the work contemplated by this Title I, in the employ of the Contractor or any subcontractor contracting for any part of said work contemplated, shall be required or permitted to work more than eight hours in any one calendar day upon such work at the site thereof, except upon the condition that compensation is paid to such laborer or mechanic in accordance with the provisions of this Article. The wages of every laborer and mechanic employed by the Contractor or any subcontractor engaged in the performance of this Title I shall be computed on a basic rate of eight hours per day and work in excess of eight hours per day is permitted only upon the condition that every such laborer and mechanic shall be compensated for all hours worked in excess of eight hours per day at not less than one and one-half times the basic rate of pay. For each violation of the requirements of this Article a penalty of five dollars shall be imposed upon the Contractor for each laborer or mechanic for every calendar day in which such employee is required or permitted to labor more than eight hours upon said work without receiving compensation computed in accordance with this Article, and all penalties thus imposed shall be withheld for the use and benefit of the Government: Provided, That this stipulation shall be subject in

[fol. 49] all respects to the exceptions and provisions of U. S. Code, title 40, sections 321; 324, 325, and 326, relating to hours of labor, as in part modified by the provisions of Section 5 (b) of Public Act No. 671, 76th Congress, approved June 28, 1940, and Section 303 of Public Act No. 781, 76th Congress, approved September 9, 1940, relating to compensation for overtime.

[fol. 50] Title II.

Procurement Of Production Equipment.

Article II-A—Statement Of Work.

1. The Contractor shall, in the shortest reasonable time, determine the production equipment requirements for the Plant and shall, subject to the approval of the Contracting Officer, thereupon proceed to do all things neces-

sary and incident to the procurement of the production equipment required.

2. The Government reserves the right to furnish any production equipment necessary for the equipping of the Plant, provided such production equipment so to be furnished is of a suitable type and in satisfactory operating condition, upon so notifying the Contractor prior to any commitment by the latter therefor. In the equipping of the Plant the Contractor shall be free (but shall not be obligated) to use any production equipment of its own manufacture; upon advising the Government in advance as to the prices at which and the conditions upon which such production equipment will be supplied, which prices and conditions, however, shall not be less favorable than those quoted to third parties for similar quantities and deliveries, any may be quoted without regard to the provisions of Section 6 of Article V-A of Title V. In the event the Government is able to obtain production equipment of equal quality and quantity at a lower price or on more favorable conditions from any responsible competitive source or from its own manufacture, it may undertake to do so upon so informing the Contractor within ten (10) days after being advised of the Contractor's price for such equipment.

Article II-B—Estimates.

It is estimated that the total cost under this Title II will be approximately Six Million Dollars ($6,000,000.00), exclusive of the Contractor's fee. It is expressly understood, however, that neither the Government nor the Contractor guarantees the correctness of this estimate. The estimated total cost set forth in this Article II-B is based upon an estimate agreed to by both the Government and the Contractor, a copy of which is on file in the office of the Chief of Ordnance.

Article II-C—Consideration.

As consideration for its undertaking under this Title II the Contractor shall receive the following:

1. Reimbursement for expenditures as provided in Title V.

[fol. 51] 2. A fixed-fee in the amount of Forty Thousand Dollars ($40,000.00), determined by negotiations between the Contractor and the Chief of Ordnance, which shall constitute complete compensation for the Contractor's services, including profit, other than that included in the prices quoted pursuant to Section 2 of Article II-A of this Title II.

Article II-D—Eight Hour Law—Overtime Compensation.

The provisions of Article I-G of Title I shall apply to the work under this Title II.

[fol. 52] Title III.

Training Of Key Personnel (Optional).

Article III-A—Statement Of Work.

1. The obligation of the Contractor to proceed with the work under this Title III shall be conditioned upon receipt by the Contractor of notice in writing from the Contracting Officer so to do, and the prior appropriation and allocation of funds necessary therefor. Upon receipt by the Contractor of such notice, the Contractor shall hire or select the key personnel necessary for the operation of the Plant, and when such personnel is available shall proceed to train such personnel in the duties and functions of their respective positions, at the Contractor's plants or elsewhere, in order that they will have obtained experience with the processes and operations involved in the Plant at any time when the Government shall exercise its option under Section 1 of Article IV-A of Title IV.

2. After completion of the work under Section 1 of this Article III-A, the Contractor shall, if directed by the Contracting Officer, until a date not in excess of Fourteen (14) months after the approval of this contract, hold the group of key personnel trained hereunder in readiness for operation of the Plant should the Government exercise its option under Section 1 of Article IV-A of Title IV.

3. The extent and character of the work to be done by the Contractor under this Title III shall be subject to the approval of Contracting Officer to whom the Contractor

shall report and be responsible. In the event that there should be any dispute with regard to the extent and character of the work to be done the matter shall be determined as provided in Article VII-N of Title VII.

Article III-B—Estimate.

It is estimated that the cost of the work under this Title III will be approximately One Hundred Fifty Thousand Dollars ($150,000.00), exclusive of the Contractor's fee. It is expressly understood that neither the Government nor the Contractor guarantees the correctness of this estimate. The estimated total cost set forth above is based upon an estimate agreed to by both the Government and the Contractor, a copy of which is on file in the Office of the Chief of Ordnance.

[fol. 53] Article III-C—Consideration.

As consideration for its undertaking under this Title III the Contractor shall receive the following:

1. Reimbursement for expenditures as provided in Title V.

2. A fixed fee of One Dollar ($1.00) which shall constitute complete compensation for the Contractor's services under this Title III, including profit.

Article III-D—Eight Hour Law—Overtime Compensation.

The provisions of Article I-G of Title I shall apply to the work under this Title III.

[fol. 54] Title IV.

Operation Of Plant (Optional)

Article IV-A—Statement Of Work.

1. The obligation of the Contractor to proceed with the work under this Title IV shall be conditioned upon receipt by the Contractor of the notice provided for in Section 1 of Article III-A hereof and receipt by the Contractor within fourteen (14) months after the date of approval of this contract of notice in writing from the Contracting Officer

so to do, and the prior appropriation and allocation of funds necessary therefor. Immediately upon receipt by the Contractor of such notice, and concurrently with the performance of the work required of it under Titles I, II and III hereof, the Contractor shall undertake all preparations necessary for the subsequent operation of the Plant, including the necessary training of personnel for such operation in addition to the key personnel trained pursuant to Title III hereof, and all other services incident to setting up an efficient and going operating force.

2. As each operating unit of the Plant is completed and ready for operation and the necessary preparation for operation and training of personnel has proceeded to a point where operation is practicable the Contractor shall proceed to operate it as directed from time to time by the Contracting Officer, irrespective of whether or not the construction and equipping of the Plant as a whole shall have been completed.

3. Notwithstanding the fact that the construction and equipping of the Plant as a whole shall not have been completed, when all operating units thereof are completed and ready for operation without incurring hazards because of the lack of completion of the construction and equipping of the Plant as a whole beyond those usual in the normal operation of a plant of the type provided for herein, the Contractor shall so notify the Contracting Officer in writing, and from and after the date of said notice the Contractor shall operate said Plant for a period of twelve (12) months.

4. Upon written notice to the Contractor not less than ninety (90) days before the anticipated completion of the operation provided for in Section 3 next above, the Government may, at its option, authorize the continued operation of the Plant for an additional period of twelve (12) months and the Contractor shall undertake such continued operation under the terms and conditions of this contract applicable to the operation of the Plant (including those relating to the fixed fee for such additional operation, which fee shall be that provided in Section 3 of Article IV C hereof). Further continued operation, if any, of said Plant by the Contractor after said additional operation shall be subject to mutual agreement.

[fol. 55] 5. The work under this Title IV shall be performed in accordance with the current applicable specifications which will be furnished by the Contracting Officer.

6. The Government shall furnish all explosives and all metal parts for the loading of the Ammunition, including shipping materials and containers, when and as requisitioned from time to time by the Contractor, to be delivered when required, f.o.b. said Plant, in sufficient quantities to enable the Contractor to carry on the operation of the Plant provided for in this Title IV. The Contractor shall be under no obligation to accept or store or permit to be stored at said Plant any explosives which would render the work to be done by the Contractor hereunder hazardous beyond what is usual in the normal operation of a plant of the type provided for herein.

7. In carrying out the work under this Title IV the Contractor is authorized and shall do all things necessary or convenient in the operating and closing down of the Plant, or any part thereof, including (but not limited to) the employment of all persons engaged in the work hereunder (who shall be subject to the control and constitute employees of the Contractor), the providing of all materials and supplies except such as the Government is to furnish or supply as elsewhere specifically provided herein, the storage of materials and supplies and of the finished products to the extent of the storage facilities at said Plant, the preparation of the product for shipment and the loading of same on cars or other carriers in accordance with the Government's shipping instructions.

8. In providing materials and supplies as provided in Section 7, next above, the Contractor shall be free (but shall not be obligated) to use any materials or supplies of its own manufacture, upon advising the Government in advance as to the prices at which and the conditions upon which such materials and supplies will be provided, which prices and conditions, however, shall not be less favorable than those quoted to third parties for similar quantities and deliveries, and may be quoted without regard to the provisions of Section 6 of Article V-A of Title V. In the

event the Government is able to obtain materials or supplies of equal quality and quantity at a lower price or on more favorable conditions from any responsible competitive source or from its own manufacture, it may undertake to do so upon so informing the Contractor within ten (10) days after being advised of the Contractor's price for such material and supplies.

9. The Contractor shall maintain a satisfactory system of inspection, gaging and gage checking concurrent with operations, and no ordnance material shall be submitted for the Government inspector's approval which has not previously been inspected by agents of the Contractor and found to be up to the contract standard.

Article IV-B—Estimates

It is estimated that the cost of the work under this Title IV will be Thirty-three Million Five Hundred Twenty-five Thousand Dollars ($33,525,000.00) exclusive of the cost of continued operation covered by the option therefor pro- [fol. 56] provided in Section 4 of Article IV-A hereof, and exclusive of the Contractor's fee. It is expressly understood that neither the Government nor the Contractor guarantees the correctness of this estimate. The estimated total cost set forth above is based upon an estimate agreed to by both the Government and the Contractor, a copy of which is on file in the Office of the Chief of Ordnance.

Article IV-C—Consideration

As consideration for its undertaking under this Title IV the Contractor shall receive the following:

1. Reimbursement for expenditures as provided in Title V hereof.

2. A fixed-fee for the work provided for in Sections 1, 2 and 3 of Article IV-A hereof, in the amount of Five Hundred Forty Thousand Dollars ($540,000.00), which fee shall constitute complete compensation (except for continued operation) for Contractor's services, including profit other than that included in the prices quoted pursuant to Section 8 of Article IV-A of this Title IV.

3. A fixed-fee for continued operation provided in Section 4 of Article IV-A hereof, in the amount of Four Hundred Twenty Thousand Dollars ($420,000.00) for twelve (12) months continued operation, which fee shall constitute complete compensation for Contractor's services during such continued operation, including profit other than that included in the prices quoted pursuant to Section 8 of Article IV-A of this Title IV.

Article IV-D—Walsh-Healey Act

1. The following representations and stipulations pursuant to the Walsh-Healey Public Contracts Act (Act of June 30, 1936; 49 Stat. 2036; 41 USC 35-45), shall apply to the operation of the Plant under this Title IV of this contract.

a. The Contractor is the manufacturer of or a regular dealer in the materials, supplies, articles, or equipment to be manufactured or used in the performance of the contract.

b. All persons employed by the Contractor in the manufacture or furnishing of all materials, supplies, articles, or equipment used in the performance of the contract will be paid, without subsequent deduction or rebate on any account, not less than the minimum wages as determined by the Secretary of Labor to be the prevailing minimum wages for persons employed on similar work or in the particular or similar industries or groups of industries currently operating in the locality in which the materials, supplies, articles or equipment are to be manufactured or furnished under the contract; provided, however, that this stipulation with respect to minimum wages shall apply only to purchases or contracts relating to such industries as have been the subject matter of a determination by the Secretary of Labor.

[fol. 57] c. No person employed by the Contractor in the manufacture or furnishing of the materials, supplies, articles, or equipment used in the performance of the contract shall be permitted to work in excess of 8 hours in any 1 day or in excess of 40 hours in any 1 week, unless such

person is paid such applicable overtime rate as has been set by the Secretary of Labor.

d. No male person under 16 years of age and no female person under 18 years of age and no convict labor will be employed by the Contractor in the manufacture or production or furnishing of any of the materials, supplies, articles, or equipment included in the contract.

e. No part of the contract will be performed nor will any of the materials, supplies, articles, or equipment to be manufactured or furnished under said contract be manufactured or fabricated in any plants, factories, buildings or surroundings or under working conditions which are unsanitary or hazardous or dangerous to the health and safety of employees engaged in the performance of the contract. Compliance with the safety, sanitary, and factory inspection laws of the state in which the work or part thereof is to be performed shall be prima facie evidence of compliance with this paragraph.

f. Any breach or violation ~~of any~~ of the foregoing representations and stipulations shall render the party responsible therefor liable to the United States of America for liquidated damages, in addition to damages for any other breach of the contract, in the sum of $10 per day for each male person under 16 years of age or each female person under 18 years of age, or each convict laborer knowingly employed in the performance of the contract, and a sum equal to the amount of any deductions, rebates, refunds, or underpayment of wages due to any employee engaged in the performance of the contract; and, in addition, the agency of the United States entering into the contract shall have the right to cancel the same and to make open market purchases or enter into other contracts for the completion of the original contract, charging any additional cost to the original contractor. Any sums of money due to the United States of America by reason of any violation of any of the representations and stipulations of the contract as set forth herein may be withheld from any amounts due on the contract or may be recovered in a suit brought in the name of the United States of America by the Attorney General thereof. All sums withheld or recovered as deductions, rebates, refunds, or underpayments of wages

shall be held in a special deposit account and shall be paid, on order of the Secretary of Labor, directly to the employees who have been paid less than minimum rates of pay as set forth in such contracts and on whose account such sums were withheld or recovered: Provided, That no claims by employees for such payments shall be entertained unless made within 1 year from the date of actual notice to the Contractor of the withholding or recovery of such sums by the United States of America.

[fol. 58] g. The Contractor shall post a copy of the stipulations in a prominent and readily accessible place at the site of the contract work and shall keep such employment records as are required in the Regulations under the Act available for inspection by authorized representatives of the Secretary of Labor.

h. The foregoing stipulations shall be deemed inoperative if this contract is for a definite amount not in excess of $10,000.00.

2. Paragraph b of Section 1 of this Article IV-D with respect to wages is inoperative due to lack of determination by the Secretary of Labor of prevailing minimum wage rates for the industry involved.

[fol. 59]

Title V.

Cost of the Work and Payment Therefor

Article V-A—Reimbursement for Contractor's Expenditures

1. The Contractor shall be reimbursed in the manner hereinafter described for such of its actual expenditures in the performance of the work under this contract, as may be approved or ratified by the Contracting Officer, and as are included in the following items:

a. All labor, materials, tools, machinery, equipment, facilities, supplies, utilities and services necessary for either temporary or permanent use for the benefit of the work, including the training of operating personnel.

b. All subcontracts made in accordance with the provisions of this contract.

c. Transportation, loading, unloading and storage charges on materials, supplies, and equipment.

d. Transportation and traveling expenses to and from the site of the Plant of the necessary field forces for the economical and successful prosecution of the work; transportation and traveling expense of such other employees of the Contractor whose full time is devoted to the work under this Contract as is actually incurred in connection with such work; and costs and expenses reimbursed to permanent employees of the Contractor in connection with the work under Title IV hereof transferred to or from the Plant on account of transportation of themselves, their families and their household goods.

Reimbursement for transportation and traveling expenses will be limited to the cost of transportation including Pullman where necessary and an allowance of Six Dollars ($6.00) per day in lieu of all other expenses. Transportation by automobile in such required travel shall be reimbursed at the rate of Five Cents ($.05) per mile as representing the actual cost of such transportation.

All travel shall be either authorized or approved in writing by the Contracting Officer. Should the Contractor, or any representative thereof, remain in a travel status in excess of six (6) days at any one time, not including the time consumed in travel, the cost for such excess travel status shall be at the expense of the Contractor, unless otherwise ordered in writing by the Contracting Officer.

e. Expenses of procuring labor and expediting the production and transportation of material, supplies and equipment.

[fol. 60] f. Salaries of employees of the Contractor engaged directly on the work provided hereunder whether at the Plant or employed full time at the Contractor's offices. In case the full time of any employee of the Contractor at the Plant is not applied to the work, his salary shall be included in this item only in proportion to the actual time applied thereto. No person shall be assigned to service by the Contractor as superintendent of construction or operation, chief engineer, chief purchasing agent,

chief accountant, or similar position in the Contractor's organization at the Plant, or as principal assistant to any such person until there has been submitted to and approved by the Contracting Officer a statement of the previous previous salary, proposed salary, qualifications, and experience of the person selected for such assignment. The regular salary or compensation rate of any such person shall not be in excess of the highest salary or compensation rate received by him during the year preceding the date of this contract plus such increase as the Contracting Officer may approve. The payment of any excess salary over such scheduled amounts shown in the approved salary schedule agreed to at the time and as shown in the record of negotiations for this contract shall not be reimbursable, unless and until the Chief of Branch has so approved in writing.

g. Buildings, trade fixtures and equipment required for necessary field offices, commissaries, hospitals, and other facilities, and the cost of maintaining and operating such field offices, commissaries, hospitals and other facilities; provided that the Contractor may enter into a contract with any third party or parties for the operation of any of the facilities provided for herein, in which event such contract shall be reduced to writing and the terms thereof subject to the prior written approval of the Contracting Officer.

h. Premiums on such bonds and insurance policies as the Contracting Officer may approve or require as reasonable necessary for the protection of the Government or the Contractor.

i. Losses and expenses, not compensated by insurance or otherwise (including settlements made with the written consent of the Contracting Officer), actually sustained by the Contractor in connection with the work and found and certified by the Contracting Officer to be just and reasonable unless reimbursement therefor is expressly prohibited.

j. The cost of reconstructing and replacing any of the work destroyed or damaged, and not covered by insurance, but expenditures under this item must have the written authorization of the Contracting Officer in advance.

k. Payments made by the Contractor under the Social Security Act (employer's contribution) and any disbursements required by law which the Contractor may be required on account of this contract to pay on or for any plant, equipment, process, organization, materials, supplies, or personnel; and, if approved in writing by the Contracting Officer in advance, permit and license fees and royalties on patents used including those owned by the Contractor.

[fol. 61] l. While the Contractor shall make every reasonable effort to have the finished product conform to the drawings and specifications referred to in Title IV hereof, it is recognized that variances therefrom are unavoidable and the Contractor shall be allowed all costs determined in accordance with this Article for re-working material because of rejection and for material finally rejected.

m. In connection with the work under Title IV only, extra compensation to employees, discontinuance wages and charges under welfare and other employee relations plans maintained by the Contractor; Provided that the Government shall be chargeable therefor only insofar as the same are consistent with the general employee relations policies existing throughout the Contractor's organization, or are incurred pursuant to agreement made as a result of collective bargaining with the representatives of employees, and are expressly authorized in writing by the Contracting Officer.

n. Accounting (including salaries and other expenses) in connection with special audits of accounts for the government in connection with work hereunder.

o. Expenses in connection with any temporary or permanent closing down of the plant.

p. 1. The fixed amount of Two Thousand Dollars ($2,000.00) per month for each calendar month, of operation, payable at the close thereof, subsequent to the commencement of the complete operation provided in Section 3 of Article IV-A of Title IV (including continued operation under Section 4 of such Article IV-A), as complete com-

pensation, including all general overhead, for all services performed by the Contractor at its New York, N. Y. offices in connection with the work under Title IV hereof, except for the wages, salaries and transportation and traveling expenses of employees of the Contractor who devote full time to the work under such Title IV. The initial amount shall be payable at the close of the calendar month during which such operation commences.

2. For the purposes of this paragraph p, the term "full time" shall be deemed to refer to the time of employment of those employees engaged solely upon the work under this contract and who are carried on payrolls separate from the Contractor's payrolls relating to its other business and not to employees of the Contractor engaged part time on the work under this Contract and part time on the Contractor's other business.

q. Disbursements incident to payment of payrolls, including but not limited to, the cost of disbursing cash, necessary guards, cashiers and pay masters. If payments to employees are made by check, facilities for cashing checks must be provided without expense to employees, and the Contractor shall be reimbursed therefor.

[fol. 62] r. Rental actually paid by the Contractor, at rates not to exceed those approved by the Contracting Officer, for construction plant in sound and workable condition exceeding $300 in value as may be necessary for the proper and economical prosecution of the work. Each contract for the rental of construction plant or parts thereof by the Contractor from third parties shall be in a form prescribed by the Contracting Officer, shall be subject to his approval and shall include provisions (1) that the lessor deliver to the Government title to such construction plant or parts thereof free of all liens and encumbrances when and if the total rental paid to the lessor for any item of construction plant or part thereof shall equal the valuation thereof, plus one per cent (1%) per month for each month or fraction thereof such part has been in use and (2) that at the completion of the work being performed under Title I hereof or upon termination of the contract as provided in Article VI, the Government may at its option purchase any part of such construction plant by paying to the lessor the

difference between the valuation of such part or parts, plus one percent (1%) per month for each month or fraction thereof such part or parts have been in use and the total rentals theretofore paid for such parts or parts, provided, however, that either of such provisions may be omitted from such rental agreements if the omission is approved by the Chief of Branch.

s. Loading and unloading of construction plant, owned or rented by the Contractor and of such repair parts and spare parts as are not included in the rental and as are not made necessary by defects in such plant, or parts thereof, or by the fault or negligence of the Contractor or his employees; the transportation thereof to the place or places where it is to be used in connection with said work and return transportation to the point of original shipment or equivalent mileage, provided that the cost of return transportation shall not exceed the cost of transportation to the point of original shipment and provided that charges for transportation over distances in excess of 500 miles must have the written authorization of the Contracting Officer in advance; and the installation and dismantling thereof.

t. Repairs and repair parts, as are not included in the rental or made necessary by the fault or negligence of the Contractor or his employees.

u. Temporary rights in land required in connection with the work.

v. Such other items as should, in the opinion of the Contracting Officer, be included in the cost of the work. When such an item is allowed by the Contracting Officer, it shall be specifically certified as being allowed under this paragraph.

[fol. 63] 2. Rental for Contractor's Equipment. Rental shall be paid at the rates indicated in the "Contractor's Equipment Rental Schedule, War Department, Office of The Quartermaster General", dated May, 1941 for such plant or parts thereof as he may own and furnish as shown in the record of negotiations, both of which documents are on file in the Office of The Quartermaster General. Except as specified below such rental shall begin at the date of de-

livery of the plant, or parts thereof, to a common carrier for shipment to the site of the work, as evidenced by bill-of-lading or other satisfactory evidence covering such shipment. In the event the plant or parts thereof, is conveyed by the Contractor, the rental shall start at time transport to the site begins, but shall not exceed the equivalent time of shipping by common carrier. Unless title thereto passes to the Government at an earlier date, the rental shall terminate on the date of notice by the Contracting Officer to the Contractor that such plant or parts thereof are no longer required provided that rental shall continue to the date shipment of such plans or parts thereof is initiated, if such shipment is initiated with delay. If such plant, or any part thereof, is not in sound and workable condition when it arrives at the site of the work, the rental period therefor shall not begin until such plant, or parts thereof, shall have been placed in sound and workable condition at the expense of the Contractor, and no rental therefor shall be paid for any prior period. If such plant, or parts thereof, cannot be placed in sound and workable condition, no transportation charges for the shipment thereof shall be included in the cost of the work or paid, either directly or indirectly, by the Government. Determination as to whether such plant, or parts thereof, are in sound and workable condition shall, in every instance, be made by the Contracting Officer. Slight delays in the use of such plant, or parts thereof, caused by necessary minor or field repairs and replacements shall not interrupt the rental period, but no rental shall be paid for the period of any delay in the use of such plant, or parts thereof, caused by other than necessary minor or field repairs. The value shown in the record of negotiations hereinbefore referred to shall be deemed final unless the Contracting Officer shall, within ten days after the machinery has been set up and working, modify or change such valuation. When and if the total *rental paid to the* Contractor for any such part shall equal the valuation thereof, plus one per cent (1%) per month for each month or fraction thereof such part has been in use, and the Contractor shall convey title thereto to the Government free of all liens and encumbrances; at the completion of the work under Title I or upon termination of the contract as provided in Title VI, the Government may at its option purchase any part of such construction plant by paying to the

Contractor the difference between the valuation of such part of parts, plus one per cent (1%) per month for each month or fraction thereof such part or parts have been in use and the total rental there-to-fore paid for such part or parts.

[fol. 64] General.

3. The Government reserves the right to furnish any materials, construction equipment, machinery, tools, or services, including communication services necessary for the completion of the work. The Contractor shall cause the foregoing equipment and machinery to be suitably marked with an identifying mark or symbol, indicating that such items are the property of the United States. Upon the completion of this contract or upon demand, the Contractor shall return such equipment and machinery to the place designated by the Contracting Officer.

4. The Government reserves the right to pay directly to common carriers any and all transportation charges on construction plant, materials, machinery, equipment and supplies.

5. The Government reserves the right to pay directly to the persons concerned all sums due from the Contractor for labor, materials, or other charges.

6. No salaries of the Contractor's executive officers or partners, no part of the expense incurred in conducting the Contractor's main office or regularly established branch offices, and no overhead expenses of any kind, except as specifically authorized in Section 1 of this Article, shall be included in the cost of the work under this contract; nor shall any interest on capital employed or on borrowed money be included in the cost of the work.

7. *The Contractor shall, to the extent of its* ability, take all cash and trade discounts, rebates, allowances, credits, salvage, commissions and bonifications, and when unable to take advantage of such benefits, it shall promptly notify the Contracting Officer to that effect and the reason therefor. In determining the actual net cost of articles and materials of every kind required for the purposes of this contract, there shall be deducted from the gross cost

thereof all cash and trade discounts, rebates, allowances, credits, salvage, commissions and bonifications which have accrued to the benefit of the Contractor or would have so accrued except for the fault or neglect of the Contractor. Such benefits lost through no fault or neglect on the part of the Contractor, or lost through fault of the Government, or lost through compliance with the provisions of Section 5 of Article V-C, shall not be deducted from gross costs.

8. All revenue received by the Contractor from the operations of the hospital, commissaries, or other facilities, or from rebates, discounts, refunds, etc., shall be accounted for by the Contractor and applied in reduction of the cost of the work.

[fol. 65] Article V-B.—Payments.

Reimbursement For Cost.

1. a. The Government will currently reimburse the Contractor for expenditures made in accordance with Article V-A of this Title V, upon certification and delivery to and verification by the Contracting Officer of the original signed pay rolls for labor, the original receipted invoices for materials, equipment, etc., or other original papers satisfactory to the Contracting Officer. Reimbursement will be made as promptly as possible, generally weekly, but may be made at more frequent intervals if the conditions so warrant. All payments made under this paragraph a of Section 1 shall be subject to the provisions of Article V-C.

b. Payment of the sum provided in subparagraph 1 of paragraph p, of Section 1 of Article V-A shall be made as provided therein.

2. Rental for Contractor's Equipment. Rental as provided in Section 2 of Article V-A of this Title V, for such construction plant or parts thereof as the Contractor may own and furnish shall be paid monthly upon presentation of proper vouchers.

Payment Of The Fixed-Fees.

3. a. The fixed fee provided for in Article I-D of Title I shall be paid in partial payments, less ten percent (10%) of each such partial payment, on the last working day of

each calendar month from and after the approval date of this contract, as it accrues, based upon estimates made by the Contractor and approved by the Contracting Officer of the percentage of completion of the work and services provided for in Title I.

b. The fixed-fee provided for in Article II-C of Title II shall be paid in partial payments, less ten percent (10%) of each such partial payment, on the last working day of each calendar month from and after the approval date of this contract, as it accrues, based upon estimates made by the Contractor and approved by the Contracting Officer of the percentage of completion of the work and services provided for in Title II.

c. The fixed-fee of One Dollar ($1.00) provided for in Article III-C shall be paid upon the completion of the work provided therein.

d. The fixed-fee of Five Hundred Forty Thousand Dollars ($540,000.00) provided for in Section 2 of Article IV-C of Title IV shall be payable as follows:

(1) One Hundred Twenty Thousand Dollars ($120,000.00) payable in four (4) equal monthly installments of Thirty Thousand Dollars ($30,000.00) each, less 10% of each such installment. The first such installment shall be payable on the last working day of the calendar month in which the first operating line of the plant is completed and ready [fol. 66] for operation, and the remaining installments shall be payable on the last working day of the next succeeding three (3) calendar months.

(2) Four Hundred Twenty Thousand Dollars ($420,000.00) payable in twelve (12) equal monthly installments of Thirty-five Thousand Dollars ($35,000.00) each, less 10% of each such installment. The first such installment shall be payable on the last working day of the calendar month during which operation of the completed plant shall be commenced under Section 3 of Article IV-A of Title IV, and the remaining installments shall be payable on the last working day of the next succeeding eleven (11) calendar months.

c. The fixed fee of Four Hundred Twenty Thousand Dollars ($420,000.00) provided by Section 3 of Title IV-C of Title IV for continued operation under Section 4 of Article IV-A of Title IV shall be payable in twelve (12) equal monthly installments of Thirty-five Thousand Dollars ($35,000.00) each, less 10% of each such installment. The first such installment shall be payable on the last working day of the calendar month during which the additional operation provided for in such Section 4 of Article IV-A of Title IV shall have commenced and the remaining installments shall be payable on the last working day of the next succeeding eleven (11) calendar months.

Payments by Contractor

4. If bills for purchase of materials, machinery, or equipment, or payrolls covering employment of laborers or mechanics incurred by the Contractor or by any subcontractor under this contract are not promptly paid by the Contractor or subcontractor, as the case may be, the Contracting Officer may, in his discretion, withhold from payments otherwise due the Contractor an amount equivalent to the amount of any such bill or pay roll until such bill or pay roll is paid. Should the Contractor neglect or refuse to pay such bills or payrolls or to direct any subcontractor to pay such bills or pay rolls within five (5) days after notice from the Contracting Officer so to do, the Government shall have the right to pay such bills or pay rolls directly provided such bills or pay rolls are not disputed in good faith by the Contractor or subcontractor, and in such event a deduction equal to five per cent (5%) of the amount so paid directly shall be made from the Contractor's fee.

Final Payment

5. Upon completion of the work under Titles I and II and its final acceptance in writing by the Contracting Officer, and again upon the completion of the work under Title IV, the Government shall pay to the Contractor the unpaid balance of the cost of the work determined under Title V hereof, and of the fees, less any sum that may be necessary to settle any unsettled claims for labor or materials, or any claim the Government may have against

the Contractor. The Contracting Officer shall accept or reject the completed work with reasonable promptness. The Contractor shall, if required, furnish the Government with a release of all claims against the Government arising under and by virtue of this contract other than such claims, if any, as may be specifically excepted by the Contractor from the operation of the release in stated amounts to be set forth therein.

[fol. 67]. Article V C—Advances

1. At any time, and from time to time, after the execution of this contract the Government, at the request of the Contractor, and subject to the approval of the Chief of Ordnance as to the necessity therefor, shall advance to the Contractor without payment of interest thereon by the Contractor, a sum or sums not in excess of thirty percent (30%) of the estimated cost of the work under this contract (as increased or decreased pursuant to the provisions of Article VII C of Title VII or as increased pursuant to the provisions of Article IV A of Title IV). When approximately sixty percent (60%) of said estimated cost (as increased or decreased pursuant to the provisions of Article VII C of Title VII or as increased pursuant to the provisions of Article IV A of Title IV) shall have been paid under Section 1 of Article V B, a revised estimate of such costs shall be made by the Contractor; and if it appears that the then estimated cost exceeds the amount of the original estimate (increased or decreased as provided above); and the revised estimate is approved by the Chief of Ordnance, the Government shall under the conditions stated above advance to the Contractor without interest, not to exceed thirty percent (30%) of such excess. Such advance or advances shall be made in each case upon the furnishing of such surety bonds in such penal sums not exceeding the total aggregate advance as the Secretary of War may prescribe; Provided, that the Secretary of War shall have prescribed the furnishing of a surety bond in connection with such advances, as security additional to that provided for in this contract; and Provided, Further, that if at any time the Secretary of War deems the security for any advance or advances theretofore made inadequate, the Contractor shall furnish on demand such other security, in the form of a surety bond or surety bonds, as will be

satisfactory to the Secretary of War but at no time shall the Contractor be required to maintain in force a safety bond or surety bonds, the total aggregate penal sums of which exceed the aggregate amount of the advances authorized by the Secretary of War under this contract. It is understood that the Government will advance to the Contractor, pursuant to this Article V C, the sums currently necessary to the Contractor for working capital to carry on the work contemplated under this contract, not in excess of thirty percent (30%) of the estimated cost of such work.

2. Whenever there shall be paid to the Contractor, pursuant to Section 1 of Article V B reimbursement which, when added to the advance payment or payments made pursuant to Section 1 of this Article V C, shall equal the full amount of the estimated cost of said work under this contract (as increased or decreased pursuant to the provisions of Section 1 of this Article V C), no additional payment on account of said work shall be made to the Contractor by the Government until said advance payments are expended; Provided, however, that if the total cost of the work shall be in excess of the amount so paid to the Contractor including said advance payments, the Government, upon presentation of satisfactory evidence, shall currently [fol. 68] and promptly reimburse the Contractor to the extent of such excess cost (subject to any delay in the availability of appropriated funds); Provided, further, that if upon termination of the contract for other than the default of the Contractor there shall remain due the Government from the Contractor any sum theretofore advanced by the Government under this contract and not fully liquidated as above provided, the same shall be applied against any payments due the Contractor and any remaining balance of such sums shall be returned to the Government forthwith after final audit by the Government of all accounts hereunder.

3. In the event of cancellation or termination of this contract because of the default of the Contractor, the Contractor agrees to return to the Government, upon demand, without set-off of any sum alleged to be due this Contractor, the outstanding balance of any advance payment; Pro

vided, however, that the Contractor may retain in the account an amount sufficient to meet the outstanding obligations incurred by it in good faith under this contract pursuant to authorization by the Contracting Officer until assumption and discharge of such obligations by the Government or final disallowance thereof. Furthermore, if, in the opinion of the Chief of Ordnance, the unliquidated balance of the advance or advances made by the Government under this contract exceeds the amount necessary for the current needs of the Contractor, as determined by the Chief of Ordnance, the amount of such excess shall, upon demand made by the Chief of Ordnance, be promptly returned to the Government and will be credited against the balance due the Government for advances previously made. If the demand made in either event set forth above is not met within fifteen (15) days after the receipt of such demand by the Contractor, the amount demanded will bear interest at the rate of six percent (6%) per annum from the date of the demand until payment is made.

4. All funds received as advance payments under this contract, together with all funds received as reimbursements for the cost of the work under paragraph a of Section I of Article V B of this contract, shall be deposited in a special bank account or accounts separate from the Contractor's general or other funds in a bank which is a member of the Federal Reserve System. Such special bank account or accounts shall be so designated as to indicate clearly to the bank their special character and purpose and shall be used by the Contractor exclusively as a revolving fund for carrying out the purposes of this contract and not for the general business of the Contractor. Balances in such special account or accounts shall at all times secure the repayment of such advances in connection with which the special account or accounts are opened, and the Government shall have a lien upon such balances to secure the repayment of such advances, which lien shall be superior to any lien of the bank upon such account or accounts by virtue of assignment or otherwise; Provided, however, that any bank in which such funds are deposited shall have no obligation whatever with respect to the use or disposition by the Contractor of funds withdrawn from such ac- [fol. 69] count or accounts or be liable for misuse by the Contractor of funds withdrawn prior to the receipt by

such bank of notice from the Chief of Ordnance or the order of a court of competent jurisdiction directing it to refrain from permitting withdrawals by the Contractor. The Contracting Officer shall at all times be afforded proper facilities for inspection and audit of such special bank account or accounts.

5. The Contractor may pay to any third party for services in advance or pay for materials or supplies in advance of delivery at the site of the work or at an approved storage site, any of the sums previously advanced to it by the Government under the provisions of this contract, with the prior written approval of the Contracting Officer.

[fol. 70]

Title VI

Termination

Article VI-A—Termination by Government

1. The Government may terminate this contract at any time by a notice in writing from the Contracting Officer to the Contractor. Such termination shall be effective in the manner and upon the date specified in said notice and shall be without prejudice to any claims which the Government may have against the Contractor. Upon receipt of such notice, the Contractor shall, unless the notice directs otherwise, immediately discontinue all work and the placing of all orders for materials, facilities, and supplies in connection with performance of this contract and shall proceed to cancel promptly all existing orders and terminate all subcontracts insofar as such orders and subcontracts are chargeable to this contract.

2. If this contract is terminated for the fault of the Contractor, the Contracting Officer may enter upon the premises and take possession, for the purpose of completing the work contemplated by this contract, of any or all materials, tools, machinery, equipment, and appliances which may be owned by or in the possession of the Contractor, and all options, privileges, and rights, and may complete, or employ any other person or persons to complete, said work. Following such termination rental shall be paid to the Contractor for such construction plant or parts thereof as he may own, and which the Government

may retain at rates prescribed in Section 2 of Article V-A of Title V.

3. Upon the termination of this contract, full and complete settlement of all claims of the Contractor arising out of this contract shall be made as follows:

a. The Government shall assume and become liable for all obligations, commitments, and claims that the Contractor may have theretofore in good faith undertaken or incurred in connection with said work and the cost of which would be reimbursable in accordance with the provisions of this contract; and the Contractor shall, as a condition of receiving the payments mentioned in this Title, execute and deliver all such papers and take all such steps as the Contracting Officer may require for the purpose of fully vesting in the Government the rights and benefits of the Contractor under such obligations or commitments.

b. The Government shall reimburse the Contractor for all expenditures made in accordance with Title V and not previously reimbursed.

[fol. 71] c. The Government shall reimburse the Contractor for such further expenditures, made after the date of termination, for the protection of Government property and for accounting services in connection with the settlement of this contract as are required or approved by the Contracting Officer.

d. The Government shall pay to the Contractor any unpaid balance for the rental of the Contractor's equipment in accordance with Title V to the date of termination.

e. If the contract is terminated for the convenience of the Government, the Contractor will be paid all fees which have accrued at the date of termination, less fee payments previously made. If the contract is terminated due to fault of the Contractor, no additional payment on account of the fixed-fees will be made.

f. The obligation of the Government to make any of the payments required by this Title, shall be subject to any unsettled claims for labor or material or any claims which the Government may have against the Contractor.

4. Prior to final settlement the Contractor shall, if required furnish a release as required in Section 5 of Article V-B of Title V hereof.

[fol. 72] Title VII.

General.

Articles VII-A—Responsibility Of Contractor.

It is the understanding of the parties hereto, and the intention of this contract, that all work under Title IV of this contract is to be performed at the expense of the Government and that the Government shall hold the Contractor harmless against any loss, expense (including expense of litigation), or damage (including liability to third persons because of death, bodily injury or property injury or destruction or otherwise) of any kind whatsoever arising out of or in connection with the performance of the work under such Title IV of this contract, except to the extent that such loss, expense, damage or liability is due to the personal failure on the part of the corporate officers of the Contractor, or of other representatives of the Contractor having supervision or direction of the operation of the Plant as a whole, to exercise good faith or that degree of care which they normally exercise in the conduct of the Contractor's business.

Article VII-B—Contingencies.

If the performance of any work under this contract is interrupted or prevented by reason of inability to obtain essential materials to be used in the performance of this contract, or by reason of labor shortage or labor disputes, from whatever cause arising, and whether or not the demands of the employees involved shall be reasonable and within the Contractor's power to concede, or by reason of fire, explosion, or accident, sabotage or any cause beyond its control, whether of a similar or dissimilar nature, the Contractor shall be excused from performing said work while or to the extent that it is prevented from so doing by one or more of such causes and all such work shall be performed as soon as practicable after such disability is removed. It is further understood and agreed that the Contractor shall be liable for any failure or delays in the per-

formance of Title IV of this contact, and accountable for the loss or destruction of or damage to any materials, tools, machinery, equipment, supplies, semi-finished or finished products or other property or materials located or stored at said Plant or used in connection with the operation thereof, if, and only if and to the extent that, the same is due to the personal failure on the part of the corporate officers of the Contractor, or of other representatives of the Contactor having supervision or direction of the operation of the Plant as a whole, to exercise good faith or that degree of care which they normally exercise in the conduct of the Contractor's business.

Article VII-C—Changes.

In connection with the work under Titles II, III and IV, the Contracting Officer may at any time after consultation with the Contractor, by a written order and without notice to the sureties, make changes in or additions to the draw- [fol. 73] ings and specifications, issue additional instructions, require additional work, or direct the omission of work covered by such Titles II, III and IV. If such changes cause a material increase or decrease in the amount or character of the work to be done under such Titles, or in the time required for its performance, an equitable adjustment of the amount of the fixed-fees to be paid to the Contractor shall be made and the contract shall be modified in writing accordingly: Provided, however, that there shall be no adjustment in the amount of the fixed-fees as provided herein nor shall there be any claim for increased compensation because of any errors and/or omissions made in computing the original estimates of cost hereunder or where the estimated costs vary from the actual costs. Any claim for adjustment under this Article must be asserted within ten (10) days from the date the change is ordered: Provided, however, that the Contracting Officer, if he determines that the facts justify such action, may receive and consider; and with the approval of the Chief of Branch, adjust any such claim asserted at any time prior to the date of final settlement of the contract. If the parties fail to agree upon the adjustment to be made the dispute shall be determined as provided in Article VII-N hereof, but nothing provided in this Article shall excuse

the Contractor from proceeding with the prosecution of the work so changed.

Article VII-D—Title.

The title to all work, completed or in the course of construction, preparation or manufacture shall be in the Government. Likewise, upon delivery at the site of the work, at an approved storage site or other place approved by the Contracting Officer and upon inspection and acceptance in writing by the Contracting Officer, title to all materials, tools, machinery, equipment and supplies, for which the Contractor shall be entitled to be reimbursed under Title V hereof shall vest in the Government. These provisions as to title being vested in the Government shall not operate to relieve the Contractor from any duties imposed under the terms of this contract.

Article VII-E—Materials And Workmanship.

1. The work shall be executed in the best and most workmanlike manner by qualified, careful, and efficient workers, insofar as they are available, in strict conformity with the best standard practices.

2. Except it be otherwise authorized by the Contracting Officer, all materials shall be of the best quality of their respective kinds. If the Contracting Officer requires that the Contractor submit for prior approval samples of materials proposed for use in the work covered by this contract, the Contractor shall make no commitments for such materials until the submitted samples have been approved by the Contracting Officer.

Articles VII-F—Records And Accounts—Inspection And Audit.

1. The Contractor agrees to keep records and books of [fol. 74] account, on a recognized cost-accounting basis, showing the actual cost to it of all items of labor, materials, equipment, supplies, services, and other expenditures of whatever nature for which reimbursement is authorized under the provisions of this contract. The system of accounting to be employed by the Contractor shall be such as is satisfactory to the Contracting Officer.

2. The Contracting Officer shall at all times be afforded proper facilities for inspection of the work and of the special bank account or accounts provided for in Article V-C hereof, and shall at all times have access to the premises, work, and materials, to all books, records, correspondence, instructions, plans, drawings, receipts, vouchers, and memoranda of every description of the Contractor pertaining to said work; and the Contractor shall, except such original documents as are submitted in support of reimbursement vouchers, preserve for a period of 3 years after completion or termination of this contract, all the books, records, and other papers herein mentioned.

3. Any duly authorized representative of the Contractor shall be accorded the privilege of examining the books, records, and papers of the Contracting Officer relating to the cost of the work for the purpose of verifying such cost.

4. In connection with the work under Title I of this contract the Contracting Officer shall have the right to decide which functions of checking and auditing are to be performed exclusively by the Government and to prescribe procedures to be followed by the Contractor in such accounting, checking and auditing functions as he may continue to perform. The employment and number of personnel to be engaged by the Contractor under such Title I for checking, auditing, and accounting work shall be subject to the approval of the Contracting Officer and if, in the opinion of the Contracting Officer, the number of employees engaged in checking, auditing and accounting work is excessive, the Contractor shall make such reductions in force as the Contracting Officer deems necessary.

Article VII-G—Special Requirements.

The Contractor hereby agrees that it will:

1. Procure and thereafter maintain such bonds and insurance in such forms and in such amounts and for such periods of time as the Contracting Officer may approved or require in writing.

2. Procure all necessary permits and licenses; obey and abide by all applicable laws, regulations and ordinances and other rules of the United States of America, of the

state, territory, or subdivision thereof wherein the work is done, or of any other duly constituted public authority.

3. Unless this provision is waived in writing by the Contracting Officer, reduce to writing every contract in excess of Two Thousand Dollars ($2,000.00) made by it for the purpose of the work hereunder for services (except [fol. 75] contracts of employment), materials, supplies, machinery, or equipment, or for the use thereof; insert therein a provision that such contract is assignable to the Government; make all such contracts in its own name, and not bind or purport to bind the Government or the Contracting Officer thereunder. No purchases in excess of Five Hundred Dollars ($500.00) shall be made or placed without the approval of the Contracting Officer.

4. Enter into no subcontract for any portion of the work without the written approval of the Contracting Officer. Subcontracts are defined as contracts entered into by the Contractor with others which involve the performance, wholly or in part, at the site of the work, of some part of the work described in Titles I and II hereof, and if the subcontract covers any portion of the design or construction work under this contract, the subcontract shall be entered into only in a form prescribed by The Quartermaster General.

5. At all times during the progress of the work keep at the site thereof a duly appointed and qualified representative who shall receive and execute on the part of the Contractor such notices, directions, and instructions as the Contracting Officer may give under the terms of this contract.

6. The Contracting Officer may require the Contractor to dismiss from the work any employee the Contracting Officer deems incompetent or whose retention is deemed to be not in the public interest, subject however to appeal under the provisions of Article VII-X for reinstatement of such employee.

7. Furnish as required by the Contracting Officer for use in connection with the work, those items of construction equipment and or machinery listed in the record of negotiations as mentioned in Section 2 of Article V-A of

Title V, provided that such pieces of equipment and or machinery shall be furnished, if required, within ten (10) days of the date on which such pieces of equipment and or machinery are stated to be available. In the event that the Contractor fails to furnish any piece of equipment and or machinery in accordance with the terms of this provision after the Contracting Officer has required the furnishing of such piece of equipment and/or machinery the additional cost of obtaining such equipment and or machinery from any source other than the Contractor shall be paid by the Contractor and shall not be a reimbursable expenditure.

8. At all times use its best efforts in all acts hereunder to protect and subserve the interest of the Government.

Article VII-H—Preference For Domestic Articles.

In the performance of the work covered by this contract the Contractor, subcontractors, material men or suppliers, shall use only such unmanufactured articles, materials and supplies as have been mined or produced in the United States, and only such manufactured articles, materials and supplies as have been manufactured in the United States substantially all from articles, materials or supplies mined, [fol. 76] produced or manufactured, as the case may be, in the United States. The foregoing provision shall not apply to such articles, materials or supplies of the class or kind to be used or such articles, materials or supplies from which they are manufactured, as are not mined, produced or manufactured, as the case may be, in the United States in sufficient and reasonably available commercial quantities and of a satisfactory quality, or to such articles, materials or supplies, as may be excepted by the Secretary of War under the proviso of Title III, Section 3, of the Act of March 3, 1933: 47 Stat. 1520 (41 U.S.C. 10b-c).

Article VII-I—Convict Labor.

The Contractor shall not employ any person undergoing sentence of imprisonment at hard labor.

Article VII-J—Workmen's Compensation Laws.

During the life of this contract the Contractor will provide and maintain for all employees of the Contractor engaged in work under this contract, Workmen's Compensa-

tion Insurance or such other protection for employees as may be required by Federal or State statutes in the jurisdiction in which such work is performed, under direction of the Contracting Officer. If the whole or any part of the work under this contract is sublet on a Fixed Fee basis, the same protection provided for employees of the Contractor will be provided for the protection of the employees of the subcontractors. In those cases where the whole or any part of the work under this contract is sublet on a Lump-Sum basis, the Contractor will require the subcontractors to maintain for their employees Workmen's Compensation Insurance or such other protection for employees as may be required by Federal or State statutes in the jurisdiction in which such work is performed. Prior to commencement of operations under this contract, the Contractor will supply the Contracting Officer with proof of compliance with this Article.

Article VII K - Accident Prevention.

In order to protect the life and health of his employees in the performance of Title I of this contract, the Contractor will comply with all pertinent provisions of the "Safety Requirements For Excavation, Building And Construction, Construction Division, O.Q.M.G.", approved by the Chief of the Construction Division, March 1, 1941, and of the specifications, and will take or cause to be taken such additional measures as the Contracting Officer may determine to be reasonably necessary for this purpose. The Contractor will maintain an accurate record of, and will report to the Contracting Officer in the manner and on the forms prescribed by the Contracting Officer, all cases of death, occupational disease, and traumatic injury arising out of or in the course of employment on work under this contract.

Article VII L. Officials Not To Benefit.

No Member of or Delegate to Congress, or Resident Commissioner shall be admitted to any share or part of this contract, or to any benefit that may arise therefrom, [fol. 77] but this provision shall not be construed to extend to this contract if made with a corporation for its general benefit.

Article VII M—Covenant Against Contingent Fees.

The Contractor warrants that it has not employed any person to solicit or secure this contract upon any agreement for a commission, percentage, brokerage or contingent fee. Breach of this warranty shall give the Government the right to terminate the contract, or in its discretion, to deduct from payments due the Contractor the amount of such commission, percentage, brokerage or contingent fee. This warranty shall not apply to commissions payable by Contractors upon contracts or sales secured or made through bona fide established commercial or selling agencies maintained by the Contractor for the purpose of securing business.

Article VII N—Disputes.

All disputes concerning questions of fact arising under this contract shall be decided by the Contracting Officer, subject to written appeal by the Contractor within 30 days to the Chief of Branch concerned or his duly authorized representative, whose decision shall be final and conclusive upon the parties hereto, when the amount involved is $50,000.00 or less. When the amount involved is more than $50,000.00, or when the dispute arises under Section 6 of Article VII G; or where no specific amount is involved, the decision of the Chief of Branch shall be subject to written appeal within 30 days by the Contractor to the Secretary of War or his duly authorized representative, whose decision shall be final and conclusive upon the parties hereto. In the meantime the Contractor shall diligently proceed with the work as directed.

Article VII O—Contractor's Organization And Methods.

Within a reasonable time after the execution of this contract the Contractor shall submit to the Contracting Officer a chart showing the executive and administrative personnel to be regularly assigned for full or part time service in connection with the work under this contract, together with a written statement of their duties and the administrative procedure to be followed by the Contractor for the control and direction of the work; and the data so furnished shall be supplemented as additional pertinent data become available. There shall also be submitted to the Contracting Of-

ficer by the Contractor charts of the various field organizations showing all personnel, other than artisans, mechanics, helpers, and laborers to be assigned for full or part time service outside of the central office organization, together with a written statement of their duties and rates of pay and the procedure proposed to be followed by the Contractor for the accomplishment of all field work, including temporary requirements; and the data so furnished shall be supplemented as additional pertinent data become available. Statements of procedure shall include purchasing, disbursing, accounting, transportation, storage, employment, housing, sanitation, subsistence, recreation and similar essential activities and methods.

Article VII P Assignment Of Claims.

Neither this contract, nor any interest therein, shall be [fol. 78] assigned or transferred by the Contractor to any other party or parties.

Article VII Q Loading And Unloading Railway Cars.

The Contractor shall load promptly all railroad cars furnished for loading upon his order and shall unload from railroad cars promptly upon arrival all shipments consigned to him and shall provide storage facilities and other facilities necessary for these purposes; and the Contractor shall not order railway cars for loading unless they can be loaded promptly and shall not cause or permit shipments to be consigned to him unless they can be unloaded from railroad cars promptly upon arrival.

Article VII R Notice To Government Of Labor Disputes.

Whenever an actual or potential labor dispute is delaying or threatens to delay the timely performance of Title I of this contract, the Contractor will immediately give notice thereof to the Chief of the Construction Division, OQMG. Such notice shall include all relevant information with respect to such dispute.

Article VII S Approval Required.

This contract shall be subject to the written approval of the Secretary of War and shall not be binding until so approved.

Article VII T Statutory Provisions.

It is understood that the respective undertakings to conform to the requirements of the several statutes hereinbefore referred to shall be operative only so long as and to the extent that such statutory requirements are applicable hereunder.

Article VII U Definitions.

1. The term "Chief of Branch" refers to the Chief of Ordnance or The Quartermaster General.

2. The terms "Secretary of War" or "Chief of Branch" shall include their duly authorized representatives as the case may be other than the Contracting Officer.

3. For the original signing of this contract, the term "Contracting Officer" as used herein shall be deemed to include the Contracting Officer appointed by The Quartermaster General and the Contracting Officer appointed by the Chief of Ordnance.

4. The term "Contracting Officer" when used in connection with the supervision of performance of construction work of the entire project, and in connection with the supervision of preparation of detailed plans and working drawings for roads, railroads, sewage systems, water systems, electrical generating plants and transmission lines, [fol. 79] heating plants, nonmanufacturing buildings, such as offices, general warehouses and garages, and such miscellaneous construction as may be requested by the Chief of Ordnance, refers to the Contracting Officer appointed by The Quartermaster General, his successor or duly authorized representative; and when used in connection with any other phase of the work to be performed under this contract it refers to the Contracting Officer appointed by the Chief of Ordnance, his successor or duly authorized representative.

Article VII V Racial Discrimination.

The Contractor, in performing the work required by this contract, shall not discriminate against any worker because of race, creed, color or national origin.

Article VIII W - Alterations

The following alterations were made in this contract before it was signed by the parties hereto:

On page 5 at the end of paragraph 3, Article I B of Title I add the following: P.G.

"There shall be no adjustment in the amount of the fixed fees as provided herein nor shall there be any claims for increased compensation because of any errors and or omissions made in computing the original estimates of cost hereunder or where the estimated costs vary from the actual costs." P.G.

On page 8, paragraph 3 of Article I C of Title I delete the following words: P.G.

"..... the Contractor does not guarantee .....", substituting therefore the words: P.G.

"..... neither the Government nor the Contractor guarantees ....." P.G.

On page 13, Article II B of Title II delete the following words:

"..... the Contractor does not guarantee .....", substituting therefore the words: P.G.

"..... neither the Government nor the Contractor guarantees ....." P.G.

On page 15, Article III B of Title III delete the following words:

"..... the Contractor does not guarantee .....", substituting therefore the words: P.G.

"..... neither the Government nor the Contractor guarantees ....." P.G.

On page 17, Article IV B of Title IV delete the following words:

"..... the Contractor does not guarantee .....", substituting therefore the words:

"..... neither the Government nor the Contractor guarantees ....." P.G.

[fol. 80] In Witness Whereof, the parties hereto have executed this contract in triplicate as of the day and year first above written.

THE UNITED STATES OF AMERICA,

Approval Recommended:

July, 16, 1941.

By L. H. Campbell, Jr.,
Brig. Gen., U. S. Army.
(Contracting Officer appointed by Chief of Ordnance)

C. M. Wesson,
Major General,
Chief of Ordnance.

By Homer W. Jones,
Lieut. Col., J.A.G.D.
(Contracting Officer appointed by The Quartermaster General)

Approval Recommended:

July 18, 1941.

E. B. Gregory,
Major General,
The Quartermaster General.

FORD, BACON & DAVIS, INCORPORATED,
(Contractor)

Two Witnesses as to Execution by the Contractor:

By Page Golsan Vice Pres.
39 Broadway, New York, N. Y.
(Business Address)

Shipley Thomas,
39 Broadway, New York, N. Y.
(Address)

Approved Jul. 19, 1941.
By direction of the Secretary of War.

Frances E. Keyes,
Washington, D. C.
(Address)

ROBERT P. PATTERSON,
Under Secretary of War.

[fol. 81] I, _____, certify that I am the _____ Secretary of the corporation named as Contractor herein; that Page Golsan who signed this contract on behalf of the Contractor was then Vice President of said corporation; that said contract was duly signed for and in behalf of said corporation by authority of

its governing body, and is within the scope of its corporate powers.

(Corporate Seal) HENRY F. STORCK.

I hereby certify that, to the best of my knowledge and belief, based upon observation and inquiry, Page Golsan who signed this contract for the Ford, Bacon & Davis, Incorporated had authority to execute the same, and is the individual who signs similar contracts on behalf of this corporation with the public generally.

L. H. CAMPBELL, JR.,
Brig. Gen., U. S. Army.

W-Ord-519
DA-W-Ord 6

(fol 82)

Exhibit No 2

Ford Bacon & Davis, Inc
Arkansas Ordnance Plant
Little Rock, Arkansas

Statement Of Production Costs
As of May 10, 1946

Contractor's Expenditures *				
501	Gross Payrolls	$ 65,186,577 61		
502	F.O.A.B. Taxes (Employer's Portion)	843,300 48		
503	Arkansas Unemployment Compensation Tax	1,737,018 67		
504	Workmen's Compensation Insurance	1,461,570 62		
505	Federal Excise Tax	193,004 84		
506	Group Life & Hospital Insurance (Employer's Portion)	179,477 00		
507	Purchased Direct Materials	9,574,802 34		
508	Indirect Materials & Supplies	5,920,835 10	15,495,637 44	
509	Other Operating Expense	809,246 14		
551	Revenues Credited to Operating Cost	1,434,864 75 Cr		
552	Discount Taken	53,556 30 Cr		
	Total Contractor's Disbursement Reimbursements *			$ 84,229,361 78
Government Expenditures **				
	Direct Materials, Government Supplied, Free Issue (Estimate)	$275,768,000 00		
520	Direct Government Expenditures, Expenditure Order No. 3	955,021 04		
508	Indirect Materials Government Furnished	86,354 21		

553	1044 Voucher Credits Sale of Services	39,792 08 Cr.	
521	Local Ordnance Administrative Expense - Salaries & Wages	1,727,101 83	
522	Contractor's Fixed Fee Paid	1,517,333 32	
	Total Government Expenditures.**		$279,714,918 32
533	Rework of Components	39,792 81 Cr.	
533A	Rework of Packing Materials	185,741 16 Cr.	
531	Construction Cost Charged Operations in Error	3 38 Cr.	
620	Materials, Supplies & Services Furnished to the Government	932 73 Cr.	
536	Materials Manufactured for Inventory	120,971 96 Cr.	
550	Total Credits		$ 347,442 04 Cr.
Total Operating Costs			$363,586,878 06
Credits To Operating Costs			
530	Project Charges to Capital Expense	179,716 78 Cr.	
531	Project Charges to Other Procurement Authorities	604,399 84 Cr.	
550	Total Credits to Operating Costs		784,116 62 Cr.
Total Net Production Costs			$362,802,761 44

* Disbursement of Government funds by Contractor, reimbursed by Government.

[fol. 83] ** Direct expenditure by Government applicable to plant operations.

Prepared by: Frank W. Smith,
Accountant.

Approved by: W. F. Whittle,
Paymaster.

Auditor Certification.

The attached statement, prepared from Contractor's Accounting Records and fiscal statements submitted to the U. S. Army Ordnance Department for Government control, in accordance with Ordnance Procurement Instructions, has been audited and verified and to the best of my knowledge is true and correct.

W. F. WEAVER, Auditor.
U. S. Army Ordnance Department.

...acknowledge receipt of ... in ... partment with reference to the collection of gaso... ...sed for use in regard to construction work performed ... ...al government on cost plus contracts. You referred to ... ...essed by the Honorable Francis Biddle, acting Attorney Gen... ... letter to the Chairman of the Committee on Uniform Sales Ta... the National Association of Tax Administrators.

I am glad to inform you that the ruling of this department for some time has been gasoline taxes, as well as sales taxes, are not to be collected on the sales of gasoline and other materials and supplies which actually are used in the construction of projects by the federal government where the contractor purchasing such gasoline and/or supplies acts as agent for the federal government or its instrumentalities; and it has been the construction of the department that the contractor does in fact act as agent for the federal government with reference to such project or projects is one commonly referred to as a cost plus fixed fee contract.

However, we wish to point out that this exemption does not extend to any commodity or equipment purchased by the contractor which are necessary to the performance of his contract but which are not considered by the government as a part of the cost in computing the fee to be paid to the contractor upon the completion of any work. For example, gasoline used by the contractor in going to and from the place where the work is to be performed, or equipment which the contractor may be required to have in order to perform the contract, such as a tractor, the cost of which is not figured as a part of the cost in computing the fee to be paid the contractor but upon which the government may pay to the contractor a fee based upon the rental thereof.

There are many other illustrations which might be made of materials and supplies which are bought by the contractor operating on a cost plusfixed fee basis upon which purchases the tax would be due, but suffice it to say that the general rule of this department is that as to all materials and supplies actually purchased by the contractor on behalf of the government, and for which he is reimbursed by the government and the cost of which is considered as a part of the cost in computing the fee to be paid the contractor, would not be subject to the tax.

Yours very truly,

JOE HARDIN
COMMISSIONER OF REVENUES

LG/p
June 21, 1941

Leffel Gentry,
Attorney

EXHIBIT 2A

d. A fire marshall will be appointed by the commanding officer at all ordnance establishments. He should be responsible for the proper functioning of the fire-fighting organization of the establishment. He should conduct inspections to insure that all fire-fighting equipment is in proper condition, and that the fire-fighting organization functions properly. Under the commanding officer he normally should be the head of the fire-fighting organization.

e. Trained employees who have positions of authority and responsibility should be held responsible not only for the specific duties of their position but also for the enforcement of regulations and for vigilance in detecting any dangerous conditions or practices within their purview and for reporting same to their immediate superiors.

7. General safety regulations.—a. The following general safety regulations will be enforced at all ordnance establishments:

(1) Aisles and exits.—During operating hours, aisles and safety exits will not be blocked, and doors must not be fastened with any locks other than antipanic catches, or other quickacting fastening devices.

(2) Authorized entry.—(a) No unauthorized person will be permitted to enter or remain in any magazine or explosive area.

(b) Employees will be allowed in explosive buildings only at such times as required by their duties. They will be required to enter and leave the explosives area at designated points.

(3) Clothing.—Clothing not worn during working hours will be placed in designated locations only.

* * * * * * *

(7) Fire drills.—All employees working in combustible buildings, in hazardous locations, or buildings containing inflammables are required to participate in such fire drills as may be prescribed by local authorities. A siren or similar device will be installed at each ordnance establishment to warn all employees in the event of fire.

* * * * * * *

[fol. 93] (11) First-aid kits.—First aid kits will be made available at all locations, where explosives are manufactured, loaded, stored, shipped, or handled.

* * * * * * *

(13) Forbidden objects.—Employees who are required to wear special clothing must not carry keys, coins, knives, or any other foreign object of any kind during the time they are in operating buildings.

(14) Guards.—Explosives areas will be guarded adequately at all times.

* * * * * * *

(18) Laundering.—(a) Laundering of special clothing will be done at the plant under the supervision of plant authorities.

(b) Uniforms and special clothing will be laundered according to schedules based on the toxicity of the material in which they are used.

* * * * * * *

(23) Machinery.—(a) Daily on beginning work employees must inspect the machinery under their charge. Employees will be responsible for the safe operation of their machines.

* * * * * * *

(25) Matches.—No person will be allowed to take matches, lighters, or other fire, flame, or spark producing devices into any magazine area or explosives area except by written authority of the commanding officer.

* * * * * * *

(29) Personnel.—All applicants for employment must be given mental and physical examinations. The commanding officer will be responsible for the character of the personnel employed. Care will be taken than no mentally unsound persons are engaged, and that all nondisqualifying physical defects are entered in the record of physical examination.

* * * * * * *

[fol. 85] Exhibit No. 3.

Excerpts From Ordnance Procurement Instructions

50,001.1 New Ordnance Facility.—The term "New Ordnance Facility" means a Government-owned, contractor-operated plant under the jurisdiction of the Ordnance Department.

* * * *

50,002.1 In the case of new Ordnance facilities and contractor-operated Field Service depots, the contracting officer's representative appointed by the contracting officer administering the operating contract will also be appointed the commanding officer of the station. Since the station is a Class IV installation under AR 170-10 as amended, he will be guided by the provisions of pertinent Army Regulations.

* * * *

50,105-2 In the adminstration of cost-plus-a-fixed-fee contracts under which the contracting officer has authority to designate the point at which title will pass to the Government, the contracting officer, in accordance with PR 1182-C, will direct the contractor to cause delivery to be taken by the Government and title to materials and supplies to vest in the Government at the point of origin, subject to final inspection and acceptance at destination. Such power will be exercised unless savings will not be realized thereby under all the circumstances or unless, in the judgment of the contracting officer, such action will definitely, demonstrably and materially interfere with or delay performance of the contract in view of the administrative or other difficulties involved.

* * * *

53,005.1 Reference is made to ASF Manual M404, AR 55-155 and AR 55-150. Government bills of lading on outbound shipments must be signed either by the transportation officer issuing such bills of lading or by his designated civilian assistant who must be an employee of the War Department. At CPFF establishments it is recommended that the preparation of Government bills of lading be made by

(39) Safety shoes.—(a) Explosives operator's safety shoes will be worn in all explosives areas when required by this manual.

(b) Before an employee enters any magazine or building in which explosives are stored or processed, shoes will be cleaned carefully of all mud, grit or other foreign material.

* * * * * * *

(41) Searches.—Frequent searches will be made for forbidden articles. These searches should include all personal property.

(42) Smoking.—(a) Smoking will be prohibited in buildings or in the vicinity of buildings containing explosives, ammunition, or other hazardous material. Smoking areas will be designated and strictly regulated by the commanding officer.

(b) Smoking in clothing which has been contaminated by explosives is prohibited.

[fol. 94] (c) Areas designated by the commanding officer for smoking will be furnished with electric lighters only. Matches and portable lighters will be prohibited.

* * * * * * *

(45)*(b) All employees will be supplied with extracts of the important regulations and essential rules concerning the station, preferably arranged in the form of a small booklet. These regulations should include not only general regulations but specific regulations which apply to the particular establishment.

The manual contains other detailed instructions covering the following subjects:

Section III—Fire Protection.

Section IV—Storage, Magazines and Magazine Areas.

Section V—Quantity—Distance Tables outlining the quantity-distance requirements which are applicable to the storage and handling of ammunition and explosives and

the contractor for the signature of the transportation officer or his designated assistant.

* * * * *

53009.1 On all contracts it will be the responsibility of the establishment administering the prime contract to designate an Accountable Property Officer within their organization to be accountable for all property in connection with that contract.

* * * * *

53,103.2 In every case where reimbursement is made on the basis of a direct charge to a CPFF contract, including any property contained in the overhead account which is specifically identified with a CPFF contract and wholly allocated thereto, the title to the property is in the Government and property accountability therefor should be established.

* * * * *

57,100.3 Commanding Officer's responsibility.—Government-owned contractor-operated plants are military reservations. Commanding officers appointed by War Department orders are responsible for the safety of all personnel and Government property. The following is an extract from AR 210-10:

4. * * * b. He will be responsible for

(1) The safety and defense of the post. * * *

[fol. 86] (4) The reservation, proper application, and use of public property.

(5) The strict enforcement of laws and regulations. * * *

(9) The guarding of the public interests in every particular.

It is, therefore, important that all commanding officers issue regulations that will insure the maximum protection to all personnel and to Government property in any event. These general regulations should be cooperatively issued by the contractor and the commanding officer. The commercial safety experience is ordinarily with the contractor and the

with which all ordnance establishments were required to comply.

Section VI—Mandatory requirements concerning packing, marking, and shipping of military supplies.

Section VII—Surveillance, Inspection of Smokeless Powder and Maintenance, Salvage and Destruction of Explosives and Ammunition.

Pertinent provisions of Section VII follow:

"c. The Chief of Ordnance exercises general supervision over the surveillance of all explosives and ammunition in storage and service; prescribes the tests, technical methods of inspections to be made; and maintains records of the condition of all lots in service and storage.

"d. The commanding officer of an ordnance establishment is responsible to the Chief of Ordnance that all ammunition and explosives at his establishment are subjected to proper surveillance; that the results of surveillance tests and inspections are promptly reported; that the Chief of Ordnance has a record by lot number of the condition of all ammunition and explosives on hand.

"e. Ammunition inspectors are personnel trained in the surveillance of explosives and ammunition. They are appointed and assigned by the Chief of Ordnance, but are under the control and supervision of the commanding officer.

* * * * * * *

"61. Maintenance.—* * *

"b. Some of the more common reconditioning operations such as resealing boxes and containers and replacing gaskets may be accomplished in routine operations. Repainting, re-marking, and repacking will be done in accordance with specific instructions from the Chief of Ordnance.

"c. The renovation of a lot of explosives or ammunition will not be undertaken except in accordance with the spe-[fol. 95] cific directions of the Chief of Ordnance. The work usually involves the use of special equipment and

military responsibility is in the commanding officer. The enforcement of these rules is discussed in OPI 57,002.

* * * * *

57,200.7 Jurisdictional status of Ordnance establishments. —The Office of the Chief of Engineers reports that the Federal Government has attained exclusive jurisdiction in certain establishments over which the Chief of Ordnance has retained responsibility in plant protection matters. The following list will be amended from time to time as jurisdiction is obtained at additional plants. Inquiry as to the present jurisdictional status of establishments not listed hereafter may be addressed to Safety and Security Branch, Washington Liaison Office, Attention of Legal Unit, Office of the Chief of Ordnance, Washington, D. C.

Name	Exclusive Jurisdiction

* * * * *

Arkansas Ordnance Plant	9-10-42

* * * * *

8,405.2 An exemption is authorized from the tax imposed by Section 3475 of the Internal Revenue Code (26 U.S.C. 3475) as to the payment for transportation of property to or from the Government of the United States shipped on a United States Government bill of lading. (Order of the Secretary of Treasury dated 29 April 1944, Federal Register 2 May 1944, Vol. 9, No. 87, F. R. Doc. 44-6128.)

8,405.3 Contracting officers, in administering cost-plus-a-fixed-fee contracts, are not, for the sole purpose of avoiding the payment of the Federal transportation tax, to arrange for the transportation of property upon the United States Government bill of lading. It should be noted in this connection that the payment of the transportation tax by a cost-plus-a-fixed-fee contractor and a subsequent reimbursement of the contractor by the Government merely transfers funds from one Government agency to another.

* * * * *

8500—Exempts sales to prime contractors from federal excise taxes.

---

methods, and requires close supervision to maintain adequate standards of safety as well as to assure the desired quality of workmanship.

* * * * * * *

"62. Salvage.—* * *

"b. Salvage operations are conducted in accordance with specific instructions from the Chief of Ordnance.

* * * * * * *

"64. Destruction of explosives and ammunition.—* * *

"b. Destruction will not be undertaken without prior approval of the Chief of Ordnance in each case, except that commanding officers may order the immediate destruction of dangerously deteriorated explosives or ammunition when in their opinion such action is necessary to protect life or property. When destruction is authorized, the provisions of Army Regulations 356640, Lost, Destroyed, Damaged, or Unserviceable Property, will be observed."

Part II. Special regulations for handling and storing specific kinds of military explosives and ammunition, together with brief descriptions of the properties and uses of the more important items.

Part III. Special safety regulations for the manufacture and loading of military explosives and ammunition.

Part IV. Special safety regulations for the storage and handling of chemical ammunition.

[fol. 96] Exhibit 5.

Jacksonville, Arkansas August 10, 1943

Subject: Request to Employ Janitors Above the Minimum Rate.

To: Commanding Officer
Arkansas Ordnance Plant
Jacksonville, Arkansas

We are experiencing difficulty in employing janitors and janitresses at the minimum established rate in accordance

with our existing wage policy. The rate range for these positions is as follows:

Code No.			Rate Range Per Hour				
415	Janitor	NS-FL	$ .40	.43	.47	.51	.55
421	Janitress	NS-FL	.40	.43	.47	.51	.55

Listed below is the total number of employees in these two classifications at the various steps in the wage bracket:

Rate Per Hour	Number of Employees Classified as Janitor or Janitress
$ .40	10
.43	35
.47	59
.51	80
.55	3*

(*Will be transferred to do crating work.)

It is not possible at this time to employ good janitors at the minimum rate of $.40 per hour. We request permission to employ janitors and janitresses at the rate of $.47 per hour which we believe will enable us to secure a more efficient class of qualified employees at a rate comparable to that now being paid by other industries in this locality.

The turnover of the janitor personnel has been high. In order to retain the services of the competent janitors now on the payroll, and to equalize the rates of pay, permission is requested to increase the rate of those janitors and janitresses now on the payroll at the rates of $.40, $.43 and $.47 per hour in accordance with the following:

[fol. 97] A. Increase to $.51 per hour those who have been continuously employed for 90 days or longer.

B. Increase to $.47 per hour those janitors and janitresses now employed at this Plant and who are on the $.40 and $.43 rate and who have not been continuously employed here as long as ninety days.

Your early action on these requests is earnestly solicited.

B. E. HARRIS,
General Manager.

BEH:m

cc:Mr. C. H. Harper, Jr.

Purchasing Form 11-B
DUPLICATE

PURCHASE ORDER

ARKANSAS ORDNANCE PLANT
JACKSONVILLE, ARKANSAS
POSTOFFICE: LITTLE ROCK, ARK.

The order number must appear on all invoices, correspondence, shipping papers and on exterior of packages. Shipping tickets must accompany all shipments.

No. 27134

Operator: FORD, BACON & DAVIS, INC.

Contract No. W-ORD-519; DA-W-ORD-6 Date ..... 194 ....

To .....

Address .....

In accordance with terms and conditions of your accepted bid and/or contract dated ..... and in conformity with conditions and instructions appearing on reverse side hereof, kindly enter order as specified below.

Requisition No. .....

Terms .....

Shipped Via .....

F.O.B. .....

ITEM NO.	QUANTITY	ITEM (Description of item must be definite and complete.)	PRICE	AMOUNT

SHIP TO: Ordnance Property Officer
Jacksonville, Arkansas

For Account of Operator: Ford, Bacon & Davis, Inc.

Prepare invoices in name of operator and MAIL DIRECT to
Ford, Bacon & Davis, Inc., Arkansas Ordnance Plant, Little Rock, Ark.

Shipment must start by: .....

And be completed by: .....

Procurement Authority No. .....

FORD, BACON & DAVIS, INC.
OPERATOR

PURCHASING AGENT

Entered on Purchase Order Register by .....

Approved:
FOR THE COMMANDING OFFICER

Purchase Approved Because:

1—Lowest Price
2—Early Delivery
3—Better Quality
4—Better or required design
5—Only Available Source
6—

EXHIBIT 3A.

[fol. 98]

War Department
Arkansas Ordnance Plant
Jacksonville, Arkansas

Prowler/ab

Attention of
SPOCQ

27 Aug 1943.

Subject: Increase in Rate for Existing Designation.
WD-WAA-1 Facility Submission No. Arkansas—8

To: Office, Chief of Ordnance,
Pentagon Building,
Washington, D. C.
ATT'N: SPOGC—Chief, Labor Section.

1. In accordance with Ordnance Procurement Instructions 9,109, forwarded herewith is the complete information as proivded for under 9,108.2, relative to request of Ford, Bacon & Davis, Inc., Contractor-Operator, this Plant, to employ janitors above the existing minimum rate, which submittal has been reviewed and meets with the approval of the Commanding Officer.

2. It is requested that the foregoing be examined by his office and forwarded to the War Department Wage Administration Agency, for approval, and that this office be advised as soon as practicable.

LINCOLN W. FENSTERMACHER,
Major, Ordnance Dep't.,
Commanding

Encl:
Request of FB&D—8/24/43,
w/supp. documents (in Quint.)

COPY
File No. AOP 248.3/19893

[fol. 88] Exhibit 3b.

War Department
Arkansas Ordnance Plant
Jacksonville, Arkansas

Memorandum)
No. 113) December 2, 1942.

Subject: Primary and Additional Assignments of Officers at Arkansas Ordnance Plant.

1. For the information and guidance of all concerned, listed below is a roster of the officers assigned to this station, with a summary of their primary and additional assignments.

a. Lieutenant Colonel Robert A. Kohloss, jr., O-396691, Ordnance Department—

Primary duty Commanding Officer, W.D. S.O. No. 145, Par. 10, dated June 2, 1942.

b. Major Lincoln W. Fenstermacher, S-898, A. S. C.—

Primary duty Administrative Officer, A.O.P. G.O. No. 33, par. 2, dated October 15, 1942.

Additional duty Property Officer, A.O.P. G.O. No. 37, par. 3, dated November 4, 1942.

Additional duty Transportation Officer, A.O.P. G.O. No. 37, par. 3, dated November 4, 1942.

Additional duty Representative for Administering Contracts (with Capt. Radcliffe), A.O.P. G.O. No. 41, par. 2, dated November 10, 1942.

c. Captain Melvin Johnson, O-297160, Ordnance Department—

Primary duty Chief, Production Service Section, A.O.P. S.O. No. 566, par. 2, dated July 9, 1942.

Additional duty Salvage Officer, A.O.P. G.O. No. 50, par. 1, dated November 30, 1942.

Additional duty Equipment Budget Officer, A.O.P. G.O. No. 50, par. 1, dated November 30, 1942.

[fol. 99]

War Department
Arkansas Ordnance Plant
Little Rock, Arkansas

Prowler/ab

16 October 1943.

Subject: Increase in Rate for Existing Designation.
WD-WAA-1 Facility Submission No. Arkansas—8.

To: Mr. B. E. Harris, General Manager,
Arkansas Ordnance Plant.

1. Reference is made to the General Manager's memorandum, dated 24 August 1943, wherein the Contractor submitted request to employ janitors above the existing minimum rate, for transmittal to the Office, Chief of Ordnance.

2. This office is in receipt of teletype from Office, Chief of Ordnance, dated 16 October 1943, wherein the War Department Wage Administration Agency has denied approval therefor.

3. Copy of the aforementioned teletype is submitted herewith, for your information.

For the Commanding Officer:

HUGO L. LIBBY,
Capt. Ordnance Dep't.,
Executive Officer

Encl:
Cy.TT—10/6/43—C.of O.
to C.O. AOP

cc: Mr. C. H. Harper, Jr.
Mr. A. R. Clerke

COPY
File No. AOP 248.3/20926

[fol. 100]

War Department
Arkansas Ordnance Plant
Little Rock, Arkansas

Prowler/ab

20 October 1943.

Subject: Increase in Rate for Existing Designation. WD-WAA-1 Facility Submission No. Arkansas—8.

To: Mr. B. E. Harris, General Manager, Arkansas Ordnance Plant.

With further reference to communication of this office, dated 16 October 1943, wherein was submitted a copy of teletype, dated 16 October 1943, from Office, Chief of Ordnance, denying approval for subject Submission,—transmitted herewith are copies of 1st, 2nd, and 3rd indorsements, relative to action of the War Department Wage Administration Agency, and comments of the Chief, Labor Section.

E. A. HAINE,
Major, Ord. Dep't.,
Commanding.

Encls: Cys. 1st, 2nd & 3rd Inds. above mentioned.

cc: Mr. C. H. Harper, Jr.
Mr. A. R. Clarke

COPY
File No. AOP 248.3/20994

[fol. 101] O.O. 248.3/6471 Arkansas O. Plt.

Attn: SPOGC—Wage Adm. Unit
AOP 248.3/19893

1st Ind.

Burns
72986

War Department, Ordnance Office, Washington 25, D.C., 3 September 1943.

To: Wage Administration Agency, Civilian Personnel Branch, Industrial Personnel Division, Room 5-C-489, The Pentagon, Washington 25, D. C.

d. Captain Benjamin B. Williams, O-118181, Ordnance Department—

Primary duty Executive Assistant, A.O.P. G.O. No. 37, par. 2, dated November 4, 1942.

[fol. 89] e. Captain Harold Radcliffe, O-409222, Ordnance Department—

Primary duty Army Inspector of Ordnance, A.O.P. G.O. No. 38, par. 2, dated November 5, 1942.

Additional duty Representative for Administering Contracts (with Maj. Fenstermacher), A.O.P. G.O. No. 41, par. 2, dated November 10, 1942.

f. First Lieutenant Verneard W. Hudgins, O-380552, Ordnance Department—

Primary duty Assistant Army Inspector of Ordnance, A.O.P. G.O. No. 4, par. 2, dated August 17, 1942.

g. First Lieutenant George A. Clemow, O-391183, Ordnance Department—

Primary duty Executive Officer, A.O.P. G.O. No. 39, par. 1, dated November 7, 1942.

Additional duty Employee Transportation Officer, A.O.P. G.O. No. 49, par. 1, dated December 1, 1942.

h. First Lieutenant Hugo L. Libby, O-351426, Ordnance Department—

Primary duty Chief, Plant Protection Section, A.O.P. S.O. No. 56, par. 5, dated July 9, 1942.

Additional duty Fire Marshal, A.O.P. G.O. No. 12, par. 1, dated August 31, 1942.

Additional duty Industrial Relations Officer, A.O.P. G.O. No. 44, par. 1, dated November 23, 1942.

i. First Lieutenant Edward O. Green, O-390915, Ordnance Department—

Primary duty Assistant to the Industrial Relations Officer, A.O.P. G.O. No. 52, par. 1, dated December 1, 1942.

1. Complying with the provisions of OPI 9,108.2 there is transmitted herewith submission number:

"Arkansas 8"

requesting approval to change the hiring rate for Janitors and Janitresses from $.40 to $.47 per hour and to increase the employees at the $.40 and $.43 rate to $.47 per hour. Request is also made to increase those employees who have worked for 90 days or more to the $.51 rate.

2. Attention is invited to the fact that the weighted average for this job classification will not exceed the locality weighted average if the hiring rate should be changed to $.47 and the increases as requested be approved. It is noted that the request to increase employees who have served a period of 90 days or more to the $.51 rate agrees with an established promotional plan of the company.

3. This office recommends approval of a $.47 hiring rate effective as of 30 August 1943.

For the Chief of Ordnance:

WILLIAM J. BRENNAN, JR.
Lt. Col., Ordnance Dept.
Assistant

1 Incl.
"Arkansas 8"

[fol. 102] Teletype

TT 23187

From PEW Wash DC C of O War Dept Oct 15 1943 2056Z
To Arkansas OP Received: 8:00 AM, October 16, 1943
Re "Arkansas 8" War Dept Wage Administration Agency Has Denied Approval To Employ Janitors and Janitresses At $.47 In Lieu Of $.40 Per Hour. General Order 31 May Be Followed With Respect To Length Of Service Increases. Letter Follows. End Cite SPOGC Duncan 160130Z.

Distribution:
cc: Major Fenstermacher
Attention: Mr. Prowler

[fol. 90] j. First Lieutenant James E. Moore, Jr., 0-36-6061, Ordnance Department—

Primary duty Plant Guard Officer, A.O.P. G.O. No. 16, par. 2, dated Setpember 16, 1942.

Additional duty Adjutant, A.O.P. G.O. No. 39, par. 2, dated November 7, 1942.

Additional duty Provost Marshal, A.O.P. G.O. No. 48, par. 3, dated November 28, 1942.

k. First Lieutenant Robert A. Lane, 0-382613, Ordnance Department—

Primary duty Signal Officer, A.O.P. G.O. No. 34, par. 5, dated October 21, 1942.

l. First Lieutenant Taylor D. Wilkes, S-715, A.S.C.—

Primary duty Safetly Officer, A.O.P. G.O. No. 47, par. 1, dated November 27, 1942.

m. Second Lieutenant Ward T. Gamble, 0-392384, Ordnance Department—

Primary duty Intelligence Officer, A.O.P. S.O. No. 56, par. 11, dated July 9, 1942.

Additional duty Public Relations Officer, A.O.P. G.O. No. 4, par. 4, dated August 17, 1942.

n. Second Lieutenant Theodore J. Bommer, 0-398261, Ordnance Department—

Primary duty Chief, Utilities Section, A.O.P. G.O. No. 12, par. 5, dated August 31, 1942.

Additional duty Inspector of Government Property, A.O.P. G.O. No. 17, par. 6, dated September 16, 1942.

Additional duty Special Services Officer, A.O.P. G.O. No. 46, par. 3, dated November 26, 1942.

By Order of Lieutenant Colonel Kohloss:

J. E. MOORE,
1st Lt., Ord. Dept.,
Adjutant.

Distribution: "C"

[fol. 103] Teletype

Jacksonville, Arkansas
21 October 1943

Arkansas Ordnance Plant Calling

War Department Wage Administration, Agency
Washington, D. C.
Attention: Major William H. Bedell

Ford, Bacon & Davis, Inc., Contractor-Operator Arkansas Ordnance Plant Is Today Filling Appeal From Negative Ruling Of Your Agency Relative To Application Number Arkansas "8" Requesting Approval To Change Hiring Rates For Janitors And Janitresses. Formal Appeal Follows end SPOCQ Cite TT—

HAINE
Commanding

Official Business

Prowler/ab

Distribution: Major Haine
Mr. Prowler
Mr. Harris
Mr. Harper
Mr. A. R. Clarke

[fol. 104] O.O.248.3/6471 Arkansas O. Plt.
Attn: SPOGC—Wage Adm. Unit
AOP 248.3/19893
SPOC-C 321.8 Arkansas Ord. Plant 4th Ind.

Prowler/ab

Office of the Commanding Officer, Arkansas Ordnance Plant, Little Rock, Arkansas.
21 October 1943.

To: War Department Wage Administration Agency, Washington D. C.,
Att'n: Major William H. Bedell.

1. Ford, Bacon & Davis, Inc., Contractor-Operator, this Plant, has requested that appeal be taken from ruling of his Agency, relative to subject submission.

[fol. 91] Exhibit No. 4.

Ordnance Safety Manual.

The Ordnance Safety Manual is a pamphlet containing 221 pages issued by the Office of the Chief of Ordnance, United States Army, and purports to contain "regulations governing the manufacture, storage, loading, and handling of military explosives and munitions at establishments of the Ordnance Department, U. S. Army". Some of the relevant excerpts from the manual are as follows:

Part I.

General Regulations For The Manufacture, Loading, Storage, Handling, Shipping, Surveillance, Maintenance, Salvage, And Destruction Of All Classes Of Military Explosives And Ammunition.

1. Purpose.—The purpose of this manual is to acquaint personnel of the Ordnance Department with the characteristics and hazards of explosives and ammunition, and to prescribe rules and regulations, the application of which will reduce the hazards involved in manufacturing, processing, storing, and otherwise handling explosives and ammunition at ordnance establishments.

2. Scope.—a. This manual gives general and specific information regarding explosives and ammunition in the stages of manufacture, and under the conditions in which they may exist at ordnance establishments, and prescribes safe methods and practices pertaining thereto. Safety requirements which are outlined herein are the minimum compatible with proper safeguarding of personnel and property. These requirements apply only to establishments under the control of the Chief of Ordnance.

b. Regulations pertaining to the storing, handling, shipping, and maintaining of explosives and ammunition at posts, camps, and stations are set forth in appropriate field and technical manuals.

c. The mandatory requirements of this manual are those in which the terms "will" or "must" are used. All mandatory provisions will be complied with unless the Chief of Ordnance grants specific authority to the con-

2. Submitted herewith is memorandum from the General Manager, Contractor-Operator, wherein is included a resurvey of the Little Rock and Jacksonville, Arkansas areas, showing the prevailing rates, together with the request for appeal.

3. It is requested that his Agency make an examination and review of the enclosed, and that this office be advised as soon as practicable.

E. A. HAINE,
Major, Ord. Dep't.,
Commanding

Encl:
Memo of FB&D to C.O.—10/20/43
(in Quint.)

(End of Exhibit 5)

[fol. 105] (Exhibit 6)

ASF, Office of the Chief of Ordnance, Washington 25, D. C.
10 Jan. 1944

To: Wage Administration Agency, Civilian Personnel Branch, Industrial Personnel Division, Room 4-C-488, The Pentagon, Washington 25, D.C.

1. In accordance with the provisions of OPI 9,108.2 there is transmitted herewith submission numbered

"Arkansas 31"

requesting approval to increase the step rates for the classification "Laborer" from $.40-.43-.51-.55 to $.51-.55-.59-.62-.66.

2. Data required by OPI 9,108.2 and not included with this submission were forwarded with "Arkansas 3." It will be noted that Laborers have been hired at $.51 per hour since December, 1942, allowing for only one merit increase within the range. All other classifications have five steps within the range, allowing for five merit increases. The increase in rate range is requested in order to correct this intra-plant inequality. Wage survey data submitted are

trary. The advisory provisions are those to which "may" or "should" be used. All advisory provisions will be complied with unless exceptions are authorized by the commanding officer of the establishment.

3. General definitions.—a. Ordnance Establishment.—An establishment under the direct control of the Chief of Ordnance.

* * * * * * *

6. Responsibilities for safety.—a. The Chief of Ordnance exercises general supervision over the safety of ordnance establishments. He prescribes general and certain special safety regulations to be applied in manufacturing, loading, storing, handling, shipping, and maintaining explosives and ammunition.

b. The commanding officer of an ordnance establishment is solely responsible to the Chief of Ordnance for the safety of his establishment. He will enforce the mandatory provisions of this manual and will be guided by the [fol. 92] advisory provisions. He will prescribe and enforce such additional safety regulations as may be necessary to meet local conditions not covered by these regulations. He will make a specific written report of any mandatory requirement in these regulations which he may consider impossible of application at his establishment. When, in his opinion, conditions of storage are such that a single fire or explosion endangers large quantities of explosives or ammunition by progressive action from magazine to magazine, a report with recommendations for corrective action will be made to the Chief of Ordnance. Refer to paragraph 24d (2) (c).

c. At each establishment, a safety officer will be appointed by the commanding officer. The safety officer should be the supervisor of safety at the establishment, and is responsible to the commanding officer for the enforcement of all safety regulations and standards, but has no authority to waive or alter any of the provisions of this manual. In establishments where there is a need for professional safety services because of size or nature of operations; a safety engineer will be employed.

taken from six Ordnance facilities outside the immediate locality.

3. This office recommends approval of the increase in rate range as requested. Retroactive approval to 3 December 1942 is requested because it has been the practice to hire individuals at the $.51 rate since that time.

For the Chief of Ordnance:

WILLIAM J. BRENNAN, JR.
Lt. Col., Ordnance Dept.
wem/ Assistant

1 Incl.
"Arkansas 31" (in dup.)

[fol. 106] To: Chief of Ordnance, Washington 25, D. C.
Attn: Chief, Labor Resources Section.

In the Matter of Application of

Ford, Bacon & Davis, Inc.
(Name of Company)

Application No. "Arkansas 31"

Arkansas Ordnance Plant
(Name of Facility)

Jacksonville, Arkansas
(Location of Facility)

for Wage or Salary Adjustments as set forth in basic communication and indorsement thereto carrying recommendation of Chief of Ordnance.

1. Under authority granted to the War Department Wage Administration Agency in connection with Executive Orders No. 9250 and No. 9328 by the National War Labor Board (General Order No. 14) and by the Commissioner of Internal Revenue (letter of 24 December 1942) approval is denied the request of Ford, Bacon and Davis, Incorporated, Operating-contractor at the Arkansas Ordnance Plant to increase the rate range for the job classification "Laborer" from $.40-.43-.47-.51-.55 per hour to $.51-.55-.59-.62-.66 per hour.

2. Approval is denied because the proposed increase would establish rates higher than the sound and tested rates for the locality.

Standard Form No. 1106 a
Form approved by
Comptroller General, U. S.
1943

U. S. GOVERNMENT BILL OF LADING

MEMORANDUM COPY

NO. 7766736

EXPLOSIVE

NAME OF INITIAL TRANSPORTATION COMPANY: MISSOURI PACIFIC R.R. CO. (494)

TRAFFIC O[illegible]3502[illegible]

STOP THIS CAR AT ● FOR

RECEIVED BY THE TRANSPORTATION COMPANY NAMED ABOVE, SUBJECT TO CONDITIONS NAMED ON THE REVERSE HEREOF, THE PUBLIC PROPERTY HEREINAFTER DESCRIBED, IN APPARENT GOOD ORDER AND CONDITION (CONTENTS AND VALUE UNKNOWN), TO BE FORWARDED TO DESTINATION BY THE SAID COMPANY AND CONNECTING LINES, THERE TO BE DELIVERED IN LIKE GOOD ORDER AND CONDITION TO SAID CONSIGNEE.

SIZE CAR IN FEET † ORDERED	SIZE CAR IN FEET † FURNISHED	MARKED CAPACITY OF CAR † ORDERED	MARKED CAPACITY OF CAR † FURNISHED	DATE CAR FURNISHED †	DATE B/L ISSUED
40'6"	40'6"	1000	1000	11 AUG.	12 AUG. 1944

FROM (SHIPPING POINT) JACKSONVILLE, ARK.

FROM (FULL NAME OF SHIPPER) [illegible] U. S. A. PLANT, JACKSONVILLE, ARK.

MARKS PTO, HAMPTON ROADS PORT
ARMY BASE PIER
NORFOLK, VA.

[illegible] INSPECT
1767-53-AIRCRAFT-[illegible]381-A-4 "LOT 1"

CONSIGNEE PTO, HAMPTON ROADS PORT
ARMY BASE PIER

[illegible], VIRGINIA

CHARGES TO BE BILLED TO (DEPARTMENT OR ESTABLISHMENT AND BUREAU OR SERVICE AND LOCATION)
WASHINGTON, D. C.

VIA (ROUTE JOURNEY ONLY WHEN SOME SUBSTANTIAL INTEREST OF THE GOVERNMENT IS SUBSERVED THEREBY)
AOT - [illegible] - [illegible] - NORFOLK

APPROPRIATION CHARGEABLE 309-502 7130-03 A21-/51005

DO NOT

ISSUING OFFICE [illegible]. A. L. PLANT, JACKSONVILLE, ARK.

PICK-UP SERVICE AT ORIGIN ..... BY THE GOVERNMENT OR ITS AGENT.
(INSERT "WAS" OR "WAS NOT")

NAME AND TITLE OF ISSUING OFFICER [illegible]. JOHNSON, 1 LT., [illegible]. A.T., I. O.

INITIALS OF SHIPPER'S AUTHORIZED AGENT OR EMPLOYEE .....

† FURNISH THIS INFORMATION IN CASE OF CARLOAD SHIPMENTS ONLY.
* SHOW ALSO CUBIC MEASUREMENTS FOR SHIPMENTS VIA OCEAN CARRIER IN CASES WHERE REQUIRED.

PACKAGES NO.	PACKAGES KIND	DESCRIPTION OF ARTICLES (USE CARRIERS' CLASSIFICATION OR TARIFF DESCRIPTION IF POSSIBLE, OTHERWISE A CLEAR NONTECHNICAL DESCRIPTION)	NUMBERS ON PACKAGES	ACTUAL WEIGHTS*
1 (765 BXS)	C/L	LOT LOADING FUZE - CLASS A EXPLOSIVE FUZE, BOMB TAIL, AN-M101 2 (.025) 10,848 LOT AOP-42 8,252 LOT AOP-43 PARTIAL	500# FIBERBOARD	94,860#

SEALS AOP-4937 & 4938 -- SEAC
WAR DEPT. REQUISITION NO. 10,700

RELEASED TO VALUATION DESCRIBED
BY TARIFF TO OBTAIN LOWEST RATE
LOD 75089

2,241.5 CU. FT.

EXPLOSIVE
PLACARD APPLIED
[illegible] that the above [illegible] by name and are in proper condition [illegible] according to the Interstate Commerce Com. [illegible]

CERTIFICATE OF ISSUING OFFICER

CONTRACT NO. OR PURCHASE ORDER NO. OR OTHER AUTHORITY FOR SHIPMENT W[illegible]-[illegible] DATED .....

(F. O. B. POINT NAMED IN CONTRACT)

SIGNATURE OF ISSUING OFFICER .....

NAME OF TRANSPORTATION COMPANY MISSOURI PACIFIC R.R. CO. (494)

DATE OF RECEIPT OF SHIPMENT 12 AUGUST 1944

SIGNATURE OF AGENT H. L. Houston PER Bagby

MEMORANDUM COPY
PROPERTY SHIPPED

10—84113-1

EXHIBIT 12.

3. Approval is granted to change the rate range for the job classification "Laborer" from $.40-.43-.47-.51-.55 per hour to $.51-.55-.59 per hour, effective as of the date of this approval.

4. Approval is granted because the new approved rate range is consistent with sound and tested rates for the locality.

5. The action taken in this ruling is based on the evidence submitted by the operating contractor. Should this evidence subsequently be shown to be incorrect, this ruling shall have no force or effect.

6. Attention is directed to the fact that the time within which appeal from this ruling may be filed with the Appeals Committee, War Department Wage Administration Agency, or with the Commissioner of Internal Revenue, through the War Department Administration Agency, expires on 22 February 1944.

By order of the Secretary of War:

The War Department Wage Administration Agency

per WILLIAM H. BEDELL
Major, F. A.

Date of Ruling 7 Feb 44
1 Incl. w/d

[fol. 107] To: Commanding Officer, Arkansas Ordnance Plant, Jacksonville, Arkansas

1. Attention is invited to 3rd indorsement above in this the War Department Wage Administration Agency has approved three and disapproved two of the hourly rates requested for the job classification "Laborer", in submission "Arkansas 31#. The Agency's ruling is effective as of 7 February 1944.

By order of the Chief of Ordnance:

WM. J. BRENNAN, JR.
Lt. Col., Ordnance Department.
wem Chief, Labor Section

cc: Field Director of Ammunition Plants
(w/cy 3rd ind.)

[fol. 108] Approval of a Wage or Salary Adjustment Through Commanding Officer

Date December 29, 1943

Name of Facility .....Arkansas Ordnance Plant.....
Name of Operating Contractor..Ford, Bacon & Davis, Inc.
Address of Facility .....Jacksonville, Arkansas.....
Is there a duly recognized certified labor organization for any or all of the employees affected by the wage or salary adjustment? Yes .... No. ..x... If yes, name the organization or organizations.
Summarize details of proposed adjustment on following lines. More detailed statement may be made on other sheets, but summary must appear in this space.....
Revise the rate range for the classification laborer from...
$.40-43-47-51-55 to $.51-55-59-61-66.....
For details of presentation, see OPI 9,108.2)
proposed effective date of adjustment..December 3, 1942..
Summerize the reasons necessitating the proposed adjustment. A more detailed statement may appear on other sheets, but summary must appear here. It has been the practice at this plant since December 3, 1942 to hire laborers at $.51 per hour, and a revision of this rate is requested so that it will be on a five step range as are other classifications at this plant.

For purposes of application of the Little Steel Formula, supply the following information with respect to each unit or individual designation for which adjustment is sought:

a. Date on which original rates or rate ranges were approved by contracting officer's representative.....

b. Date on which employees were first hired at the original rates.....

c. Such earlier date as contractor contends should be used for purposes of computation under Little Steel Formula, attaching documentary evidence in support thereof.....

Employer:
Ford, Bacon & Davis, Inc.
Operators Ark. Ord. Plant

.....
Name of company

[fol. 118] Exhibit No. 13.

Arkansas Ordnance Plant
Ford, Bacon & Davis, Inc.

Operations Manual No. 10

Fuze, Bomb, Tail, AN-M100A1

Section A: Assemble Fuse.

Operation No. 1 Assemble and Press Relay Cup in Delay Holder.

Insert relay cup, closed end first, in delay holder. Locate holder against locating block on platen of press. Operate foot pedal and press at 60,000 pounds per sq. in.

Hourly Production.....

Operation No. 2 Reconsolidate Black Powder Pellet.

Place delay holder on base of loading fixture, wrench holes facing downward. Assemble punch guide on base. With tweezers, pick up black powder pellet, inspect for condition, and insert in punch guide. Be sure pellet does not cock in hole. Place assembly on platen of press against the centering block. Reconsolidate pellet at 60,000 pounds per sq. in.

Note: Do not have more than 15 or 20 pellets exposed to air at one time. Do not use pellets which are cracked or chipped.

Hourly Production.....

Operation No. 3 Seat Cushion in Detonator Holder.

Place cushion in detonator cavity of holder and seat with seating stick.

Hourly Production.....

.....

Name of official

General Manager

.....

Title

24-35420

(End of Exhibit 6)

[Fol. 109] (Exhibit 6a)

C. Q. M. Form

Arkansas Ordnance Plant
Little Rock, Arkansas

Interoffice Communication

Use this form. Do not depend on verbal transmission.

Keep copy for your files

To: Mr. Chas. H. Harper, Jr., Project Controller — Date March 12, 1942

Your file No..... From G. D. Wintersteed, Chief Project Auditor

Subject: Operations Payroll No. 5. Our file No.....

1. It is found that your Operations Payroll No. 5 contains badge numbers of three individuals; namely—Nos. 1105, 1133, and 1134, upon which we have no authority of employment signed by the Commanding Officer.

2. Your attention is directed to the fact that we cannot reimburse until we have of record, both in this office and in the office of the Finance Officer, an approval signed by the Commanding Officer. To avoid delay of these three names, will you kindly submit an approval immediately?

G. D. WINTERSTEEN
Chief Project Auditor.

[fol. 110] Exhibit 7.

OOSL—Operations

Vellenoweth/vaf

February 25, 1943

Subject: Installation of Prosperity Valves

To: Commanding Officer,
Arkansas Ordnance Plant,
Little Rock, Arkansas.

1. Following Major Bain's inspection of the loading of M54 fuzes and Mk 27 detonators on February 3 and 4 he has recommended that prosperity valves be installed on all consolidation presses.

2. This office requests that these valves be installed as recommended and this office advised when installation is complete.

3. It is recommended that funds to cover installation of valves be obtained from and charged to regular plant operation and maintenance fund.

By order of the Field Director:

E. W. VELLENOWETH,
Major, Ord. Dept.,
Assistant.

COPY
File No. AOP 600.1/13404
OOSL 600/64054

[fol. 111] War Department
Arkansas Ordnance Plant
Little Rock, Arkansas

March 20, 1943

AOP No. 600.1/15639

Fenstermacher/bd

Subject: Installation of Prosperity Valves

Memo to: Mr. R. A. Morgan,
General Manager,
Arkansas Ordnance Plant

1. There is inclosed copy of letter received from the Office of the Field Director of Ammunition Plants pertaining to the above subject.

Operation
No. 4 Insert and Crimp Detonator.

Insert detonator in cavity, colored end first. Assemble holder in fixture, wrench holes facing downward. Lower press ram to crimp detonator in holder.

Inspect to see that detonator is flush or below face of detonator holder.

Hourly Production.....

Operation
No. 5 Stamp Primer Body.

Place empty box in position at the mouth of the chute to receive ejected bodies. Start machine and insert bodies in the stations on dial of press as they are indexed to position in front of operator. Bodies are ejected into chute after stamping.

Hourly Production.....

[fol. 119] Operation
No. 6 Gage Primer.

Insert New No. 4 Primer in gage. Primer must gage freely and seat on shoulder of gage. Reject all primers that do not gage.

Hourly Production.....

Operation
No. 7 Seat Primer in Body.

With tweezers insert New No. 4 Primer in primer body. Place assembly on base on platen of press and seat primer body at 225 pounds dead weight.

Hourly Production.....

Operation
No. 8 Crimp Primer in Body.

Place assembly on base fixture and depress foot treadle to crimp primer in primer body.

Hourly production.....

Operation No. 9 Insert Sealing Washer.

Insert sealing washer in delay holder cavity of primer body. Seat washer in place with seating stick.

Hourly production.....

Operation No. 10 Tension Delay Holder in Primer Body.

Coat threads of delay holder with NRC compound. Engage 2 or 3 threads in primer body. Place assembly in the fixture, tighten vise jaws of base, and tension delay holder in primer body.

Hourly production.....

Operation No. 11 Tighten Detonator Holder in Primer Body.

Start detonator holder in primer body by hand. Assemble primer body to fixture. Engage wrench slots in work holes of holder. Tighten detonator holder to primer body.

Hourly production.....

Operation No. 12 Stake Detonator Holder in Primer Body.

Place assembly in holding fixture on platen of press. Depress foot treadle to lower the staking punch and stake primer body to detonator holder in two places, 180° apart.

Hourly production.....

[fol. 120] Operation No. 13 Paint Surface of Primer Detonator.

Paint one-fourth of detonator holder surface on the face of the primer detonator with black paint or enamel to indicate burning time of .025 second.

Hourly production.....

2. Recommendation is made that these valves be installed and that expenditures be charged to regular plant operation and maintenance.

3. Installation of these valves should be assigned a project number in the manner provided and this office advised when installation is complete.

For the Commanding Officer:

LINCOLN W. FENSTERMACHER,
Major, Ordnance Department,
Executive Officer.

Incl. 1

a/s

(End of Exhibit 7.)

[fol. 112] Exhibit 8.

War Department :
Arkansas Ordnance Plant
Jacksonville, Arkansas

15 April 1944

Tolson/cyt

Subject: Purchase of One Photoelectric Gaging Machine, Artillery Fuze Line No. 2, AOP Project No. 200.

To: Field Director of Ammunition Plants
3629 Lindell Boulevard
St. Louis 8, Missouri

Attn: SPOLY-D

1. In accordance with paragraph 10,103, Section F, of the Ordnance Procurement Instructions, transmitted herewith is memorandum dated 11 April 1944, from the General Manager, Ford, Bacon & Davis, Inc., Contractor-Operator, this Plant, together with description of work, bill of materials, and Specifications for Photoelectric Gaging Machine for Use in Determining the Arming or Non-Arming of the Firing Pin in the M48A2 Delay Plunger Assembly, requesting the approval for purchase of one photo-

Operation No. 14 Stamp Fuze Body.

Place fuze on holding fixture so that pin of fixture enters primer body cavity of fuze body. Operate lever to stamp required data on body. Remove fuze body from fixture.

Hourly production.....

Operation No. 15 Gage Depth of Plunger.

Use flush pin gage to gage depth from end of body to tip of plunger (min. depth 1.385").

Note: Before gaging, visually inspect body for presence of plunger assembly.

Hourly production.....

Operation No. 16 Insert Spring and Seat Spring Retainer in Body.

With fingers insert a spring and a spring retainer in the primer detonator cavity of the fuze body. Place assembly on platen of press and operate press to lower punch and seat spring retainer in fuze body.

Note: Omit this operation when bodies are received with spring and spring retainer assembled.

Hourly production.....

Operation No. 17 Assemble and Tighten Primer Detonator in Fuze Body.

Engage primer detonator threads in body and tighten hand tight.

Note: Be sure that spring is centered against spring retainer so as to eliminate any possibility of the primer detonator catching and compressing spring during assembly.

Hourly production.....

electric gaging Machine, Artillery Fuze Line #2, at an estimated cost of $4,485.00.

2. The proposed project has been reviewed and concurred in by the Commanding Officer. It is requested that consideration be given to this project by his office, and that funds be allotted to cover the cost.

CHARLES G. TOLSON,
Major, Ord. Dept.,
Commanding.

4 Incls.
Incl. 1. Memo FB&D to C.O.-AOP 4/11/44 (in Quad.)
Incl. 2 739B (in quad.)
Incl. 3. 679B (in quad.)
Incl. 4. Specifications for Photoelectric Gaging Machine.

cc: Army Inspector of Ordnance
Comptroller
Planning Manager
Plant Engineer
Field Auditor

COPY
File No. AOP 600.1/24458

[fol. 113]

War Department
Arkansas Ordnance Plant
Jacksonville, Arkansas

29 April 1944

Tolson/cyt

Mr. B. E. Harris, General Manager,
Arkansas Ordnance Plant.

Re: Purchase of One Photoelectric Gaging Machine, Artillery Fuze Line No. 2, AOP Project No. 200.

Dear Mr. Harris:

1. With reference to subject Project, this office has received notice that same has been approved, and funds are now available therefor, under Procurement Authority E. P. of E. & S. 1940-44 5-27029 P210 A210/40141.

[fol. 121] Section B: Pack Fuze

Operation No. 1 Pack Fuze in Container

Place pad in bottom of container. Slip support over booster end of fuze until flange allows assembly of the two diaphragms. Assemble two diaphragms, slots opposite each other, around the tube of fuze. Insert fuze in container and put cover on container.

Hourly production.....

Operation No. 2 Secure Cover to Body With Sealing Strip.

Apply a strip of adhesive tape around container over joint of body and cover, lapping the ends over to form a tab approximately ¾" long. Take care that sealing strip provides a waterproof seal.

Hourly production.....

Operation No. 3 Paint Assembly.

Dip the entire assembly in acid-proof black paint, using tongs for handling containers. Place coated assemblies on drying racks and allow to dry thoroughly.

Note: Inspect assemblies frequently for neatness and condition of painting job. Touch up any bare spots with a brush.

Hourly production.....

Operation No. 4 Attach Label to Assembly.

Secure label to container with bleached shellac varnish. Maintain uniform location of la-

2. Upon completion of the work, the final statement of cost should be submitted for the information of this office. If it becomes apparent that the final cost of the work may exceed the original estimate, this fact should be brought to the attention of this office, in order that a proper review may be made of the Project.

Very truly yours,

CHARLES G. TOLSON,
Major, Ord. Dept.,
Contracting Officer's Representative.

cc: Army Inspector of Ordnance
Comptroller
Planning Manager
Plant Engineer
Field Auditor

COPY

File No. AOP 600.1/24698

(End of Exhibit 8.)

[fol. 114] Exhibit 9.

Army Service Forces
Arkansas Ordnance Plant
Little Rock, Arkansas EMBrown/vs

In Replying Refer to
SPOCQ No. 600.1/31038 8 May 1945

Mr. B. E. Harris, General Manager
Arkansas Ordnance Plant

Re: AOP Project No. 199.

Dear Mr. Harris:

This office is in recept of teletype from the Office of the Field Director of Ammunition Plants, St. Louis, Missouri, which states as follows:

"Project No. 199 appears unnecessary for present production schedule. Therefore request uncompleted

work be cancelled. Advise immediately if you do not concur. End SPOLY-D Daddow. Gerber, Field Director."

If for any reason the Contractor does not agree with the above it will be appreciated if you will advise the undersigned as soon as possible.

Very truly yours,

E. A. Haine
Major, Ordnance Department
Contracting Officer's Representative

5-9-45

Copy to: Mr. Bemberg
Mr. Harper
Mr. Pipkin

bels, Waterproof by application of shellac varnish.

Caution: Container assembly must be thoroughly dry before label is attached.

Hourly production.....

Operation No. 5 Stencil Data on Packing Box.

Stencil lot number, date, and any other data required on packing box.

Hourly production.....

[fol. 122] Operation No. 6 Pack Containers and Vanes in Packing Box.

Place 25 vanes over wooden fillers on carriage bolts, 6 each on three bolts and 7 on one bolt. Pack first vane on each bolt with flat face of center out and remaining vanes, except last, facing same way. Invert last vane.

Place one sleeve and one washer between each vane. Place metal washer and lock washer on vane and secure with wing nut.

Insert partition in box with vanes in smaller compartment. In larger compartment pack 25 containers horizontally, lengthwise of the box, alternating each layer, end for end, five layers to a box, with one filler in bottom and one between each layer.

Hourly production.....

Operation No. 7 Secure Cover to Packing Box.

Place one or more fillers on top as required to pack containers tightly. Place data card on fillers.

Secure top with wood screws, seated firmly with screwdriver.

Pass strapping in grooves around box and pull tight until strapping cuts into edges of box.

Hourly production.....

7/20/42

[fol. 123] Exhibit No. 14.

Appendix A.

Conducting Static Tests.

Operations Manual No. 11
M54 Fuze, Time and Superquick

(1) See that all the flash holes are open in the test fixture and assemble test fuzes in fixture (normally 5 assemblies). Do not tighten bar clamp at this time.

(2) Assemble a "New No. 4 Winchester Primer" in one of the primer holders in the fuze fixture provided for the purpose. Two holders are provided for this purpose but only one is used in ordinary routine tests. For Inspection tests, primers are assembled in both holders.

(3) Assemble the firing pins in the fuzes and primer holder and tighten bar clamp to secure fuzes.

(4) Place the gauge on top of the fuze holder and adjust the firing pins so that they just contact the gauge.

(5) Cover the wheel of the chronograph with white paper.

(6) Put ink in the container of the pen.

(7) Place the fuze fixture containing the test fuzes on the carriage in front of the chronograph wheel.

(8) Adjust the carriage so that all shots will register on the chronograph wheel.

(9) Start the suction fan.

(10) Start the chronograph and the direct current generator to operate the pen.

(11) Pull down hood of suction pipe, to facilitate removal of gases of combustion.

O. O. Form 2997
(Revised Jan. 1, 1934)

WAR DEPARTMENT
OFFICE OF CHIEF OF ORDNANCE
WASHINGTON, D. C.

SHIPPING ORDER

No. SPOFA-J50079-5

Date 21 Nov 45

To: Commanding Officer, Arkansas Ordnance Plant, Jacksonville, Ark.

Ship to: Trans Off, Delaware Ordnance Depot, Pedricktown, New Jersey
For Surv and Renov

Routing: None Required

Basis: OO 471.87/336; SPOJG 471.87/1983

QUANTITY	ITEM
25 ea	Box, packing, wood for Fuze, bomb, tail, AN M101A1 Drg. 76-16-166, Rev. 4 Released to FS on 1770-4071 Do not furnish boxes for AN M101A2 fuze
~~25 ea~~	~~Box, packing, wood for Fuze, bomb, tail, AN M101A1~~ ~~Drg. 76-16-166, Rev. 4~~ Released to FS on 1770-4071 Do not furnish boxes for AN M101A2 fuze

ea

Cost of transportation chargeable to:

Cy of SO to Misc Unit & Miss Lambert, Ken

By order of the Chief of Ordnance:

Daniel J. Strauss, Major

EXHIBIT 10.

Doc. 10,500

107

Standard Form No. 1106 a
Form approved by
Comptroller General, U. S.
1943

S. GOVERNMENT BILL OF LADING

MEMORANDUM COPY

NO. ES-776673

EXPLOSIVE

CAR INITIALS AND NO.
PRL 73269

NAME OF INITIAL TRANSPORTATION COMPANY
SP&SF & [illegible] (4%)

TRAFFIC CONTROL NO.
PLANT TO SHIP

STOP THIS CAR AT — FOR

SIZE CAR IN FEET †		MARKED CAPACITY OF CAR †		DATE CAR FURNISHED †	DATE B/L ISSUED
ORDERED	FURNISHED	ORDERED	FURNISHED		
40'6"	40'6"	800	800	12 AUG.	12 AUG. 1944

RECEIVED BY THE TRANSPORTATION COMPANY NAMED ABOVE, SUBJECT TO CONDITIONS NAMED ON THE REVERSE HEREOF, THE PUBLIC PROPERTY HEREINAFTER DESCRIBED, IN APPARENT GOOD ORDER AND CONDITION (CONTENTS AND VALUE UNKNOWN), TO BE FORWARDED TO DESTINATION BY THE SAID COMPANY AND CONNECTING LINES, THERE TO BE DELIVERED IN LIKE GOOD ORDER AND CONDITION TO SAID CONSIGNEE.

FROM (SHIPPING POINT)
JACKSONVILLE, ARK.

FROM (FULL NAME OF SHIPPER)
T. O., ANA. ORD. PLANT, JACKSONVILLE, ARK.

MARKS

CONSIGNEE
TRANS. OFFICER
U. S. ARMY ORD. DEPT.
LOUISIANA ORD. PLANT

C. O., U. S. ARMY ORD. DEPT.
LOUISIANA ORD. PLANT
DOYLINE, LOUISIANA

DESTINATION
DOYLINE, LOUISIANA

CHARGES TO BE BILLED TO (DEPARTMENT OR ESTABLISHMENT AND BUREAU OR SERVICE AND LOCATION)
WASHINGTON, D. C.

VIA (ROUTE JOURNEY ONLY WHEN SOME SUBSTANTIAL INTEREST OF THE GOVERNMENT IS SUBSERVED THEREBY)
NOP - LAA

APPROPRIATION CHARGEABLE
SOS-900 P150-03 A212/51005

ISSUING OFFICE
ARM. ORD. PLANT, JACKSONVILLE, ARK.

NAME AND TITLE OF ISSUING OFFICER
2/LT. J. JACOBS, 1ST LT., ORD. DEPT., T. O.

† FURNISH THIS INFORMATION IN CASE OF RAILROAD SHIPMENTS ONLY.
‡ SHOW ALSO CODE REQUIREMENTS FOR SHIPMENTS VIA OCEAN CARRIER IN CASES WHERE KNOWN.

PICK-UP SERVICE AT ORIGIN HAS NOT BY THE GOVERNMENT OR ITS AGENT.
(INSERT "HAS" OR "HAS NOT")

INITIALS OF SHIPPER'S AUTHORIZED AGENT OR EMPLOYEE

PACKAGES NO.	PACKAGES KIND	DESCRIPTION OF ARTICLES (USE CARRIERS' CLASSIFICATION OR TARIFF DESCRIPTION IF POSSIBLE, OTHERWISE A CLEAR NONTECHNICAL DESCRIPTION)	NUMBERS ON PACKAGES	WEIGHTS* ACTUAL
1 C/L (714 BXS)		DETONATING FUZE - CLASS A EXPLOSIVE FUZE, P.D. M48A2 16,662 LOT AOP-3-396 16,970 LOT AOP-3-396	500/ CONTAINER	75,600/

NOP - LAA

PICK-UP SERVICE AT ORIGIN HAS NOT BY THE GOVERNMENT OR ITS AGENT.
(INSERT "HAS" OR "HAS NOT")

INITIALS OF SHIPPER'S AUTHORIZED AGENT OR EMPLOYEE

SOS-900 P150-03 A212/51005
ISSUING OFFICE

ARM. ORD. PLANT, JACKSONVILLE, ARK.
NAME AND TITLE OF ISSUING OFFICER

2/LT. J. JACOBS, 1ST LT., ORD. DEPT., T. O.
† FURNISH THIS INFORMATION IN CASE OF RAILROAD SHIPMENTS ONLY.
‡ SHOW ALSO CODE REQUIREMENTS FOR SHIPMENTS VIA OCEAN CARRIER IN CASES WHERE KNOWN.

PACKAGES NO.	PACKAGES KIND	DESCRIPTION OF ARTICLES (USE CARRIERS' CLASSIFICATION OR TARIFF DESCRIPTION IF POSSIBLE, OTHERWISE A CLEAR NONTECHNICAL DESCRIPTION)	NUMBERS ON PACKAGES	WEIGHTS* ACTUAL
1 C/L (714 BXS)		DETONATING FUZE - CLASS A EXPLOSIVE FUZE, P.D. M48A2 16,662 LOT AOP-3-396 16,970 LOT AOP-3-396	500/ CONTAINER	75,600/

SEALS AOP-4982 & 4983 — SLAC
WEIGHT AGREEMENT NO. 10,700

RELEASED TO VALUATION PREScribed BY TARIFF TO OBTAIN LOWEST RATE
ICSD 73269

EXPLOSIVE
PLACARD APPLIED

I hereby certify that the above articles are property of the U.S. Government and are packed and marked and are in proper condition for transportation according to the regulations prescribed by the Interstate Commerce Commission.

CERTIFICATE OF ISSUING OFFICER

CONTRACT NO. OR PURCHASE ORDER NO. OR OTHER AUTHORITY FOR SHIPMENT W-[illegible]-22072 Dated [illegible]

(F. O. B. POINT NAMED IN CONTRACT)

SIGNATURE OF ISSUING OFFICER

NAME OF TRANSPORTATION COMPANY
SP&SF & [illegible] (4%)

DATE OF RECEIPT OF SHIPMENT
12 AUGUST 1944

T. L. Houston Agt.

MEMORANDUM COPY

PROPERTY SHIPPED

16—64116-1

EXHIBIT 11.

108

(12) Place the pen on the wheel and check to see that it is marking properly, and that there is proper contact with the master clock.

(13) Push down lever to operate the hammer, which fires primers and initiates combustion of the fuzes.

(14) Shift the carriage to the right about 1/8 inch as each revolution is nearing completion in order that the pen will not mark on the line already present.

(15) Remove the pen from the wheel when the base charges of all the fuzes have fired.

(16) Stop the chronograph. Shut off direct current generator (when all firings have been completed.)

(17) Transfer fuze fixture from the chronograph to the table.

(18) Raise the hood of the suction pipe.

(19) Locate the initial primer mark on the chronograph wheel. Draw a line through it and mark the left hand pen line at a point parallel to the initial primer record, using the straight edge provided for this purpose.

(20) Interruptions in the pen line are caused by the clock's pendulum passing through a reservoir of mercury, completing an electrical circuit. Making and breaking of [fol. 124] this circuit registers seconds on the chronograph wheel. These registered seconds vary slightly in length due to the increase and decrease of electric power used to rotate chronograph wheel. For sake of accuracy, all computations are made from point where interruptions occur. Determine the length of the second within which the mark on the pen line is located, using the scale provided for this purpose. The scale is arranged with measurements of different lengths to cover seconds of different lengths, each divided into tenths of a second.

(21) Measure downward from the initial primer mark to the first interruption below the mark. Record this measurement in hundreth parts of a second by interpolation. This measurement will be termed "Initial Fraction" on the Static Control Test Form.

(22) Locate each of the final shot impressions. Draw a line through each, and mark the right hand pen line at points parallel to each on the chronograph final shot. Number these marks commencing with the shot on the left hand side of the chronograph wheel.

(23) Determine length of second within which these shots fell.

(24) Measure upward from the mark parallel with the No. 1 shot to the point of the first interruption above the mark, and record this measurement in hundredths parts of a second. This fraction will then be termed "Final Fraction". Measure and record the other shots in the same manner.

(25) Count the complete number of seconds between the "Initial Fraction" and the "Final Fraction" and record them in the column marked "Inner Seconds."

Note: It frequently happens that the final shots do not all fall in the same second. In this case the final fraction measurements of each shot will have to be computed on the particular second in which it fell (usually all shots fall within one or two seconds). In this case also, care will have to be exercised in counting the complete seconds, as the total number will necessarily be different if the shots do not all fall in the same second.

(26) Add the initial fraction, final fraction and complete seconds of each fuze tested to get its burning time and record this figure in the column marked "Uncorrected Time".

(27) Add the shots together in the "Uncorrected Time" column and divide this result by the number of fuzes tested. Enter this figure in the space marked "Average Uncorrected."

(28) Take barometer reading. Proceed as follows:

a: Adjust the screw at the bottom of the barometer so that the mercury just contacts the point of the pin in the mercury chamber.

b. Adjust the sliding gauge at the top of the barometer so that it just comes to the top of the meniscus of the mercury column. (The eyes of the operator should be on a level with the top of the mercury column in order to eliminate parallax).

c. Read the inches recorded on the barometer at the bottom of the gauge, using the vernier for determining hundredths of an inch.

(29) Record the barometer reading in the space marked "Barometer".

(30) The following formula has been found satisfactory for correcting, for the barometric reading.

$$To = \frac{TV\ B}{5.48}$$

Where B = barometric reading in inches of mercury
T = actual static time of burning in seconds
To = time of burning in seconds under standard barometric conditions.

[fol. 125] (31) Deduct the shortest burning of any fuze in the test from the longest and record the result obtained in the space marked "Dispersion".

(32) Enter any other data required, as shown on the "Transmittal Slip" which accompanies the test fuzes, on the Static Control Test Form.

6/5/42

[fol. 126] Exhibit No. 15

Operations Manual No. 11
M54 Fuze, Time and Superquick

Appendix B

Method of calculating the proper proportions of fast and slow powder for a pilot lot.

Assume that it is desired to blend fast powder having a static time of 21 seconds with slow powder having a static

time of 39 seconds to make up a 400 pound blend which will have a static time of 25 seconds.

Let A = number of pounds of fast powder
then 400 — A = " " " " " slow "

Then 21 A # 39 (400 — A) = 25 x 400

21 A # 15600 — 39 A = 10,000

transposing 18A = 5600
A = 311 pounds of fast powder
400—A = 89 " " slow "

The pilot lot is prepared using these amounts of fast and slow powder.

After the powder has been screened, dried, and tested for moisture content, the proper amounts of fast and slow powder are weighed and placed in the 300 pound blender, which is operated for 6 hours at 6 R.P.M. The powder is then emptied into 25 pound containers and stored in heated rest house. As an extra precaution, the powder is re-screened before conditioning to insure the removal of any foreign matter.

Fuze powder for static and ballistic tests is conditioned by pouring ½ pound in each conditioning tray and exposing to the atmosphere in the conditioning room for 6 hours, after which it is poured from the tray into rubber stoppered containers until ready for loading into rings.

Sufficient rings are loaded and assembled into fuzes for static and ballistic tests. If the static time is between the limits of 24.75 seconds and 25.25 seconds, a ballistic sample of fuzes containing the blend is sent to the proving ground. The powder is reblended with fast or slow powder if the ballistic time is not within the limits of 26.7 seconds to 28.5 seconds required by the specification. For example, assume the static time of the pilot lot was 25 seconds and the ballistic time 26.50 seconds. The latter is .2 seconds below the minimum permitted and 1.1 seconds below the desired time of 27.6 seconds.

In reblending the powder, a static time of 26.1 seconds should be aimed at. The amount of slow powder to be added to increase the static time from 25 seconds to 26.1

seconds is calculated using the same method as outlined above.

This process is repeated until a blend giving satisfactory ballistic times is obtained.
6/4/42

[fol. 169] (Request of Plaintiffs for Admissions of Fact by Defendant, etc., and Responses thereto)

(Filed in U. S. District Court on August 9, 1947)

Please take notice that the plaintiff hereby requests the defendant, pursuant to Rule 26 of the Federal Rules of Civil Procedure, to admit within 10 days after service of this request, for the purposes of the above-entitled action only, and subject to all pertinent objections to admissibility which may be interposed at the trial, the truth of the following facts:

1. You, at the time you employed each of the plaintiffs, promised to pay to each at his regular rate for the first forty hours worked in any one work week. By regular rate we mean that rate set forth in your schedule of wages as approved by the Ordnance Department.

Answer: 1. Defendant admits that it promised to pay each hourly-paid employee his regular rate of pay for the first forty hours worked in any week.

2. Your contract with the United States Government provided that you should pay each of the plaintiffs for forty hours worked each work week at a rate equal to his regular hourly rate of pay and for all hours worked in any one work week in excess of forty hours at a rate equal to one-and-one-half times his regular rate of pay. By rate of pay we mean that rate set forth in your wage schedules as approved by the Ordnance Department.

Answer: 2. A copy of the contract between the Government and Ford, Bacon & Davis, Inc., is attached as Exhibit 1 to the affidavit of W. F. Whittle in support of the motion for summary judgment.

3. Your contract with the United States Government provided that each of the plaintiffs would be paid at his

regular rate for eight hours worked each day and one-and-one-half his regular rate for all hours worked in excess of eight hours in any one day.

Answer: 3. A copy of the contract between the Government and Ford, Bacon & Davis, Inc., is attached as Exhibit 1 to the affidavit of W. F. Whittle in support of the motion for summary judgment.

4. You have not paid all of the plaintiffs for the hours worked, in accordance with statements 1, 2 and 3, above set forth.

Answer: 4. Defendant refuses to admit requested admission of fact No. 4.

5. Your operations at the Arkansas Ordnance Plant were checked by the Administrator of the Department of Labor, Wage and Hours Division.

Answer: 5. Defendant admits that from time to time the Wage and Hour Division of the Department of Labor made investigations at the Arkansas Ordnance Plant.

Filed Aug. 9, 1947. Grady Miller, clerk.

[fol. 170] 6. You were furnished finding by the Administrator of the Department of Labor, Wage & Hour Division.

Answer: 6. The Department of Labor in some, but not in all, instances furnished the defendant with its findings.

7. The Department of Labor, Administrator Wage & Hour Division, after investigation of your operation at the Arkansas Ordnance Plant, found that your operation was governed by the Wage and Hour Law.

Answer: 7. Some of the defendant's records have been destroyed by fire. We find no record at this time indicating that the Arkansas Ordnance Plant was governed by the Wage and Hour law, but the defendant believes that the Department of Labor was of the opinion that employees at the Arkansas Ordnance Plant were subject to the Fair Labor Standards Act.

8. The Department of Labor, Wage & Hour Division, rendered to you its opinion as to your operation, after investigating such.

Answer: 8. It is believed that the Department of Labor made no general investigation concerning the question of whether employees at the Arkansas Ordnance Plant were subject to the Fair Labor Standards Act.

9. You required these plaintiffs to report early for work each shift worked by them, and remain on the premises for the full term of their shift.

Answer: 9. The defendant refuses to admit requested admission No. 9.

10. You required these plaintiffs, in addition to their regular shift tour, to remain on your premises subject to be called to duty for a period of thirty minutes each shift worked.

Answer: 10. The defendant refuses to admit requested admission No. 10.

11. Your employees at the Arkansas Ordnance Plant made, manufactured, produced and processed goods, wares, merchandise, machines and tools, other than munitions of war, which were shipped out of the State of Arkansas.

Answer: 11. The Arkansas Ordnance Plant was operated for the purpose of producing munitions of war. These munitions were by the Government shipped to destinations outside of Arkansas.

12. Your employees at the Arkansas Ordnance Plant designed parts for, manufactured parts for, altered and repaired machines which were and now have been shipped from the State of Arkansas.

[fol. 171] Answer: 12. The defendant designed parts for and in some instances manufactured parts for machines that were used at the Arkansas Ordnance Plant. It also altered and repaired such machines. These machines were used at the Arkansas Ordnance Plant. The defendant is not informed as to the disposition made by the Government of this property after termination of operations at the plant.

13. Your employees at the Arkansas Ordnance Plant worked on processed, assembled and disassembled certain wares, goods and merchandise which, being unfit for muni-

tions of war, were sold as salvage, shipped from the State of Arkansas and sold to private individuals.

Answer: 13. Some materials were scrapped and by direction of the Ordnance Department sold as salvage f. o. b. the plant at Jacksonville, Arkansas. Copies of records indicating the method of disposition of salvage are attached as Exhibit "A".

14. You were in competition with other cost-plus-fixed-fee contractors in the United States who were equipped to manufacture and assemble the same type munitions as you were producing.

Answer: 14. The defendant operated the Arkansas Ordnance Plant under the provisions of its contract with the United States Government. The Government directed the type and quantity of all munitions manufactured. See Exhibit "B" attached hereto.

15. The Department of Labor, after [investigation] your operation at the Arkansas Ordnance Plant, ordered you to pay your employees in accordance with the terms of the wage and hour law.

Answer: 15. The defendant refuses to admit requested admission No. 15.

16. You were required to and did qualify to enter the State of Arkansas as a foreign Corporation when you moved onto the reservation at Jacksonville and subsequently paid the tax levied by such state on foreign corporations.

Answer: 16. The defendant admits that it qualified to do business in Arkansas, and that it complied with all provisions of law.

17. You at all times led these plaintiffs to believe you would and were paying them in accordance with the provisions of the Wage and Hour Law?

Answer: 17. The defendant denies that it has violated the Fair Labor Standards Act.

[fol. 172] 18. You at all times led your employees to believe that you were and would pay them in accordance with the terms of the Wage and Hour Law.

Answer: 18. The defendant denies that it has violated the provisions of the Fair Labor Standards Act.

19. That under the terms of the regulations, order, rules, approvals and interpretations of the Ordnance Department of the United States Army, an agency of the United States, you were at all times mentioned in the complaint and interventions filed herein, subject to the terms of the Wage and Hour Law of 1938, as amended.

Answer: 19. The defendant is aware of no regulation, order rule, approval, or interpretation of the Ordnance Department to the effect that employees at the Arkansas Ordnance Plant were covered by the Fair Labor Standdards Act. As a practical matter, the Ordnance Department instructed and approved the payment of all hourly-paid employees at one and one-half or two times their regular hourly rate for all hours in excess of forty worked during any one work week, thereby eliminating as to them any question of coverage under the act.

20. Pursuant to regulations, orders, rules, approvals, and interpretation of the Ordnance Department of the United States Army, an agency of the United States you, at all times mentioned in the complaint and interventions filed herein, were paying all "hourly rate" employees, for the time you considered them to be on duty, in accordance with the terms of the Wage and Hour Law of 1938, as amended.

Answer: 20. See admission No. 19 above

21. That you promised each and every hourly rate employee that he would be paid at his regular rate for 40 hours worked in each work week, and for all hours worked in excess of 40 hours in any one work week at one-and-one-half times his hourly rate.

Answer: 21. The report of hire form did not set forth any provision relating to overtime pay. The Employees' Manual of General Information stated that overtime would be paid.

22. That the Ordnance Department of the United States Army, an agency of the United States, at no time issued to you any formal regulations, orders, rulings and approval

relating to the payment of any questioned overtime which the plaintiffs and interveners worked at Arkansas Ordnance Plant.

Answer: 22. Defendant refuses to admit requested admission No. 22.

[fol. 173] 23. That in pursuance of General Order No. 31 of the War Labor Board, Ford, Bacon & Davis, Inc., submitted a wage plan to said board for its approval.

Answer: 23. See answers to interrogatories numbered 42 and 43.

24. That General Order No. 31 of the War Labor Board was general in its nature and did not apply exclusively to the Arkansas Ordnance Plant.

Answer: 24. The extent of applicability of General Order No. 31 of the War Labor Board is not a proper question for determination by the defendants.

25. That the following is a true and correct copy of the report of Staff Meeting No. 94, held on or about March 22, 1944, insofar as said report deals with "Salary Adjustments":

"Staff Meeting No. 94
March 22, 1944

"Salary Adjustments

"At Mr. Harris' suggestion the following points under our present wage plan for non-supervisory employes were brought up for discussion and clarification:

"Number of Increases that may be made in a Year: Mr. Clarke explained that when we submitted our wage plan under the War Labor Board's then existing General Order No. 31, we adopted the merit increase system and when we made our submission we included in our letter that it was the intention of the present management to limit merit increases to two a year, and that we are bound by that intention.

"Clarification of the Meaning of a Year: Mr. Clarke said that under the Order it constitutes practically what we want to make it. It is either a year of employment or

a calender year. Mr. Harper said we are now operating under the employment year or the date of reclassification.

"Ninety Day Limitation on Salary Increases: It was brought out that we observe the ninety day limitation on salary increases as this part of our plan.

"Promotions and Reclassifications: On promotions to classifications carrying a higher wage bracket this employee starts at the minimum of comparable rate, and he starts his employment year anew and may be given two merit increases from the time of the reclassification. In changing classifications carrying the same wage bracket, this is to be treated as one classification and only two merit increases may be given in the year.

"An understanding of the plan was summed up to mean that an employee may not be given a raise in less than 90 days from his previous raise or date of hire in any classification and cannot be given more than two such raises within a single 12 month period."

Answer: 25. See answer to interrogatory No. 45.

26. That the above purported excerpt of the the Staff Meeting No. 94, held on or about March 22, 1944, is substantially correct.

Answer: 26. See answer to interrogatory No. 45.

[fol. 174] 27. That Mr. Harris, referred to in the above report, was General Manager of the Arkansas Ordnance Plant, and an employee of Ford, Bacon & Davis, Inc.

Answer: 27. Defendant admits requested admission Number 27.

28. That Mr. Clark, deferred to in the above report, was A. R. Clarke, Head of the Personnel Department of the Arkansas Ordnance Plant and an employee of Ford, Bacon & Davis, Inc.

Answer: 28. Defendant admits requested admission No. 28.

[fol. 174a] Exhibit "A".

War Department
Arkansas Ordnance Plant
Little Rock, Arkansas

AOP No. 160/21916 McGowen/vw
3 December 1943

"Mr. B. E. Harris, General Manager
Arkansas Ordnance Plant

Re: Sale of Salvage Material

Dear Mr. Harris:

1. Reference is made to your letter dated 30 November 1943, same subject as above, and the analysis of bids attached thereto, AOP File No. 400.71/19419.

2. Approval is granted for sale of the following salvage material as stipulated in reference letter:

Approximately 35 gross tons of unprepared heavy and light iron mixed, including steel containers at $10.39 per gross ton to Southwest Compressed Steel Corporation.

Approximately 10,000 pounds of mixed aluminum scrap at .045 per pound to A. Tenenbaum Company, Incorporated.

Approximately 20,000 pounds of mixed brass scrap at .053 per pound to A. Tenenbaum Company, Inc.

Approximately 2,500 burlap bags 100 pound capacity) at .06 each to Sol Alman Company.

3. It is understood that applicable OPA price regulations have been complied with in each instance.

4. All copies of the bills of sale are returned herewith bearing approval of this office.

For the Contracting Officer's Representative:

Yours very truly,

CHARLES G. TOLSON,
Major, Ord. Dept.
Commanding

Incls: n/c

[fol. 174b]

War Production Board
Washington, D. C.

December 7, 1944

M-9 OPN 1629 R

Allocation No. A-1369

War Department,
Office, Chief of Ordnance
Washington 25, D. C.

Attention: Industrial Service, Production Service Division
Redistribution & Salvage Branch
Salvage & Scrap Section

Gentlemen:

Please ship from Arkansas Ordnance Plant, Little Rock, Arkansas, to International Minerals & Metals Company, the following material during December:

1 car (approximately 80,000 pounds)
Brass Shavings & Borings

1 car (approximately 80,000 pounds)
Fuzes & component parts sold as refinery brass.

This firm will furnish you with loading and shipping instructions.

Very truly yours,

G. P. NORTON, Chief, Scrap Branch
Copper Division
WPB Dept. 7300

cc: International Minerals & Metals

O.O. 470.1/42147 Leyava/ee

Attn: SPOIP 1st Ind. 73671—6257

War Department, Ordnance Office, Washington, D. C., 9 December 1944

To: Commanding Officer, Arkansas Ordnance Plant, Little Rock, Arkansas.

1. Basic letter from the War Production Board (Allocation No. A-1369) covers approximately 80,000 pounds of brass shavings and borings, and approximately 80,000 pounds of fuses and component parts as refinery brass allocation to International Minerals & Metals Co., New York, New York, for shipment during the month of December at the maximum applicable OPA price for copper content as shown by mill analysis, in accordance with MPR #20.

2. This confirms our teletype of 7 December 1944, a copy of which is attached.

By order of the Chief of Ordnance:

MILTON LEVENSON,
Capt. Ord. Dept.
Assistant

1 Incl: C of our TT 12/7/44

[fol. 174c]

7 Dec

LEYAVA/cc
73671 — 6257

Commanding Officer
Arkansas Ord Plant
Jacksonville, Ark

Reurtt 23677 7 Dec 14202 And2d Ind SPOCQ 160/28183 29 Nov Melin WPB Has Allocated Subject Material As 2 Carloads Of Refinery Brass To International Minerals & Metals, New York, New York For December Shipment On Allocation A-1369 Forth Coming. Complete Your Form S Allocation Contract And Secure Shipping Instructions From Mr. Markwitz Of Internation Minerals & Metals. Authority Granted To Ship Prior To Receipt Of Signed Contract End SPOIP

Safford

[fol. 174d]

War Department
Arkansas Ordnance Plant
Little Rock, Arkansas

20 December 1944

McLin/cht

File No.
SPOCQ No. 160/28700

Mr. B. E. Harris, General Manager
Arkansas Ordnance Plant

RE: Allocation of Brass.

Dear Mr. Harris:

1. Forwarded for action by your office is a copy of a letter dated 7 December 1944, from the War Production Board, to the Chief of Ordnance, Subject: Allocation No. A-1369, together with 1st indorsement from the Chief of Ordnance, directing this plant to ship two carloads of refinery brass to International Mineral & Metals Co., New York, New York.

2. The regular Form-S Allocation Contract will be required for this transaction, with payment to be made at maximum applicable OPA price as shown by mill analysis.

3. In accordance with conversation of 19 December 1944, between Mr. L. H. Sickels, of your office, and Captain Jacobs and Mr. McLin of this office, the present contract with A. Tenenbaum & Company, Inc., should either be cancelled or allowed to lapse, at your discretion.

4. As of December 1944, the Redistribution and Salvage Branch, Office of Chief of Ordnance, advised that shipment of this brass need not go forward until the first week in January 1945. This will allow time for the present contract of A. Tenenbaum & Company, Inc., to expire.

Very truly yours,

E. A. HAINE,
Major, Ordnance Department,
Contracting Officer's Representative.

Incls: a/s

(End of Exhibit A.)

[fol. 175] Exhibit "B".

War Department

Arkansas Ordnance Plant
Little Rock, Arkansas

August 24, 1942

General Orders)
No. 7)

1. In order to maintain high standards of quality, safety, and morals of the operating personnel, there will be no competition in quantity production between any producing units at this Plant.

2. Production should proceed on a planned schedule as approved, and competition between bays, lines, or areas striving to out produce other units should be prohibited.

3. No awards, honors, or other recognition should be given to the high producing sections.

4. No unreasonable pressure will be exerted on operating personnel by persons in a supervisory capacity to increase excessively the rate of production over the normal schedule.

By Order of Lieutenant Colonel Korloss:

HAROLD RADCLIFFE,
1st Lt., Ord. Dept.,
Executive Officer.

Official:

/s/ Edward O. Green
EDWARD O. GREEN,
1st Lt., Ord. Dept.,
Adjutant.

Distribution—

General Manager	(12)
Lt. R. A. Lane-Guards	(6)
All Ord. Officers	
St. Louis District	(3)
Explosive Safety Branch, Chicago, Illinois.	(3)
8th Service Command, Ft. Sam Houston, Texas.	(3)

[fol. 176] (Interrogatories to be propounded by Plaintiffs to Defendant and Responses thereto.)

(Filed in U. S. District Court on August 9, 1947)

1. Please state whether or not goods of any nature were purchased by you during your operation of Arkansas Ordnance Plant which were not bought on bids and if so, the nature, and extent of such purchases.

Answer: 1. According to the records and to the best of my knowledge, until about June, 1942, all purchases were made with the prior approval of the Contracting Officer's representative. After that date, prior approval of the Contracting Officer's representative was not required on purchases of less than $500.00, but a large number of such purchases were submitted to such representative for prior approval. All purchases were audited by the Ordnance Department and approved for payment on 1034 Public Reimbursement Vouchers (standard Government form). The above statements apply equally to materials purchased on bid and to materials procured by emergency purchase. Material procured by bid far exceeds in amount material procured without bid. No invoices were paid until audited and approved by the Government.

2. If your answer to the foregoing interrogatory is in the affirmative, please state whether or not any of such purchases were made out of the State of Arkansas and shipped into Arkansas.

Answer: 2. According to the records, and to the best of my knowledge, on occasion materials were purchased without bids from vendors located outside the State of Arkansas, and the materials so purchased were shipped to the Arkansas Ordnance Plant from without the State of Arkansas.

3. State whether or not you ever made any purchases of goods outside the State of Arkansas without notifying the Ordnance Department of such and getting its approval.

Answer: 3. According to the records, and to the best of my knowledge, no.

4. State whether or not it was customary to purchase goods from without the State of Arkansas, prior to getting approval of such from the Ordnance Department.

Answer: 4. According to the records, and to the best of my knowledge, no.

5. State whether or not the Ordnance Department inspected and approved all shipments to your plant before it would take title to such.

Answer: 5. According to the records, and to the best of my knowledge, the United States Government, through the Ordnance Department, took title to all materials purchased for use at the Arkansas Ordnance Plant at their respective points of origin, subject to inspection and acceptance upon delivery at the plant site.

[fol. 177] 6. Please state whether or not the land grant railroads, over which you received shipments, granted you military rates on such shipments, under protest and now have claims pending against the Government for the difference in such rates and commercial rates?

Answer: 6. According to the information furnished me by the Ordnance Department, land grant freight rates were allowed during the entire period of operation of the Arkansas Ordnance Plant, in accordance with applicable provisions of Ordnance Procurement Instructions. The contractor has no knowledge of any protest or claim pending. Any such claims would probably be made against the Government, who paid freight bills direct, and not against Ford, Bacon & Davis, Inc.

7. Was it or was it not a common practice for you to draw checks on your accounts in local banks in payment of purchases made by you, prior to approval of such by the Ordnance Department?

Answer: 7. According to the records and to the best of my knowledge, no checks were drawn by Ford, Bacon & Davis, Inc., either against its private funds or against funds furnished by the Government in payment of materials

purchased for use at the Arkansas Ordnance Plant, prior to approval by the Ordnance Department.

8. On many occasions were purchases made by you for operation of the Arkansas Ordnance Plant from your private funds?

Answer: 8. According to the records and to the best of my knowledge, no, never.

9. Name the ordnance plants to whom you shipped assembled products and if you know, state whether or not such plants were operated by contractors on a cost-plus-fixed-fee basis.

Answer: 9. A complete list of ordnance establishments in the United States is attached as Exhibit "A". According to the information furnished by the Ordnance Department, all completed products of the Arkansas Ordnance Plant were shipped either to one of the installations listed therein or to a port of embarkation for overseas shipments. A list of ports of embarkation is attached as Exhibit "B". Information from the Ordnance Department is to the effect that shipments were not made to each of these installations. Some of the consignees of material shipped from the plant are as follows:

Transportation Officer, United States Army Ordnance Department, Louisiana Ordnance Plant, Loyline, La.

Transportation Officer, United States Army Ordnance Department, Erie Proving Ground, Lacarne, Ohio.

Transportation Officer, U. S. Army Ordnance Department, Lone Star Ordnance Plant, Defense, Texas.

[fol. 178] Transportation Officer, U. S. Army Ordnance Department, Picatinny Arsenal, Picatinny, New Jersey.

Transportation Officer, Columbus Army Service Forces Depot, Columbus, Ohio.

Transportation Officer, United States Army Ordnance Department, Frankford Arsenal, Bridesburg Station, Philadelphia, Pa.

Transportation Officer, United States Army Ordnance Department, Elwood Ordnance Plant, Elwood, Ill.

10. The items shipped directly overseas by you were consigned to whom?

Answer: 10. According to the information furnished by the Ordnance Department, materials shipped from the Arkansas Ordnance Plant for direct overseas destinations were consigned to the Port Transportation Officer at various ports of embarkation. A list of ports of embarkation is attached as Exhibit "B". A photostat of a duplicate bill of lading covering such a shipment is attached as Exhibit 12 to the affidavit of W. F. Whittle in support of defendant's motion for summary judgment.

11. State whether or not free-issue materials, which you received, were manufactured by Government-owned and operated arsenals or by cost-plus-contractors?

Answer: 11. According to the records and to the best of my knowledge, free issue materials were manufactured both in Government-owned and operated arsenals and in Government-owned and contractor-operated establishments.

12. Give the amount paid to the State of Arkansas as sales tax on purchases made by you for the operation of the Arkansas Ordnance Plant.

Answer: 12. According to the records and to the best of my knowledge, no State sales tax was paid on purchases during the period of operations.

13. Please state whether or not Ordnance Fiscal Circular No. 70, Change No. 2, dated August 25, 1942, was issued in order that no fee would have to be paid you on expenditures made by you for the items mentioned therein?

Answer: 13. The contract between the Government and Ford, Bacon & Davis, Inc., provides for a fixed fee, which is not determined by the amount of expenditures.

14. Please state whether or not the United States Government retained the right to supply electricity for your

use at the Arkansas Ordnance Plant and if such effected a savings to the Government?

Answer: 14. Under the provisions of Paragraph 3, page 27, of the prime contract between the Government and Ford, Bacon & Davis, Inc., the Government retained the right to furnish any materials or services to the contractor, as it might elect. The contractor has no knowledge [fol. 179] concerning whether in electing to furnish materials or services the Government saved money.

15. State whether or not you were ever assigned schedules, which had been previously assigned other cost-plus-fixed-fee contractors.

Answer: 15. According to information furnished by employees of the Ordnance Department, on a few occasions schedules were transferred from other government-owned contractor-operated facilities to the Arkansas Ordnance Plant.

16. For what purpose did you maintain a cost accountant at the Arkansas Ordnance Plant?

Answer: 16. In order to comply with Title VII, Article VII-F, of the prime contract, the Ordnance Procurement Instructions, and instructions received from the Field Director of Ammunition Plants, it was necessary to employ a full-time cost accountant.

17. Did you have, during the period of your operation at Arkansas Ordnance Plant, a method by which you determined the unit cost of production?

Answer: 17. Yes.

18. For what purpose were the materials used upon which you paid Arkansas Sales Tax?

Answer: 18. As stated in the answer to Question No. 12, no sales tax was paid.

19. When O. P. I. Section 8500 become effective and when and upon what items did you discontinue payment of Federal Excise Tax?

Answer: 19. According to the records and the best of my knowledge, O. P. I. Section 8500 became effective January 27, 1942, and was revised on December 1, 1942. It was, therefore, in effect during the entire period of operations. The excise taxes mentioned in the statement of production costs attached as an exhibit to the affidavit of W. F. Whittle on the motion for summary judgment were taxes on pay rolls. Attached hereto and marked Exhibit "C" is a copy of the authorization to Ford, Bacon & Davis, Inc., to grant tax exemption certificates.

20. As provided in O. P. I. Section 53009.1, state when the property officer took charge of materials shipped to Arkansas Ordnance Plant.

Answer: 20. O. P. I. Sections 50105.1 and 50105.2 direct the Contracting Officer to cause delivery to be taken by the Government and title to be vested in the Government at the point of origin of such property. To the best of my knowledge, this procedure was uniformly followed at the Arkansas Ordnance Plant.

[fol. 180] 21. State when and under what conditions you took custody of property from the property officer.

Answer: 21. According to the records, and to the best of my knowledge, after materials shipped to the Arkansas Ordnance Plant had been inspected and accepted and after a receiving and inspection report and a tally-in sheet had been certified by the Ordnance Department the contractor stored the material for use in accordance with the contract.

22. What was the procedure used for relieving you of liability for property placed in your custody?

Answer: 22. Title VII, Article VII-A, of the prime contract, fixes the responsibility of the contractor in the operation of the plant. When the contract between the Government and Ford, Bacon & Davis, Inc., covering the operation of the plant was terminated, the Government, through its Contracting Officer, determined that no property was lost, destroyed, or damaged directly through bad faith or wilfull misconduct on the part of the contractor or its officers or agents, and, therefore, no liability for property

was ever incurred by Ford, Bacon & Davis, Inc. A copy of the letter from the Contracting Officer is attached as Exhibit "D".

23. Is it a fact that the Ordnance Department maintained inspectors on your production lines?

Answer: 23. Yes. See Exhibit "D-½" attached.

24. Did the Government inspectors have authority to reject material processed by you and did they actually reject such products?

Answer: 24. According to the records and to the best of my knowledge, Government inspectors had the authority to determine that processed material should not be shipped for use by the Ordnance Department. These inspectors could determine whether or not the processed material was in accordance with specifications and could determine what disposition should be made thereof.

25. When lots of your products were rejected, which could not be reworked, what disposition was made of them?

Answer: 25. According to the records and to the best of my knowledge, such materials were first made safe for handling and then were scrapped at the direction of the Ordnance Department.

[fol. 181] 26. Was any material bought by you and shipped to Arkansas ~~Ordnance Plant~~ consigned directly to you, rather than the property officer?

Answer: 26. All vendors were instructed to consign materials to

"Ordnance Property Officer
Jacksonville, Arkansas

For account of Operator: Ford, Bacon & Davis, Inc."

A photostat of the standard form of purchase order is attached as Exhibit 3-A to the affidavit of W. F. Whittle in support of the motion for summary judgment.

27. Please state whether or not all employees of Ford, Bacon & Davis, Inc., at the Arkansas Ordnance Plant were paid from funds advanced by the United States Government.

Answer: 27. Yes.

28. Please state whether or not wage classifications were set up by you for each plaintiff in these cases.

Answer: 28. According to the records and to the best of my knowledge, the contractor working in cooperation with the Ordnance Department established wage classifications and rates for all classes of employees at the Arkansas Ordnance Plant. These classifications and rates were approved by the Ordnance Department.

29. Please state whether or not the Secretary of Labor set up minimum wage rates for each of the plaintiffs employed by you?

Answer: 29. According to the records and to the best of my knowledge, no.

30. Please state what the minimum wage rate for each of the plaintiffs was during the term of their employment.

Answer: 30. A large number of the plaintiffs in this consolidated case have been furnished with copies of their employment records showing the date of employment under each different classification for each employee and the wage or salary paid. Under the wage rate schedule proposed under date of January 1, 1942, the lowest hourly rate of any employee at the Arkansas Ordnance Plant was 40¢. This schedule has been filed with the clerk, and minimum wage rates for any classification may be determined by reference thereto.

31. Please state whether or not you agreed to pay each of the plaintiffs at their regular rate of pay, as fixed, for the first forty hours worked in each work week and at one-and-one-half times their regular rate of pay for all hours worked in excess of forty in any one work week.

[fol. 182] Answer: 31. According to the records and to the best of my knowledge, all non-supervisory employees at the Arkansas Ordnance Plant were paid time and one-half for all hours in excess of forty worked during any one work week. There was no agreement regarding such payments incoporated in the report of hire form.

32. In your statement of production cost you show, Item 551 a credit for "Revenues Credited to Operating Cost," please state the source of such revenue.

Answer: 32. Item 551 includes money collected by the contractor for the Government and remitted to the Government. These revenues included rentals on dwelling houses on the plant area, rentals on dormitory accommodations, receipts from vending machines located on the plant area, shortage and damage claims, sale of scrap and salvage, and other miscellaneous receipts.

33. In your statement of production cost you show, Item 536, "Materials Manufactured for Inventory", please state where such materials were manufactured, from what source the component parts came and the final disposition of such inventory.

Answer: 33. This item includes materials upon which processing had commenced, but had not been finished, at the time operations at the plant ceased. These materials were manufactured in the same manner and from materials obtained in the same manner as were all other goods manufactured or processed at the plant. This material was taken over by the Government upon termination of the contract.

34. Please attach the entire document as approved setting forth the wage schedules of Arkansas Ordnance Plant, together with a copy of your letter of transmittal to the commanding officer and his letter transmitting such schedules to Washington, D. C.

Answer: 34. A file containing wage and salary schedules proposed January 1, 1942, and April 6, 1942, has been filed with the Clerk of the Court.

35. Please state the manner in which you were required to dispose of all salable salvage material at Arkansas Ordnance Plant.

Answer: 35. According to the records and to the best of my knowledge, Government-owned materials determined by the Ordnance Department to be unuseable were certified by the Ordnance Department as salvage and the contractor was requested to negotiate sales of such salvage. At the direction of and with the approval of the Contracting Officer, the contractor disposed of such salvage by sale on bid or by fixed price, and the receipts therefrom were remitted to the Government. Such materials were sold f.o.b. Plant Site, Jacksonville, Arkansas. The Ordnance Department dis- [fol. 183] posed of certain salvage materials through its own facilities. On many occasions the Ordnance Department would direct the contractor to sell certain items of salvage to certain specific purchasers at a stipulated price.

36. Of what did salable salvage material consist and to whom was it sold?

Answer: 36. According to the records, and to the best of my knowledge, salable salvage material consisted of waste paper, rags, unuseable packing boxes, cans, lumber, containers, broken glass, and metal. Unless otherwise instructed by the Government, such salvage was sold to any qualified bidder.

37. State the date, bulletin number and order number of any and all regulations, rules, approval or interpretation of your operation under the Fair Labor Standards Act in which the Ordnance Department of the United States Army, an agency of the United States Government, attempted to interpret, and the manner of your operations as it related to the Fair Labor Standards Act of 1938, as amended.

Answer: 37. The Ordnance Department approved wage rates and job classifications for employees at the Arkansas Ordnance Plant. Examples of the schedules dated January 1, 1942, and April 6, 1942, have been filed with the clerk of the court. (See response to Interrogatory No. 34.) All reports of hire and changes of status of employees were also

approved by the Ordnance Department before these changes became effective. Exhibit "D-1" attached hereto is an example of the approval given by the Ordnance Department to the hiring of new employees. Exhibit "D-2" attached hereto is an example of the approval given by the Ordnance Department to changes of status of employees, The code numbers contained in these forms "D-1" and "D-2" refer back to a previously approved wage rate and job classification schedule. The time cards of employees were checked by the Ordnance Department each week and the time for which compensation was due was approved by the Ordnance Department. Exhibit "D-3" attached hereto is a photostat of a time card for regular time and also a time card for overtime. Each of these cards indicates approval by a representative of the Ordnance Department. The initials appearing in the extreme right hand column of the time card at the bottom of Exhibit "D-3" are initials of the Government Checker on the daily clock time. At the end of the week, after examining the total hours for the week, the Government checker signed the card in the space marked "Approved Ordnance". Time cards such as these were the basis for computing the pay of employees. Duplicate time records were maintained by the Government. Exhibit "D-4" attached hereto is a photostat of the front and back of a recomputed time card made from Government records to replace a card that had been lost. The approval [fol. 184] signatures and initials on both the front and back of Exhibit "D-4" are those of a Government checker. All wage and salary payments were made in accord with the approvals mentioned above. A complete pay roll was prepared by the contractor and submitted to the Ordnance Department. These pay rolls were audited by the Ordnance Department. If found to be correct, or if incorrect, after corrections had been made, these weekly pay rolls were approved by the Ordnance Department auditor and the contracting officer's representative put the following certification thereon:

"This is to certify that this salary pay roll has been examined and the compensation, including increases in compensation, paid to the individuals has been approved.

For Contracting Officer:

Contracting Officer's
Representative."

Ordnance Procurement Instructions, paragraphs 9101.1, 9102, and 9107.1, indicate the relationship between the Government and the contractor regarding employment and pay of employees. These instructions are attached as Exhibits "E", "F", and "G", respectively. Copies of miscellaneous correspondence showing the control mantained by the Government over wages and salaries paid to employees of the Ordnance Plant are attached as Exhibits "H", "I", "J", and "K".

38. Please attach hereto copies of all regulations, orders, rulings, approvals and interpretations of the Ordnance Department of the United States Army as directed to you with reference to your compliance or non-compliance with the Fair Labor Standards Act of 1938, as amended.

Answer: 38. See answer to Interrogatory No. 37.

39. Please attach hereto copies of all regulations, orders, rulings, approvals and interpretations regarding your manner of operation of the Arkansas Ordnance Plant as respects to the Fair Labor Standards Act of 1938, as amended.

Answer: 39. Instructions regarding operation of the Arkansas Ordnance Plant were given Ford, Bacon & Davis, Inc., by the Ordnance Department through the Commanding Officer of the Arkansas Ordnance Plant. It was the opinion of the contractor that the employment and payment of employees at the Arkansas Ordnance Plant were not in violation of the Fair Labor Standards Act. The Department of Labor normally took up matters concerned with the operation of the plant with the Ordnance Department and not with the contractor. There is attached as Exhibit "L" a photostat of a letter furnished the defendant by the Ordnance Department.

[fol. 185] 40. Is it not true that the War Labor Board issued its General Order No. 31 requesting Ford, Bacon & Davis, Inc., as Operators of the Arkansas Ordnance Plant,

among others, to submit its wage plan for consideration and approval?

Answer: 40. The defendant is unable to find in its records a copy of General Order No. 31 of the War Labor Board. A copy of said order as amended is attached as Exhibit "M".

41. If the answer to the above interrogatory is in the affirmative, please attach a copy of said General Order No. 31 of the War Labor Board hereto as an exhibit.

Answer: 41. See answer to Interrogatory No. 40.

42. Is it not true that Ford, Bacon & Davis, Inc., as Operators of the Arkansas Ordnance Plant submitted a wage plan to the War Labor Board in accordance with the provisions of General Order No. 31 of the War Labor Board?

Answer: 42. According to the records, its appears that a wage plan was probably prepared and submitted through channels under General Order No. 31 of the War Labor Board. A search of the records has been made, but no copy of the plan or of the letter of submission was found. The submission, if any was made, would probably have been to the Commanding Officer of the Arkansas Ordnance Plant, and not direct to the War Labor Board.

43. If the answer to the above interrogatory is in the affirmative, please attach hereto a copy of said General Order No. 31 of the War Labor Board and also attach a copy of the letter of submission of the Plan to the Board.

Answer: 43. See answer to Interrogatory No. 42.

44. Were there not staff meetings of the officials, usually of department heads, of Ford, Bacon & Davis, Inc., held regularly?

Answer: 44. Yes.

45. Was there not a staff meeting of Ford, Bacon & Davis, Inc., held on or about March 22, 1944? If so, attach a copy of the report of said staff meeting.

Answer: 45. Yes. A copy of the minutes of said meeting is attached as Exhibit "N".

W. F. WHITTLE.

GERLAND P. PATTEN
Atty. for Plaintiffs.

Subscribed and sworn to before me this 7th day of August, 1947.

EVA LASTER,
Notary Public.

(Seal)

My commission expires August 9, 1947.

[fol. 2] Exhibit "A"

Exhibit "A" is a list of ordnance establishments of the United States Army containing the name of the establishment, its code letters, the address and telephone number, the function of the establishment, and the name of the commanding officer. The following is an example. it is deemed unnecessary to set forth the entire list.

Aberdeen Proving Ground—SPOBG—Aberdeen, Md. Telephone, 252. Proof of equipment and ammunition.

Commanding General: Maj. Gen. Charles T. Harris, Jr.

Exhibit "B"

Exhibit "B" is a list of ports of embarkation. The following is an example:

Boston Port Of Embarkation—SPTAB—Port Ordnance Office

Army Base, Boston, Mass. Port Ordnance Officer, Lt. Col. William L. Rich.

It is deemed unnecessary to copy the entire list, which contains six ports of embarkation and three subports of embarkation.

[fol. 3] War Department
Arkansas Ordnance Plant
Little Rock, Arkansas

April 7, 1943

AOP No: 012/16297 Fenstermacher/lh

Subject: Tax Exemption Certificates for Federal Excise Tax.

Memo To: Mr. R. A. Morgan, General Manager Arkansas Ordnance Plant

1. In accordance with Ordnance Procurement Regulations, there is inclosed United States Government Tax Exemption Certificate No. W 718,685, issued in blanket form, and attached thereto W. D. Tax Form No. 1, executed Certificate of Authority of Contractor to issue tax exemption certificates.

2. There is also inclosed blanket form of Exemption Certificate to be used by the Contractor for Federal Tax Exemption purposes.

ROBERT A. KOHLOSS, JR.,
Lt. Col., Ord. Dept.,
Commanding

3 Incls—a/s

cc—Mr. Chas. H. Harper, Jr.
Mr. Morton Prowler

[fol. 3a] War Department
Arkansas Ordnance Plant
Little Rock, Arkansas

W. D. Tax Form No. 1

Authority of Contractor
To Issue Tax Exemption Certificates
(To be attached to a Form 1094 U. S.
Tax Exemption Certificate).

Ford, Bacon & Davis, Inc. (Name of Contractor)

Contract No. W—ORD-519
DA-W-ORD-6

Arkansas Ordnance Plant, Jacksonville, Arkansas. (Address of Contractor).

Tax Exemption Certificate
NO W 718,685

The contractor is authorized to issue tax exemption certificates in the form prescribed by Section 470.3(b) of Treasury Decision 5114, approved January 27, 1942 (7 Fed. Reg. 579, January 29, 1942) as to all articles sold on a Federal tax exclusive basis and for which payment is made by the United States, directly or by reimbursement of the contractor, and which are used by the contractor as equipment, material or supplies in performing the contract to which this (the attached) certificate pertains.

ROBERT A. KOHLOSS, JR.
(Contracting Officer Representative)

Lt. Col., Ord. Dept.,
(Title)

Exhibit "C"

[fol. 3b] Form to Be Used As Exemption Certificate by the Contractor

Exemption Certificate

.....19....
Date

The undersigned hereby certifies that the articles specified in the accompanying order or on the reverse side hereof are purchased from .....
(Name of vendor)
for the United States under Government contract.....
.....; that he now has in
(Number or other identification)
his possession a certificate of exemption furnished by the United States with respect to such contract; and that such certificate authorizes him to issue this exemption certificate.

It is understood that the fraudulent use of this certificate to secure exemption will subject the undersigned and all guilty parties to a fine of not more than $10,000, or to im-

prisonment for not more than five years, or both, together with costs of prosecution.

.....
(Name)

.....
(Address)

(End of Exhibit C)

[fol. 4] Exhibit "D"

Exhibit "D" is omitted as immaterial.

[fol. 5] Exhibit "D-½"

War Department
Ordnance Inspection Section
Arkansas Ordnance Plant
Jacksonville, Arkansas

Shaffer:mlc
August 17, 1942

Inspection Section
Circular Number 3

To: All Ordnance Inspectors

1. It has come to the attention of this office that some 140,000 M20 Detonators were sent to the Above Ground Magazine Storage Area which had not been properly inspected; in that they had powder on the closing discs. It is the duty of each Line Inspector to keep a record of all acceptable lots leaving the line. It is understood that in order to keep from over-stocking the line with finished detonators, lots are often moved prior to the signing of the line warehouse transfer. Without a record, the Line Inspector's signature has no value. Some lots may be moved without the knowledge of the Line Inspector. The Line Inspector should definitely understand that his signature on the line warehouse transfer indicates that he is accepting the lot as far as the inspection on the line is concerned, exclusive of tests. If these instructions are followed, detonators with powder on the discs or other defects will not get to the Above Ground Magazine Storage Area or be shipped from the plant.

2. Ordnance Department drawings are made with unilateral tolerance. As an example, the weight of charge for the AN-M103 Relay is given as 57-4 milligrams lead azide. This does not mean that the scales should be set at 57 milligrams, but rather that a point in the middle of the tolerance should be selected. In other words, the scale should be set at 55 milligrams so that a variation over and under can be permitted. It is understood that there has been some confusion and misunderstanding on the Detonator Lines concerning the interpretation of this tolerance.

3. Arrangements have been made for transportation of Ordnance static tests samples by the Contractor. When samples to be tested on a different line are ready to go to that line, the Ordnance Line Inspector should, during the day, request transportation by calling Station 311; at night, Station 312. At the same time he should call the line to which the samples are being sent so that the Ordnance Inspector on that line will be ready to receive the samples.

W. M. SHAFFER
1st Lt., Ord. Dept.
Army Inspector of Ordnance

[fol. 5a] All Communications Should Be Accompanied By Carbon Copy and Addressed to Commanding Officer

Plant on Highway 67
15 Miles Northeast
of Little Rock
To Insure Prompt Attention
In Replying Refer to
.....No.....
Attention of
.....

Post Office, Telegraph, and
Express Address:
Little Rock, Arkansas
Freight Address
Arkansas Ordnance Plant
Jacksonville, Arkansas

Telephone:
War Department Little Rock 4-3392
Arkansas Ordnance Plant
Little Rock, Arkansas
Teletype:
Jacksonville, Ark. 363

Frisch/dlw
August 18, 1942

11—13,660

Memorandum to: Traffic Department
Arkansas Ordnance Plant
Jacksonville, Arkansas

Subject: Transmittal of Circular No. 3.

Attention: Mr. G. P. Charles

1. Attached hereto is a copy of Ordnance Inspection Circular No. 3, which has been sent to all Ordnance Inspectors.

2. Paragraph three (3) of this Circular gies in detail the proceedure for handling the transfer of Static and Ballistic Samples which will be adhered to by our department.

L. L. FRISCH
Sr. Insp., Powder & Explosives
Ordnance Department

EXHIBIT "D-1"

TRIPLICATE ORDNANCE DEPT

ACCOUNTING FORM 24 SR 12 43

PAGE 1 2

FORD, BACON & DAVIS, INC.
ARKANSAS ORDNANCE PLANT
JACKSONVILLE, ARKANSAS

No 231

PAYROLL AUTHORIZATION

■ REPORTS OF HIRE
□ CHANGE OF STATUS

DATE June 12, 1944

BADGE NUMBER	EMPLOYEE NAME	FROM OCCUP CODE	FROM RATE	TO OCCUP CODE	TO RATE	EFFECTIVE DATE
	346 HELPER MAINTENANCE					
12677	NATHANIEL LEWIS			346	56	60944
31867	EARL J MORROW			346	56	60944
35450	ARLEY A WHEETLEY			346	56	60944
35464	JOHN R WHITAKER			346	56	60944
35474	WALTER W WILD			346	56	60944
35476	THOMAS O WESLEY			346	56	60944
	369 INSPECTOR					
7320	DOVIE ARNOLD			369	56	60944
22801	ALTA SUE INGERSOLL			369	66	60944
	421 JANITRESSES					
35486	ALDONIA JONES			421	40	60944
35487	EUGENE MCKINNEY			421	40	60944
35488	MATILDA MACKN			421	40	60944
35489	ESTELLA E MARTIN			421	40	60944
	430 LABORER					
18830	ALF BOSLEY			430	51	60944
	769 TYPIST					
35813	ELIZABETH B WILSON			769	2500	60944
	771 OPERATOR PRODUCTION					
164	ZULA O WIGHAU			771	66	60944
30188	IDA MAE HUFFMAN			771	62	60944
60330	GEORGE HIGHTOWER			771	56	60944
8369	MARY P HUTCHINS			771	66	60944
8729	ALBERT J BROWN			771	62	60944
14285	LOYCE SOWELL			771	56	60944
30196	FREDA BURGAHDNER			771	56	60944
32210	LADYS M LEWIS			771	56	60944
32180	EMMA M MOORE			771	56	60944
34080	EULAH WATKINS			771	56	60944
35461	GRACE ALICE ZERBE			771	56	60944
35462	EMMA JANE FRAWLEY			771	56	60944
35466	ERDA MAE BURNICH			771	56	60944
35467	DOROTHY M HOPKINS			771	56	60944

	430 LABORER					
18830	ALF BOSLEY			430	51	60944
	769 TYPIST					
35813	ELIZABETH B WILSON			769	2500	60944
	771 OPERATOR PRODUCTION					
164	ZULA O WIGHAU			771	66	60944
30188	IDA MAE HUFFMAN			771	62	60944
60330	GEORGE HIGHTOWER			771	56	60944
8369	MARY P HUTCHINS			771	66	60944
8729	ALBERT J BROWN			771	62	60944
14285	LOYCE SOWELL			771	56	60944
30196	FREDA BURGAHDNER			771	56	60944
32210	LADYS M LEWIS			771	56	60944
32180	EMMA M MOORE			771	56	60944
34080	EULAH WATKINS			771	56	60944
35461	GRACE ALICE ZERBE			771	56	60944
35462	EMMA JANE FRAWLEY			771	56	60944
35466	ERDA MAE BURNICH			771	56	60944
35467	DOROTHY M HOPKINS			771	56	60944

Correct: W. W. Whittle
W. W. WHITTLE
Paymaster

For the General Manager: J.T. Berry
J.T. BERRY
Assistant to the General Manager

APPROVED: Charles G. Tolson
CHARLES G. TOLSON
Major, Ordnance Department
Contracting Officer's Representative

EXHIBIT "D-1"

EXHIBIT "D-2"

TRIPLICATE ORDNANCE DEPT

ACCOUNTING FORM 84-SB 13-45

PAGE 1 OF 3.

FORD, BACON & DAVIS, INC.
ARKANSAS ORDNANCE PLANT
JACKSONVILLE, ARKANSAS

No. 1216

PAYROLL AUTHORIZATION

☐ REPORTS OF HIRE
☒ CHANGE OF STATUS

DATE June 10, 1944.

BADGE NUMBER	EMPLOYEE NAME	FROM OCCP'T CODE	FROM RATE	TO OCCP'T CODE	TO RATE	EFFECTIVE DATE
	14 ADJUSTER, MACHINE HELPER					
3146	MARIE CLUCK	771	66	14	66	60644
28404	LINNIE E COOLEY	771	62	14	62	60644
29415	JOE S BOWLING	346	56	14	56	60644
33890	HENRY D BECK	771	56	14	56	60744
3-142	SAMUEL A STARRETT	771	56	14	56	60744
	77 CHECKER MATERIAL					
17457	WILLIAM W FORBUSH	640	4800	77	3200	60644
	127 CLERK					
15241	LUNA H CHANEY	514	2500	127	2500	60644
	310 FOREMAN GENERAL LINE					
405	ETHELDA ALMOND	432	81	310	4500	60544
	325 GUARDS					
8570	HOYT H ABBOTT	770	89	325	3500	60644
	346 HELPER MAINTENANCE					
20236	LEONARD FRANKLIN	430	59	346	52	60544
33703	WILLIAM J TALBERT	430	51	346	56	60544
35065	JAMES CARL ROBERTS	567	56	346	56	60644
35119	FRED J CALLAHAN	567	56	346	56	60644
35120	BILLY J SCROGGS	567	56	346	56	60644
35121	MARION L COOK	567	56	346	56	60644
35123	CHARLES C LUDWICK	567	56	346	56	60644
35126	MIRAN S ROGER	567	56	346	56	60644
35130	MILLY J HARDEN	567	56	346	56	60644
35139	LLOYD H MEEKS	567	56	346	56	60644
35140	VERNON L CURD	567	56	346	56	60644
35147	SAMMY H WARNING	567	56	346	56	60644
35171	VERNON E SPENCER	567	56	346	56	60644
35203	CHARLES K JORDAN	567	56	346	56	60644
35185	VIROLK WELLAN	567	56	346	56	60644
	369 INSPECTOR					

CORRECT: W.F. WHITTLE
Paymaster

For the General Manager:
J.T. BERRY
Assistant to the General Manager

APPROVED: Charles G. Tolson
CHARLES G. TOLSON
Major, Ordnance Department
Contracting Officer's Representative

EXHIBIT "D-2"

EXHIBIT "D-3"

CLOCK NUMBER	NAME OF EMPLOYEE	SEX	CREW NO	RATE OF PAY	BADGE NO	DATE	SUP	HOURS	AREA
						7-28			

FORD BACON & DAVIS INC. JACKSONVILLE, ARK.

TO BE FILLED OUT BY TIMEKEEPER

NAME OF EMPLOYEE (PLEASE PRINT) | SHIFT

AREA NO: 38 | BADGE NUMBER: 227 | CREW NO. | CLOCK NO.

CLASSIFICATION | CLASS CODE

RATE OF PAY | CHECK KIND: 1 ☐ HOURLY 2 ☐ WEEKLY 3 ☐ MONTHLY

HOURS: 1 | AMOUNT | ☐ SUPERVISORY ☐ NON SUPERVISORY

REASON

LATE ARRIVALS OR EARLY DEPARTURES	OVERTIME AUTHORIZATION	NEW EMPLOYEE
USE RED CARD — FILL OUT ALL INFORMATION ON LEFT HAND END OF CARD — ALL INFORMATION MUST BE COMPLETE	USE GREEN CARD — FILL OUT ALL INFORMATION ON LEFT HAND END OF CARD — FOREMAN OR SUPERVISOR MUST SIGN & APPROVE	USE YELLOW CARD — FILL OUT ALL INFORMATION ON LEFT HAND END OF CARD — TIMEKEEPER & FIELD CHECKER MUST SIGN THIS CARD

CLOCK IN & OUT ON THIS CARD & WHITE CARD

16 15 14 13 12 11 10 9 8 7 6 5 4 3 2 1

SUPERVISOR SIGNATURE: H C Ball

TIMEKEEPER SIGNATURE: P Lar

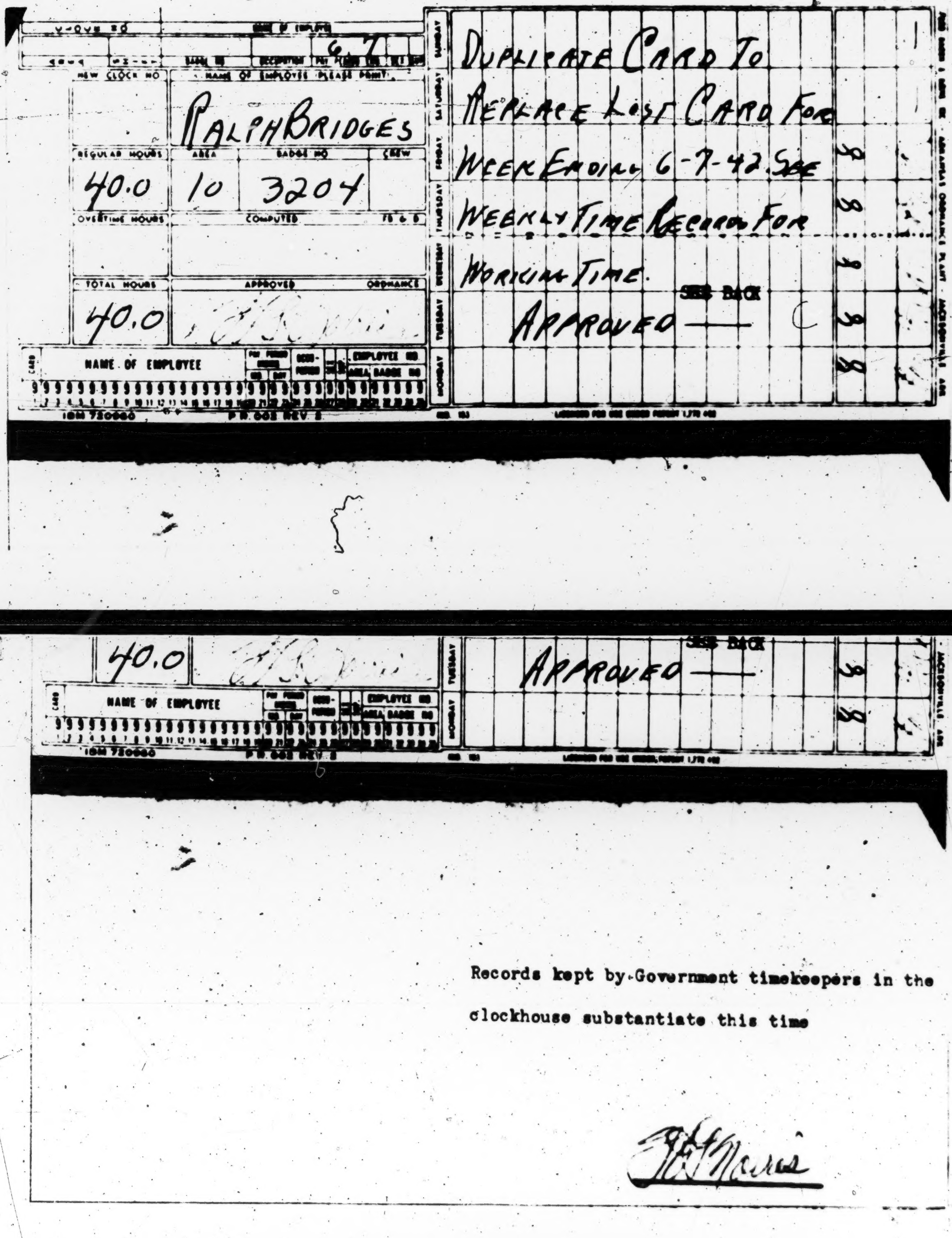
GOVERNMENT CHECKER SIGNATURE: W. E. Lin

NAME OF EMPLOYEE	P.O. NO.	J.L. NO.	EMPLOYEE NO. AREA	EMPLOYEE NO. BADGE NO.	OCCUPATION	RATE OF PAY	SHIFT	DATE MO	DATE DAY	DATE YR.	CLASS CODE	ACCOUNT NO. DEPT	ACCOUNT NO. MAJ	ACCOUNT NO. MIN	HOURS	AMOUNT	O CODE	I CODE	CREW NO	CLOCK NUMBER
9 9 9 9 9 9 9 9 9 9 9 9 9 9 9 9 9 9 9 9	9 9 9 9 9	9 9 9 9	9 9	9 9 9 9	9 9	9 9 9	9	9 9	9 9	9 9	9	9 9 9	9 9	9 9	9 9 9	9 9 9 9	9	9	9 9	9 9 9 9 9 9
1 2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19	20 21 22 23 24	25 26 27 28	29 30	31 32 33 34	35	36 37 38	39	40 41	42 43	44 45	46	47 48 49	50 51	52 53	54 55 56	57 58 59 60	61	62	63 64	65 66 67 68 69 70

IBM 720483

LICENSED FOR USE UNDER PATENT 1,772,482

EXHIBIT "D-4"



Records kept by Government timekeepers in the clockhouse substantiate this time

EXHIBIT "D-4"

[fol. 10] Exhibit "E"

Ordnance Procurement Instructions

9,101.1 Statement of Labor Policy Dated June 22, 1942.

The War and Navy Departments on June 22, 1942, issued a Statement of Labor Policy governing Government-owned, privately-operated plants, the backbone of the Nation's armament program. Under the terms of the Congressional mandate by which their construction and operation was authorized, the War and Navy Departments were given the option of themselves operating the plants or of operating them through the agency of selected qualified commercial contractors. The War Department chose the latter course and in doing so created industrial units of a novel and peculiar character. They have many significant features which combine to form a unique relationship between the operating contractor and the War Department and consequently the handling of many problems, including that of labor relations, must necessarily be slightly different than in the case of wholly private plants. The primary responsibility for dealing with problems relating to the employment of labor is with the contractor since he is hired for the express purpose of utilizing his skill and experience in running the plant and taking care of all questions of personnel. Because of the relationship which obtains, however, the War Department has the responsibility to see that each plant is operated in accordance with all laws and Executive Orders, and in such a manner as to provide for the safety and protection of the plant and its personnel, and to insure maximum production at a reasonable cost. The various provisions of the Statement of Labor Policy, dated June 22, 1942, are referred to in the provisions of this section which follow.

[fol. 11] Exhibit "F"

Ordnance Procurement Instructions

9,102. Responsibility of Contractor Personnel Branch.

The Contractor Personnel Branch has been assigned the responsibility of administering the Labor Policy as it affects the Ordnance Department. The Contractor Personnel Branch is charged with:

a. Assisting Commanding Officers and contractors with respect to labor relations problems.

b. Acting as liaison for the Ordnance Department with appropriate Government agencies having labor relations responsibility.

c. Passing upon collective bargaining agreements to determine whether same comply with the Labor Policy.

d. Passing upon interim grievance procedures submitted under OPI 9,104.3.

f. Assisting commanding officers and contractors to clarify the application of National Labor Relations Act, Walsh-Healey Act, Fair Labor Standards Act, Davis-Bacon Act, Copeland "Anti-Kick Back" Act, and other Federal statutes dealing with wages, hours, or conditions of employment.

g. Assisting commanding officers to conduct hearings requested under Section 5 (b) of the Labor Policy on petitions with respect to discharges directed by them in the interest of plant security. (See OPI 9,105.2).

[fol. 12] Exhibit "G"

Ordnance Procurement Instructions

9,107.1 War Department Responsibility.

The War Department has contractual responsibility for the approval of pay-roll costs. Thus, notwithstanding approvals by the War Department Wage Administration Agency under the Executive Orders and statute dealing with national wage and salary stabilization, approvals by the contracting officer's representatives are also required for purposes of reimbursement of expenditures made pursuant to initial wage and salary scales and any adjustments therein, save only of such individual adjustments within established and approved wages and salary ranges as are permitted without approval pursuant to OPI 9,107.3 and OPI 9,107.4 (not including individual adjustments in salaries in excess of $6,000 covered by OPI 50,006.1).

[fol. 13] Exhibit "H"

Exhibit "H" is a seven-page exhibit and is not set forth in full. It appears from the exhibit that Ford, Bacon & Davis, Inc., desired to eliminate 56 job classifications at the Arkansas Ordnance Plant and to substitute in lieu thereof ten new job classifications. The jobs to be eliminated were various classifications of truck and passenger car drivers and various classes of inspectors, leaders, and machine operators, all of them being hourly paid jobs drawing rates ranging from 40¢ an hour to $1.15 an hour. It was proposed to consolidate these 56 job classifications into ten new job classifications. As an example, truck and passenger car drivers would have two classifications, to-wit, first-class and second-class, in lieu of a number of original classifications, depending upon the type of equipment driven. Exhibit "H" reflects the procedure necessary to be followed in order to secure the desired changes.

The exhibit reflects that in the first instance the Commanding Officer at the Plant gave an emergency approval, then forwarded the matter to the Field Director of Ammunition Plants, at St. Louis, Missouri, who in turn forwarded it to the office of the Chief of Ordnance at Washington. The Office of Chief of Ordnance forwarded it, with its recommendation, to the War Department Wage Administration Agency for final determination. This agency approved the request, which approval was transmitted through channels to the Commanding Officer of the Arkansas Ordnance Plant.

[fol. 14]. Exhibit "I".

War Department
Arkansas Ordnance Plant
Little Rock, Arkansas

November 26, 1942

AOP No. 248.3/12028

Memorandum To: Mr. R. A. Morgan, General Manager, Arkansas Ordnance Plant, Jacksonville, Arkansas.

Subject: National War Labor Board General Order No. 14.

1. Attached hereto is telegraphic copy of General Order No. 14 issued by the National War Labor Board, dealing

with wage and salary adjustments requiring prior War Labor Board approval.

2. Your attention is invited to the fact that the National War Labor Board now delegates to the Secretary of War, to be exercised on his behalf by the Wage Administration Section within the Civilian Personnel Division, Headquarters, Services of Supply, hereinafter referred to as the War Department Agency, the power to rule upon all applications for wage and salary adjustments affecting the employees at this Plant insofar as approval hereof has been made a function of the National War Labor Board.

3. Your attention is further invited to the fact that all requests or problems pertaining to wage or salary adjustments are to be submitted to the Commanding Officer and, where his authority is not sufficient to apply, same shall be channeled to higher authority in accordance with previously issued instructions.

ROBERT A. KOHLOSS, JR.,
Lt. Col., Ord. Dept.,
Commanding.

1 Incl.
As stated.

[fol. 15] Exhibit "J".

Ark. Ord. Plant
248.21
Dec 11 1941

O.O. 675/22104 Arkansas O.P.
Att: Amm. Div.—Ind. Serv. Hampton/jim
248/292 1st Ind.

War Department, Ordnance Office, Washington, D. C.,
December 4, 1941

To: Commanding Officer, Arkansas Ordnance Plant,
Little Rock, Arkansas

1. The chart of proposed salary ranges for the operation of Arkansas Ordnance Plant, prepared by Ford, Bacon & Davis, Inc., has been reviewed.

2. Although the approval of this office is not required for salaries under $6000 per annum, it being a responsibility of the contracting officer's representative to approve salaries under this figure at rates believed to be reasonable and in agreement with salaries paid elsewhere for the same or comparable work, it is suggested that some rates under $6,000 per annum appear high; therefore, it is recommended that the subject of salaries for operating personnel be further discussed with the contractor's representative. At a leading plant the range for Employment Manager is $4200 to $4500 per annum and for Employee Training Supervisor it is $3000 to $3600 per annum. The salary range on the chart for Employment Manager is $4800 to $5400 per annum and for Employee Training Supervisor the range is $3000 to $4800 per annum. Under Personnel Group, a Director is proposed at a minimum salary of $6000 per annum and an Industrial Relations Manager at a range of $4800 to $5400 per annum. It is believed the rate of Personnel Director, (that is, $6000) is reasonable and, therefore, is approved. However, the necessity for an Industrial Relations Manager at a range of $4800 to $5400 per annum is not quite clear.

3. It is the purpose of this office to approve salaries of personnel of the contractor, over $6000 per annum when within a reasonable range. However, in several instances the salary proposed is out of range with salaries in effect at other plants under this Division. It is, of course, understood that for the present the maximum salary for General Manager is $12,000 per year, which rate is hereby approved. The necessity for a Technical Consultant at a minimum salary of $10,000 per year, as well as a Technical Director at a minimum of $6,000 per year, is not clear, and, therefore, additional information is desired as to the duties to be performed by these persons. On the chart is is noted that the Technical Consultant is an assistant to the General Manager.

4. This office is in agreement with the statement in paragraph 2 of basic letter that the proposed range for Cafeteria Manager, namely, $6,000 to $8,000, is excessive. At present, there is no record in this office to show what salary is being paid at other operating plants for Cafe

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Σ 22.50
Σ 22.50
Σ 22.50
1957
1992

EXHIBIT "D-3"

teria Manager. However, the rate paid at other plants must be less than $6,000 per year, otherwise the prior approval of this office would have been required. It is suggested that inquiry be made of other plants to ascertain the salary paid for Cafeteria Manager and a report furnished this office.

[fol. 16] Exhibit "K".

Ark Ord Plant
248.3/10477
Oct 21, 1942

October 21, 1942

Subject: Procedure Re: Salaries and wages of Supervisory and Non-Supervisory Personnel

To: Mr. R. A. Morgan, General Manager
Arkansas Ordnance Plant
Jacksonville, Arkansas

1. Reference is made to your memorandum on the above subject, dated October 13, 1942, outlining the policy which was established in connection with the Wage Rate Classification Schedule of August 16, 1942, concerning advancement in wages and salaries to qualified employees. Inasmuch as operations have now proceeded to a point where qualified operators merit advancement, it is considered appropriate that this policy be definitely outlined at this time.

2. It is noted on Page 1, paragraph 1 (a), that increases within a classification will be based on merit only. It is assumed that this policy has been adopted in place of the procedure whereby the first wage increase is based solely on length of service and any others solely on merit.

3. It is understood that in effectuating the procedure outlined in your memorandum, the effective date of all increases and/or changes of classification will be current, and in no event, made retroactive.

4. Paragraph 1 (b) on Page 1 indicates that a ninety-day period is the minimum time for an increase within classification. In this connection it is believed that emphasis should be based upon the fact that the minimum elapsed time is only one qualification for promotion. At the

end of ninety days, a person may be considered for promotion, but the final criterion is the responsibility of the job and the manner in which it is being performed, subject to final approval of the Commanding Officer.

[fol. 17] Exhibit "L".

U. S. Department Of Labor

Wage And Hour And Public Contracts Divisions

Washington, D. C.

October 11, 1943

In Reply Refer To:
AD:JBM:zls

Oct 13, 1943

Lt. Col. Wm. J. Brennan, Jr.
Chief, Labor Section
Office of the Chief of Ordnance
War Department
Room 1E-520, Pentagon Building
Washington, D. C.

Re: Two-Platoon System for Firemen at Arkansas Ordnance Plant

Dear Colonel Brennan:

This will reply to your letter dated October 7, 1943, with which you forwarded further correspondence from the commanding officer of the subject project which changes somewhat the plan as proposed earlier and as described in my letters to you dated July 19 and August 16, 1943.

As I understand it now, each fireman will be on a 24-hour tour of duty on three days each week and during each such tour of duty the last eight hours will be free time in which they will be permitted to sleep or do whatever else they desire, except that it will be necessary that they remain at the fire station in order to be available should an alarm be turned in. No payment will be made for these last hours unless the men are called to duty to answer an alarm, in which event they will be paid at straight time for such time, or at time and one-half provided that they have already accumulated the regular 40 hours at the straight time rate.

In any event it is proposed to pay the men a time and one-half allowance for all hours actually worked in excess of 40 in any one week.

I further understand that the arrangement is mutually satisfactory to the employees and the employer. It appears, therefore, to be unobjectionable and the payment to employees in accordance with the plan would not appear to be violative of the Fair Labor Standards Act.

Very truly yours,

WM. R. McCOMB,
Deputy Administrator.

[fol. 18] Exhibit "M".

Exhibit "M" is omitted as immaterial.

Exhibit "N".

Exhibit "N" is omitted as immaterial.

(Endorsed): No. 13,660. Stipulation relating to Exhibits attached to Responses to Interrogatores, and Exhibits attached thereto. Filed in U. S. District Court on January 19, 1948.

[fol. 20] (Order of United States Circuit Court of Appeals denying Petition of Appellee to require Appellants to print Additional Record, etc.)

United States Circuit Court Of Appeals
Eighth Circuit

January Term, 1948.
Monday, January 12, 1948.

Julia Rhoda Aaron, etc., et al., Appellants,
No. 13,660. vs.
Ford, Bacon & Davis, Incorporated.

Appeal from the District Court of the United States for the Eastern District of Arkansas.

Motion and amended motion of appellee to require appellant to print additional record is this day presented to the

Court by Mr. E. L. McHaney, Jr., and the response of appellant thereto by Mr. Gerland P. Patteu, and after due consideration, It is ordered by the Court that said motion and amended motion be, and they are hereby, denied, without prejudice however to appellee to print such additional record as it may be advised is necessary.

January 12, 1948.

[fol. 3] And thereafter the following proceedings were had in said cause in the United States Court of Appeals for the Eighth Circuit, viz:

(Appearance of Counsel for Appellants.)

Julia Rhoda Aaron, et al., Appellants,
No. 13,660. vs.
Ford, Bacon & Davis, Inc.

The Clerk will enter my appearance as Counsel for the Appellants.

GERLAND P. PATTEN,

COOPER JACOWAY,

C. H. EARL,

JUNE P. WOOTEN,
Pyramid Building,
Little Rock, Arkansas.

PAUL TALLEY,

WAYNE W. OWEN,
Rector Building,
Little Rock, Arkansas.

(Endorsed): Filed in U. S. Circuit Court of Appeals, Nov. 22, 1947.

(Appearance of Counsel for Appellee.)

The Clerk will enter my appearance as Counsel for the Appellee.

GROVER T. OWENS,

JOHN M. LOFTON,

E. L. McHANEY, JR.

(Endorsed): Filed in U. S. Circuit Court of Appeals, Dec. 1, 1947.

[fol. 4] (Appearance of Counsel for Amicus Curiae, Administrator, Wage and Hour Division, U. S. Department of Labor.)

The Clerk will enter my appearance as Counsel for the Amicus Curiae, Administrator, Wage and Hour Division, U. S. Department of Labor.

JETER S. RAY.

(Endorsed): Filed in U. S. Circuit Court of Appeals, Mar. 3, 1948.

(Order of Submission.)

November Term, 1948.

Monday, November 8, 1948.

Before Judges Gardner, Sanborn, Woodrough, Thomas, Johnsen, Riddick and Collet.

This cause having been called for hearing in its regular order, argument was commenced by Mr. June P. Wooten for appellants, continued by Mr. E. L. McHaney, Jr., for appellee and concluded by Mr. June P. Wooten for appellants.

Thereupon, this cause was submitted to the Court in banc on the record printed by appellants, the supplemental record printed by appellee and briefs of counsel and amicus curiae, the supplemental memorandum of amicus curiae and by way of supplemental brief appellee filed the brief of Owens, et al., as Amicus Curiae in the Supreme Court of the United States in the case of Kennedy, et al. v. Silas Mason Company.

[fol. 5] (Opinion.)

United States Court of Appeals

For The Eighth Circuit.

No. 13,669.

Julia Rhoda Aaron and all other Plaintiffs and Interveners listed in the Complaints and Interventions in the District Court in Civil Action No. L. R. 1584 Consolidated, Appellants, vs. Ford, Bacon & Davis, Incorporated, Appellee.	Appeal from the United States District Court for the Eastern District of Arkansas.

[April 12, 1949.]

Mr. June P. Wooten (Mr. Josh McHughes, Mr. Lee Cazzort, Jr., Mr. Charles H. Earl, Mr. Paul Talley, Mr. Wayne W. Owen, Mr. Cooper Jacoway, and Mr. Gerland P. Patten were with him on the brief) for Appellants.

Mr. E. L. McHaney, Jr. (Mr. Grover T. Owens, Mr. John M. Lofton, Jr., and Messrs. Owens, Ehrman & McHaney were with him on the brief) for Appellee.

Mr. William S. Tyson, Solicitor, Miss Bessie Margolin, Assistant Solicitor, Mr. William A. Lowe and Mr. E. Gerald Lamboley, Attorneys, and Mr. Reid Williams,

Regional Attorney, United States Department of Labor, filed brief as Amicus Curiae.

Before GARDNER, Chief Judge, and SANBORN, WOODROUGH, THOMAS, JOHNSEN, RIDDICK, and COLLET, Circuit Judges.

COLLET, Circuit Judge, delivered the opinion of the Court.

This action constitutes a consolidation of seven separate actions against the defendant, Ford, Bacon & Davis, Inc., filed by more than 1800 of its employees in the District Court for the Eastern District of Arkansas claiming in excess of one million dollars in overtime compensation, liquidated damages, and attorney fees under the Fair Labor Standards Act of 1938.[1] Ford, Bacon & Davis, Inc., operated the Government-owned Arkansas Ordnance Plant in Pulaski County, Arkansas, under a cost-plus-a-fixed-fee contract with the Government for the production of munitions of war for Government use in World War II. This consolidated cause was submitted to the District Court on motion for summary judgment. At the hearing on that motion it was stipulated that the motion raised no disputed issues of fact. The motion was sustained. The District Court filed as its memorandum opinion in this case its opinion in the previously determined similar case, *Barksdale v. Ford, Bacon & Davis, Inc.*, reported in 70 Fed. Supp. 690. Many of the same issues were presented to the trial court in this case as were presented in the trial court in *United States Cartridge Co.* v. *Powell, et al.*, No. 13,663, decided on this date, ... F.2d ..... On the appeal in this case the same determinative questions were presented in this court as were presented on appeal in the Powell case. This case, like the Powell case, was held under submission awaiting a decision of the case of *Kennedy v. Silas Mason*

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[1] 29 U.S.C.A., Sec. 201 et seq.

by the Supreme Court. Upon the remand of *Kennedy* v. *Silas Mason*, 334 U.S. 249, the previous submission of this case was set aside and this cause was set for rehearing and reargument before this Court en banc with the Powell case. The Powell case has, as indicated above, been decided by our opinion filed today. The substantive issues are the same in this and the Powell case. Our opinion in the Powell case is therefore controlling here. For the reasons stated in that opinion, the order of the District Court dismissing plaintiffs' complaints is affirmed.

[fol. 9] (Opinion)

United States Court of Appeals
for the Eighth Circuit.

No. 13,663.

The United States Cartridge Company, a corporation, Appellant, vs. R. M. Powell, et al., Appellees.	Appeal from the United States District Court for the Eastern District of Missouri.

[April 12, 1949.]

Mr. R. H. McRoberts (Mr. Rhodes E. Cave, Mr. Marion S. Francis, and Messrs. Bryan, Cave, McPheeters & McRoberts were with him on the brief) for Appellant.

Mr. Thomas Bond for Appellees.

Mr. William S. Tyson, Solicitor, Miss Bessie Margolin, Assistant Solicitor, Mr. William A. Lowe and Mr. E.

Gerald Lamboley, Attorneys, and Mr. Reid Williams, Regional Attorney, United States Department of Labor, filed brief as Amicus Curiae.

Before GARDNER, Chief Judge, and SANBORN, WOODROUGH, THOMAS, JOHNSEN, RIDDICK, and COLLET, Circuit Judges.

COLLET, Circuit Judge, delivered the opinion of the Court.

This is an action brought by a group of fifty-nine plaintiffs who were employed during World War II at the St. Louis Ordinance Plant to recover overtime compensation, liquidated damages, attorney fees, and costs, under the Fair Labor Standards Act of 1938. On trial the court found all the issues in favor of plaintiffs and entered judgment aggregating $246,251.44 (twice the amount of overtime claimed), plus $24,625.00 as attorney fees and costs. The parties will be referred to as they were designated in the District Court.

Defendant was engaged in the operation of a large munitions plant near St. Louis, Missouri, manufacturing small arms ammunition for use by the military forces of the United States under a cost-plus-a-fixed-fee contract with the United States and under the supervision of the Ordnance Department of the War Department. It is admitted by the pleadings that plaintiffs were all employees of defendant. Plaintiffs allege that defendant was engaged in interstate commerce and in the production of goods for interstate commerce within the meaning of the Fair Labor Standards Act of 1938,[1] and that they were employed in the production of goods for interstate commerce at agreed salaries for a 40-hour week, with the understanding that for all hours which they worked over 40 per week they

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[1] 29 U.S.C.A., Sec. 201 et seq.

would be compensated at the rate provided by that Act of one and one-half times the regular rate of pay. Plaintiffs were all employed in defendant's Safety Department.

Defendant denied and still denies that it was engaged in interstate commerce or in the production of goods for interstate commerce, denied that plaintiffs were so employed or at agreed salaries for a 40-hour week or that they were entitled to overtime pay for time worked in excess of 40 hours per week. The defendant alleged and continues to contend that each of the plaintiffs was employed in a bona fide administrative capacity as that term is defined in the Fair Labor Standards Act with the result that that Act did not apply with respect to them. The defendant furthermore set up certain provisions of the Missouri Statute of Limitations as an affirmative defense. After judgment was entered a motion for rehearing was filed, requesting among other things that the cause be reopened to permit defendant to plead and prove the defenses made available to it under the Portal-to-Portal Act, which had become effective subsequent to the trial and shortly prior to the judgment. This motion was accompanied by an affidavit stating certain facts deemed relevant to those defenses. Plaintiffs answered this affidavit with a counter affidavit. The motion was denied. This appeal followed. We held the case under submission pending the determination of *Kennedy* v. *Silas Mason Co.*, 334 U.S. 249 (1948) because of the similarity of certain important issues in both cases. Upon the remand of the Kennedy-Silas Mason case we set aside the submission of this cause and set it for re-argument before this court en banc. The parties were granted leave to file supplemental briefs particularly directed to the applicability, if any, of either the Fair Labor Standards Act of 1938, supra; the Act of July 2, 1940, 54 Stat. 712, 50 U.S.C.A. App., Sec. 1171, 1172, and 5 U.S.C.A., Sec. 189(a); or the Walsh-Healey Public Contracts Act of June 30, 1936, 49 Stat. 2036, 41 U.S.C.A., Sec. 35 et seq.

Pursuant thereto the cause was re-argued and supplemental briefs bearing upon the applicability of the above-mentioned Acts were filed.

Defendant contends (1) that plaintiffs were not engaged in the production of goods for interstate commerce within the meaning of the Fair Labor Standards Act, and were not included within the coverage of that Act, (2) that it was not engaged in interstate commerce or in the production of goods for interstate commerce within the meaning of the Fair Labor Standards Act, (3) that the ammunition produced by defendant for the United States was for use in the war and was not "goods" within the meaning of that Act, (4) that plaintiffs were not engaged in interstate commerce or in the production of goods for commerce, (5) that the burden was on plaintiffs to plead and prove the coverage of the Act, the hours worked, and that they were engaged in the production of "goods" as defined in the Fair Labor Standards Act, which burden was not sustained, (6) that plaintiffs were employed in a bona fide administrative capacity and were exempt from the provisions of the Fair Labor Standards Act, (7) that the judgment of the trial court is in any event excessive in that it (a) is based on the erroneous assumption that the salaries paid plaintiffs were base pay for a 40-hour week instead of a variable or 48-hour week, (b) includes in the computations of hours worked a one-half hour lunch period, and (c) includes as hours worked, time prior to the beginning of and following the ending of plaintiffs' regular work shifts, (8) that the claims of certain plaintiffs were barred by Sections 1012 and 1015 R.S. Mo. 1939, (9) that the provisions of the Portal-to-Portal Act of 1947 are binding in this case and defendant should have been given the opportunity to plead and sustain the defenses made available to it under the Act, and (10) that two of the plaintiffs died while the cause was under submission and there has been no proper substitution and revival.

The trial court found that defendant was engaged in interstate commerce and in the production of goods for commerce within the meaning of the Fair Labor Standards Act and gave judgment for plaintiffs under that Act, including, as heretofore noted, the overtime claimed, liquidated damages, and attorney fees. ~~Apparently the possible applicability of the Walsh-Healey Act or of the Act of July 2, 1940, or the bearing of either of those Acts upon the applicability of the Fair Labor Standards Act was not presented to or considered by the trial court, but the question relates to jurisdiction and is properly before us.~~

There is no serious dispute concerning the underlying facts. Defendant entered into a cost-plus-a-fixed-fee contract with the United States Government to operate and maintain the munitions plant in suit and to produce therein and thereat small arms and ammunition in huge quantities for the United States Government. The Government acquired the site for the plant, erected all of the buildings and installed all of the machinery, to all of which it retained title. The Government furnished defendant with all raw materials or the funds with which to acquire them. The title to all raw materials and finished munitions remained in the Government. A large part of those materials were shipped to the plant from outstate, some by the Government and some on defendant's orders consigned to defendant. All those materials were unloaded at the plant by defendant's employees. Defendant manufactured those raw materials into arms and ammunition at the plant in Missouri. In doing so it had the actual physical possession of the material and products thereof, but all operations were under the direct supervision of representatives of the United States Government. All completed products were carefully inspected by the Government. And all of those products were shipped upon the order of the Government to places specified by it. Predominately, if not entirely, those destinations were beyond the confines of the State of

Missouri. Those shipments were usually on Government bills of lading, but occasionally they were made on defendant's bills of lading. All of the finished products with one exception were shipped at Government expense to points for use by it in the war. That exception consisted of small quantities of test ammunition sent to Purdue University and a point in Pennsylvania for test purposes. A by-product, scrap copper or brass, resulting from the making of shells, appears to have been transported in defendant's trucks to a nearby cartridge company on defendant's commercial bill of lading. This appears to be the only product resulting from defendant's manufacturing process which left the plant on other than Government bills of lading. The title to this by-product appears to have remained in the Government. All shipments from the plant were crated and loaded by defendant. Bills of lading and shipping papers were prepared by defendant's employees. The defendant by the terms of the contract was required to do all things necessary to the operation of the plant, to hire all employees, to inspect and check all materials by its own inspectors before submitting the goods to the Government for acceptance, to keep records and books of account showing the cost of all labor, material and other expenditures, to pay employee contributions under the Federal Social Security Act, and to pay all state and local taxes, licenses or fees required by state law, including state compensation laws. Extensive railroad switching facilities were constructed on the plant site (which was a military reservation). These facilities were also owned by the Government, as well as the switch engines and similar equipment. This equipment was stated by defendant to have been manned and operated by defendant's employees. The defendant was designated in the contract as an independent contractor[2] but the Government had, as heretofore noted,

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[2]From the contract, page 780 of the Record:

"It is expressly understood and agreed by the Contractor and the Government that in the performance of the work provided for in this contract,

the right to make any changes its representatives deemed necessary in the method of performing the work and, as heretofore inferred, it paid all operating costs. Defendant's fixed fee was based upon the amount of the completed product produced. As many as 40,000 employees were at times engaged at the plant. All were engaged in the production of munitions for the Government under defendant's contract with the Government. More than six billion small arms cartridges were produced. The contract specifically provided that the provisions of the Walsh-Healey Act should apply to this contract.[3] These plaintiffs, as well as all other employees of defendant, were notified in a booklet given them at the commencement of their employment that overtime would be compensated for at the *rate* provided under the Walsh-Healey Act *and* the Fair Labor Standards

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the Contractor is an independent contractor and in no wise an agent of the Government."

[3]From the contract, page 783 of the Record:

"Article III-D—Walsh Healey Act.

"1. The following representations and stipulations pursuant to the Walsh-Healey Public Contracts Act (Act of June 30, 1936; 49 Stat. 2036; 41 USC 35-45), shall apply to the performance of this contract:

"(a) The Contractor is the manufacurer of or a regular dealer in the materials, supplies, articles, or equipment to be manufactured or used in the performance of the contract.

"(b) All persons employed by the Contractor in the manufacture or furnishing of the materials, supplies, articles, or equipment used in the performance of the contract will be paid, without subsequent deduction or rebate on any account, not less than the minimum wages as determined by the Secretary of Labor to be the prevailing minimum wages for persons employed on similar work or in the particular or similar industries or groups of industries currently operating in the locality in which the materials, supplies, articles, or equipment are to be manufactured or furnished under the contract: Provided, however, that this stipulation with respect to minimum wages shall apply only to purchases or contracts relating to such industries as have been the subject matter of a determination by the Secretary of Labor.

"(c) No person employed by the Contractor in the manufacture of furnishing of the materials, supplies, articles, or equipment used in the performance of the contract shall be permitted to work in excess of 8 hours in any 1 day or in excess of 40 hours in any 1 week, unless such person is paid such applicable overtime rate as has been set by the Secretary of Labor.

"(d) No male person under 16 years of age and no female person under 18 years of age and no convict labor will be employed by the Con-

Act.[4] The relationship between the Government and defendant in the operation of the plant was also described in this booklet.[4] As noted heretofore, defendant's answer

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tractor in the manufacture or production or furnishing of any of the materials, supplies, articles, or equipment included in the contract.

"(e) No part of the contract will be performed nor will any of the materials, supplies, articles, or equipment to be manufactured or furnished under said contract be manufactured or fabricated in any plants, factories, buildings, or surroundings or under working conditions which are insanitary or hazardous or dangerous to the health and safety of employees engaged in the performance of the contract. Compliance with the safety, sanitary, and factory inspection laws of the State in which the work or part hereof is to be performed shall be prima facie evidence of compliance with this subsection.

"(f) Any breach or violation of any of the foregoing representations and stipulations shall render the party responsible therefor liable to the United States of America for liquidated damages, in addition to damages for any other breach of the contract, in the sum of $10 per day for each male person under 16 years of age or each female person under 18 years of age, or each convict laborer knowingly employed in the performance of the contract, and a sum equal to the amount of any deductions, rebates, refunds, or underpayment of wages due to any employee engaged in the performance of the contract; and, in addition, the agency of the United States entering into the contract shall have the right to cancel same and to make open-market purchases or enter into other contracts for the completion of the original contract, charging any additional cost to the original Contractor. Any sums of money due to the United States of America by reason of any violation of any of the representations and stipulations of the contract as set forth herein may be withheld from any amounts due on the contract or may be recovered in a suit brought in the name of the United States of America by the Attorney General thereof. All sums withheld or recovered as deductions, rebates, refunds, or under-payments of wages shall be held in a special deposit account and shall be paid, on order of the Secretary of Labor, directly to the employees who have been paid less than minimum rates of pay as set forth in such contracts and on whose account such sums were withheld or recovered: Provided, that no claims by employees for such payments shall be entertained unless made within 1 year from the date of actual notice to the Contractor of the withholding or recovery of such sums by the United States of America.

"(g) The Contractor shall post a copy of the stipulations in a prominent and readily accessible place at the site of the contract work and shall keep such employment records as are required in the Regulations under the act available for inspection by authorized representatives of the Secretary of Labor.

"(h) The foregoing stipulations shall be deemed inoperative if this contract is for a definite amount not in excess of $10,000.00.

"2. Stipulation (b) of section 1 of this Article III-D with respect to wages is operative due to determination by the Secretary of Labor of prevailing minimum wage rates for the industry involved."

[4]From the booklet given employees, page 191 of the Record:

"The Saint Louis Ordnance Plant is wholly owned by the United States Government. The United States Cartridge Company is the operating agent."

From the booklet given employees, pages 203-204 of the Record:

admitted that plaintiffs were its employees. There was no issue presented concerning the propriety of the *rate* of pay under any Federal or State law. The controversy relates to whether the Fair Labor Standards Act applies, whether plaintiffs are within the class of employees entitled to overtime under the Act, and, if so, the extent of that overtime, whether liquidated damages and attorney fees are recoverable, and whether defendant should have been permitted to amend its answer setting up defenses under the Portal-to-Portal Act.

"Wages of Employees.

"It is the policy of the Saint Louis Ordnance Plant to pay each employee a wage in keeping with the rates determined by the Ordnance Department of the United States Army for ammunition production. Since our product is for our United States Government, and since each employee is a part of our government, it is naturally expected that each employee will strive diligently to turn out an honest day's work for a fair wage.

"The company pays you your wages but it is immediately repaid by the United States Government.

"In the final analysis, your wages come from the United States Government, whose only source of income is taxes collected from you and all other citizens.

"The United States Cartridge Company is merely managing the plant for the Federal Government.

"An employee's remuneration consists not only of the money he receives each payday, but also the Company's contribution to the Social Security, Workmen's Compensation for accident protection, and Unemployment Compensation funds."

From the booklet given employees, page 206 of the Record:

"Standard Hours of Work.

"There will be eight hours in any working day, and forty hours will consitute a working week. To meet the schedule required of us by the National Defense Program, it will be necessary to employ three shifts on production operations. When production demands require a longer work day, or longer work week, the Company will pay the legal overtime rate as provided under the Walsh Healey Act, and the Fair Labor Standards Act. When three shifts are operating there will be rotation of the first, second and third shifts every two weeks. A lunch period will be allowed on each shift and will be paid for by the Company, that is, no deduction will be made for this lunch period.

"Payment of Overtime.

"Time and one-half will be paid in excess of eight hours per day or forty hours per week. Time and one-half also is paid for authorized work on Sunday and national holidays, except in departments or occupations where the established schedule requires seven days continuous operations. This means that overtime is paid for Sunday work and holidays on repair, maintenance, mechanical and new routine process operations, but not for work

There are many cases bearing upon the problem with which we are confronted.[5] No good purpose will be served by an analysis of each of them here, since it is obvious from the opinion of the Supreme Court in *Kennedy* v. *Silas Mason Company, supra*, that that court will in due time authoritatively determine the correctness of the various conclusions expressed in those cases.

As to the application of the Walsh-Healey Act. It is clear and undisputed that all of the articles manufactured by defendant were manufactured pursuant to a contract be-

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such as watching, plant protection, or continuous procedure operations. The following national holidays—New Year's Day, Memorial Day, Fourth of July, Labor Day, Thanksgiving Day and Christmas, will be observed.

"It will be the policy of the Company to avoid work on Sundays and Holidays as far as possible. However, since we are a part of the National Defense program, we shall have to adjust our schedule according to the needs of the situation."

[5]*Holland* v. *Haile Gold Mines*, 44 F. Supp. 641; *Walling* v. *Haile Gold Mines, Inc.*, 136 F.2d 102; *Fox* v. *Summit King Mines*, 143 F.2d 926; *St. Johns River Shipbuilding Company* v. *Adams*, 164 F.2d 1012, 13 Labor Cases, Par. 64,171; *Crabb* v. *Welden Brothers*, 164 F.2d 797; *Clyde* v. *Broderick*, 52 F. Supp. 533; *Clyde* v. *Broderick*, 144 F.2d 348; *Anderson* v. *Federal Cartridge Corp.*, 13 Labor Cases, Par. 64,072 (D.C. Minn.); *Barksdale* v. *Ford, Bacon & Davis, Inc.*, 70 F. Supp. 690 (E.D. Ark.); *Clyde* v. *Broderick*, 52 F. Supp. 533 (D. Colo.), reversed on other grounds, 144 F.2d 348; *H. B. Deal & Company, Inc.* v. *Leonard*, 210 Ark. 512, 196 S.W.2d 991; *Dickenson* v. *Trojan Powder Co.*, not officially reported, D. C. N. D. Ohio, W.D., April 18, 1944; *Divins* v. *Hazeltine Electronics Corp.*, 70 F. Supp. 686 (S. D. N. Y.), affirmed 163 F.2d 100; *Hays* v. *Hercules Powder Co.*, 13 Labor Cases, Par. 64,123 (D. C. W. D. Mo.); *Kennedy* v. *Silas Mason Company*, 68 F. Supp. 576, affirmed 70 F. Supp. 929 (W.D. La.), affirmed 164 F.2d 1016, 13 Labor Cases, Par. 64,170; *Kruger* v. *Los Angeles Shipbuilding and Drydock Corp.*, 12 Labor Cases, Par. 63,660 (D. C. S. D. Calif.); *Lynch* v. *Embry-Riddle Co.*, 63 F. Supp. 992 (S.D. Fla.); *Matlock* v. *Sanderson & Porter*, 7 Labor Cases, Par. 61,806 (Cir. Ct. Ark.); *Patton* v. *Roane-Anderson Co.*, 14 Labor Cases, Par. 64,245 (D. C. E. D. Tenn.); *Raymond* v. *Parrish*, 30 S.E.2d 669 (Ga. App.); *Ritch* v. *Puget Sound Bridge & Dredging Co.*, 60 F. Supp. 670 (W.D. Wash.), reversed on other grounds 156 F.2d 334; *Selby* v. *J. A. Jones Construction Co.*, 14 Labor Cases, Par. 64,246 (D. C. E. D. Tenn.); *Stewart* v. *Kaiser Company, Inc.*, 71 F. Supp. 551 (D. Ore.); *Torres* v. *Lock Joint Pipe Co.*, Prentice-Hall Wage & Hour Service, Vol. 1, Par. 10,189.8 (D.C. Puerto Rico); *Trefs* v. *Foley Bros., Inc.*, 7 Labor Cases, Par. 61,743 (D. C. W. D. Mo.); *Young* v. *Gellex Corporation*, 14 Labor Cases, Par. 64,244 (D. C. E. D. Tenn.); *Cody, et al.*, v. *Dossin's Food Products*, 156 F.2d 678; *Jones* v. *Springfield Missouri Packing Co.*, 45 F. Supp. 997; *Gibson* v. *St. Paul Fire & Marine Insurance Co.*, 184 S.E. (West Va.) 562; *Tripp* v. *United States Fire Ins. Co.*, 44 Pac.2d (Kansas) 236; *Bell* v. *Porter*, 159 F.2d 117; *Jackson* v. *Northwest Airlines* (D.C. Minn., Oct. 9, 1947), 75 F. Supp. 32; *O'Riordan* v. *Helmers, Inc.* 6 W.H. Cases 961 (N.Y.C. Ct. 1947); *Ware* v. *Goodyear Corp.*, 6 W.H. Cases 160 (S.D. Ind. 1946); *Swettman* v. *Remington Rand*, 6 W.H. Cases 336 (S.D. Ill. 1946); *Mockl* v. *Dupont de Nemours & Co.*, 6 W.H. Cases 638

tween defendant and an agency of the United States for the manufacture of "materials, supplies, articles and equipment in an amount exceeding $10,000.00", and that plaintiffs and all other employees of defendant were at all times engaged exclusively "in the manufacture of materials, supplies, articles and equipment used in the performance of the contract"[6] between defendant and the United States.

Which of these two acts did Congress intend should apply to a cost-plus-a-fixed-fee contractor manufacturing munitions of war exclusively for the United States under contract with the United States? If a portion of defendant's business had been devoted to the "production of goods for commerce" for others than the United States, the question whether the Walsh-Healey Act should apply to the employees engaged in the production of the munitions under contract with the United States and the Fair Labor Standards Act should apply to other employees would be a proper subject for consideration. But such is not the case here. All goods produced were for the United States under contract therewith. It has not been suggested and could not be reasonably contended that the Walsh-Healey Act

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(N.D. Ill., 1947), 12 Labor Cases, Par. 63,515; *Blaster v. Western Pipe & Steel Co.*, 6 W.H. Cases 637 (S.D. Cal., 1946); *Tiller v. Anchor Optical Corp.*, 6 W.H. Cases 655 (S. D. N. Y., 1947); *Roland v. United Airlines*, 6 W.H. Cases 663 (N.D. Ill., 1947); *Belanger v. Hopeman Bros.*, 6 W.H. Cases 616 (D. Maine, 1947); *Umthun v. Day & Zimmerman, Inc.*, 16 N.W.2d 258 (S. Ct. Iowa, 1944); *Timberlake v. Day & Zimmerman*, 49 F. Supp. 28 (S.D. Iowa, 1943); *Lasater v. Hercules Powder Co.*, 7 W.H. Cases 150 (E.D. Tenn., 1947); *McCumsky v. Norden, Inc.*, 7 W.H. Cases 142 (N. Y. S. Ct., 1947); *Simkins v. Elmhurst Construction Co.*, 181 Misc. 791, affirmed 181 Misc. 793, affirmed 268 App. Div. 858; *Steiner v. Pleasantville Constructors*, 181 Misc. 798, affirmed (modified on other grounds) 182 Misc. 66, affirmed 269 App. Div. 798; *Henderson v. Bechtel-McCome Corp.*, 7 W.H. Cases 107 (N.D. Ala., 1947); *Fox v. Summit Hill*, 143 F.2d 926 (9th Cir.); *Ware v. Goodyear Engineering Corp.*, 6 W.H. Cases 160 (S.D. Ind.); *Moehl v. Dupont de Nemours & Co.*, 6 W.H. Cases 638 (N.D. Ill.), 12 Labor Cases, Par. 63,545; *Bailey v. Porter*, 6 W.H. Cases 1017 (N.D. Ill. 1947); *Southern California Freight Lines v. Davis*, 167 F.2d 708; 14 Labor Cases, Par. 64,479; *Harrington v. Empire Construction Co.*, 167 F.2d 389; 14 Labor Cases, Par. 64,455. *Alfred Kovacs et al., v. Metropolitan Life Insurance Company, et al.*, 14 Labor Cases, Par. 64,480 (S. D. N.Y., April 20, 1948).

[6] Walsh-Healy Act, Sec. 35, Title 41 U.S.C.A.

was repealed by the passage of the Fair Labor Standards Act, in view of the amendment of the former subsequent to the passage of the latter, the recognition of the Walsh-Healey Act in the National Defense Act of July 2, 1940 (Sections 1171-1172, Title 50 App. U.S.C.A.),[7] and Executive Order 9001 of The President, issued December 29, 1941, 6 Fed. Register 6787.[8]

The Walsh-Healey Act is not an exercise by Congress of regulatory power over private industry or employment, nor an act of general application to industry. *Perkins* v. *Lukens Steel Co.*, 310 U.S. 113; *Endicott-Johnson Corp.* v. *Perkins*, 317 U.S. 501. The purpose of the Act was, as pointed out in *Endicott-Johnson Corp.* v. *Perkins*, to raise labor standards for the segment of industry doing business with the Government. To accomplish that purpose, it specified, as the terms on which the Government would do business with private concerns, the hours of employment and that overtime should be paid for all hours in excess of 40 hours per week. It applied irrespective of whether the workers employed in producing the goods contracted for were engaged in producing goods "for commerce" or exclusively in intra-state commerce. The sole criterion of application in that regard was that the goods were to be produced for the Government. And with respect to hours of work and rates of pay, the Walsh-Healey Act was more

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[7] That Act provides: "That no contract entered into pursuant to the provisions of this section which would otherwise be subject to the provisions of the Act entitled 'An Act to provide conditions for the purchase of supplies and the making of contracts by the United States, and for other purposes', approved June 30, 1936 (49 Stat. 2036; 41 U.S.C., secs. 35-45), shall be exempt from the provisions of such Act [sections 35-45 of Title 41] solely because of being entered into without advertising pursuant to the provisions of this section."

[8] That Order provides: "No contract or modification or amendment thereof shall be exempt from the provisions of the Walsh-Healey Act (49 Stat. 2036) because of being entered into without advertising or competitive bidding, and the provisions of such act, the Davis-Bacon Act, as amended (49 Stat. 1011), the Copeland Act, as amended (48 Stat. 948), and the Eight Hour Law, as amended by the Act of September 9, 1940 (Public No. 781, 76th Congress) if otherwise applicable shall apply to contracts made and performed under the authority of this Order."

favorable to labor than the later Fair Labor Standards Act, in that there was no progressive reduction of weekly hours of labor from 44 hours to 40, as in the Fair Labor Standards Act, and there was no minimum wage fixed at a figure comparatively low if compared with wages actually being paid in manufacturing industries. The Walsh-Healey Act fixed the wage to be paid at not less than the minimum wage (to be determined by the Secretary of Labor) for persons employed on similar work in the locality where the goods for the Government were to be produced. The Fair Labor Standards Act had also as its purpose the improvement of living conditions and labor standards. It was designed and intended to affect private industry engaged in interstate commerce. Its provisions relative to minimum wages and hours of labor for those employed in making goods for the United States were unnecessary as provision therefor equal or more advantageous to labor had already been made by the Walsh-Healey Act. The Fair Labor Standards Act further provided that the employee might recover liquidated damages and attorney fees. But the Walsh-Healey Act had already provided sanctions for the violation by those furnishing goods to the United States of its provisions relative to hours of employment and rates of pay, and had already provided that any wages due employes engaged in producing goods for the United States might be withheld by the United States and paid to the employee or recovered in the name of the United States by the Attorney General and paid to the employee. Thus, the Walsh-Healey Act had provided for the collection of any wages due employees such as plaintiffs without cost to them and had provided sanctions more severe in some respects than those of the Fair Labor Standards Act for failure to pay without compulsion.

The Wage and Hour Division of the Department of Labor, as Amicus Curiae, suggests that both Acts may be

applicable and that plaintiffs may have the benefit of the most favorable provision of either—in this instance, the liquidated damages and attorney fee provisions of the Fair Labor Standards Act. We are not impressed with the view that Congress intended that an employee might elect which of these Acts would apply to his individual employment or claim for compensation, with the attending confusion in computing wages and the collection of claims therefor. Nor are we impressed with the view that Congress intended that when an industry was engaged in producing munitions of war for the United States under a cost-plus-a-fixed-fee contract and failed to pay an employee engaged in such production his proper wages, that the United States should be required to pay him not only his unpaid wages but also an amount equal thereto as liquidated damages, and, in addition, his attorney fees, when another method of safe-guarding the employees' rights had been provided which does not entail such a penalty against the United States. We are of the opinion that the two Acts are sufficiently divergent that both may not apply at one and the same time, that the Walsh-Healey Act was intended by Congress to apply to the employees of manufacturers engaged in producing munitions of war for the United States, and that under the Walsh-Healey Act liquidated damages and attorney fees may not be recovered by the employee.

It has been suggested that the National Defense Act of July 2, 1940, suspended the operation of the Fair Labor Standards Act and, a fortiori, the Walsh-Healey Act. The National Defense Act was passed in the interest of national defense, to provide for the production of war materials of all kinds necessary to the successful prosecution of the war. Summarized, it authorizes the Secretary of War to provide for the construction of plants and facilities for the development, manufacture, maintenance, and storage of military equipment, munitions and supplies, and to provide for the

purchase, manufacture, shipment, and storage of such supplies. It carries a provision that the regular working hours of laborers and mechanics employed by the Department of the Army, who are engaged in the manufacture, or production, of military equipment, munitions, or supplies, shall be eight hours per day or forty hours per week during the period of the national emergency and that overtime shall be compensated for at one and one-half times the regular rate of pay. But it contains a proviso, as heretofore noted, that no contract which would otherwise be subject to the provisions of the Walsh-Healey Act should be exempt therefrom merely because contracts entered into pursuant to the authority of the National Defense Act were made without advertisement. We have indicated above that we construe this latter proviso as a recognition by Congress of the continued effectiveness of the Walsh-Healey Act.

Our attention has been directed to our opinion in *Day & Zimmerman* v. *Reid*, 168 F.2d 356, as authority for plaintiffs' right to recover liquidated damages and attorney fees under the Fair Labor Standards Act. The defense interposed to plaintiffs' claim in that case was the Portal-to-Portal Act of 1947. The parties stipulated the amount due plaintiffs under the Fair Labor Standards Act, subject to a determination by the court of plaintiffs' right to recover that amount in view of the defense interposed under Section 9[9] and 11[10] of the Portal-to-Portal Act. The trial court construed and applied the Portal-to-Portal Act. Our review was limited to the correctness of the trial court's action in that regard. No question was raised concerning the application of the Fair Labor Standards Act, the Walsh-Healey Act, or the National Defense Act, and no such question was decided. That case is therefore no authority in the present case.

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[9] 29 U.S.C.A., Sec. 258.

[10] 29 U.S.C.A., Sec. 260.

Since the district court did not have jurisdiction of the cause under the Fair Labor Standards Act and since the Walsh-Healey Act does apply and plaintiffs may not maintain this action under the Walsh-Healey Act, the cause is reversed.

JOHNSEN, Circuit Judge, concurring separately.

On September 8, 1939, the President proclaimed the existence of a national emergency with respect to "the strengthening of our national defense within the limits of peace-time authorizations." Proclamation 2352, 3 CFR, 1939 Supp., pp. 59, 60.

The Congress took cognizance of the emergency and sought to "expedite" the strengthening of our national defense, by grants of additional powers to the President, the Secretary of War, the Secretary of the Navy, and the Secretary of the Treasury, "during the national emergency declared by the President * * * to exist," for the purpose of facilitating the obtaining of necessary implements, munitions, etc., for the military, naval, and coast-guard services.

Two measures, popularly known as the National Defense Acts, were enacted in June and July, 1940. The first of these, Act of June 28, 1940, 54 Stat. 676, ch. 440, 50 U.S.C.A. App. §1151 et seq., had relation primarily to the naval and the coast-guard services, but it contained the following general provision: "During the national emergency declared by the President on September 8, 1939, to exist, the provisions of the law prohibiting more than eight hours' labor in any one day of persons engaged upon work covered by Army, Navy, and Coast Guard contracts shall be suspended." 54 Stat. 678, 679, §5(b), 50 U.S.C.A. App. §1155(b). The second of the National Defense Acts, Act of July 2, 1940, 54 Stat. 712, ch. 508, 50 U.S.C.A. App.

§1171 et seq., 5 U.S.C.A. § 189a, had application to the War Department.

Under subsection (a) of §1 of this Act, the Secretary of War was given power, without the necessity of resorting to advertising, to provide, among other things, for the purchase or manufacture of military equipment, munitions, and supplies, and for shelter, "under such conditions as he may deem necessary." He was similarly empowered to purchase or to construct munitions plants, as well as to provide "Government-owned facilities at privately owned plants." Subsection (b) expressly authorized him to operate any such plants acquired or constructed and any facilities so furnished, "either by means of Government personnel or through the agency of selected qualified commercial manufacturers under contracts entered into with them." There was a further general provision in section 1, authorizing him to make such contracts or such amendments or supplements to existing contracts, "as he may deem necessary to carry out the purposes specified in this section."

These were extraordinary powers, intended to be granted for a limited period only, and designed to accomplish an emergency purpose. The scheme, which is involved in the present situation, of producing munitions in government-owned plants, "through the agency of selected qualified commercial manufacturers," on the basis of cost plus a fixed fee for carrying on the operations, with title to both the materials used and the products manufactured resting at all times in the United States, was admittedly a novel and revolutionary set-up in the field of American industrial life. The "Statement of Labor Policy," issued jointly by the War and Navy Departments on June 22, 1942, with the approval of the President of the American Federation of Labor and the Chairman of the Congress of Industrial Organizations, characterized it in this language: "The industrial units thus created are unique. * * * These plants

embody a new and tripartite relationship among Government, labor, and management."

The commercial operating agency was not economically affected by the production costs and so had no direct concern about the wages and overtime rates that might be paid in the plant. These questions therefore were matters which the Government of necessity was required to resolve. If it could be said to have been the intention of Congress to make the Walsh-Healey Public Contracts Act, 49 Stat. 2036; 41 U.S.C.A. §35 et seq., govern the hybrid relationship involved, the scale of minimum wages and the rate of overtime pay were matters over which the Secretary of Labor had generally the power of determination and control.

I can see some sound reasons to doubt that the National Defense Acts could have intended to permit of any possibility of a slowing of the Secretary of War's and the Secretary of the Navy's emergency defense efforts through a necessary resort to the normal processes of investigation, determination, etc. by the Secretary of Labor, as the latter would have the power to compel them to do under the Walsh-Healey Act. Moreover, Congress did not expressly declare that the unique, hybrid relationship, which it was permitting to be created as an emergency measure, was within the operation of the Walsh-Healey Act. In fact, it specifically refused to make a general declaration that all contracts made by the Secretary of War under section 1 of the Act of July 2, 1940, should be subject to the provisions of the Walsh-Healey Act. The Conference Committee Report on the Bill had contained the following statement. (Cong. Rec., Vol. 86, Part 8, p. 8901): "The conference agreement * * * provides that instead of all contracts under the section being subject to the provisions of the Walsh-Healey Act, no such contract which would otherwise be subject to such Act should be exempt from its provisions solely because it was entered into without advertising."

And pursuant to the conference agreement, section 1 of the Act, on final passage, was made to contain the simple proviso, "That no contract entered into pursuant to the provisions of this section which would otherwise be subject to the provisions of the (Walsh-Healey) Act * * * shall be exempt from the provisions of such Act solely because of being entered into without advertising pursuant to the provisions of this section."

Parenthetically, it may be observed that there, of course, would be contracts made by the Secretary of War, in fields apart from that of the operation of the government-owned munitions plants, which normally and regularly would be subject to the provisions of the Walsh-Healey Act, except as it might be sought to be contended that they had been taken out of the operation of that Act because they had been made without advertising. The proviso quoted above would preclude the making of any such argument.

Beyond the failure expressly to provide that the hybrid relationship involved in the operation of a government-owned munitions plant should be governed by the Walsh-Healey Act, the Act of July 2, 1940, as I have already pointed out, further used such terms in relation to the scope of the Secretary of War's contracting powers as, "under such conditions as he may deem necessary" and "as he may deem necessary to carry out the purposes specified in this section." If a test of these powers should have arisen in a situation indicating the impossibility or impracticality, in attempting to make prompt defense preparations, of having the wage scales and overtime rates fixed in these plants except by War Department action, I should doubt that any court would have difficulty in seeing in the nature and the language of the Act, as I have discussed them above, a reservoir of power in the Secretary of War so to act, independent of the wage and hour provisions of any other statute.

The Secretary of War's actions, under this concept of the statute, might perhaps be subject to the control of an Executive Order issued by the President, and, of course, they necessarily would be so after the War itself began in 1941. The only other limitation that probably would exist on the Secretary's power was the clear indication of a congressional policy to have overtime rates paid for work in excess of 40 hours per week, as reflected in the express command in section 4(b) of the Act, 5 U.S.C.A. §189a, applicable to any direct operation of defense plants by the Secretary of War himself, that "the regular working hours of laborers or mechanics employed by the War Department, who are engaged in the manufacture or production of military equipment, munitions, or supplies shall be eight hours per day or forty hours per week during the period of any national emergency declared by the President to exist: *Provided*, That under such regulations as the Secretary of War may prescribe, such hours may be exceeded, but compensation for employment in excess of forty hours in any workweek, computed at a rate not less than one and one-half times the regular rate, shall be paid to such laborers and mechanics."

But I do not think it necessary to discuss this aspect of the question further in the present case. Whether the Secretary of War had power generally under the Act of July 2, 1940, to fix wage scales and overtime rates and rights for the employees in the hybrid relationship involved in these munitions plants, as I have referred to above, without regard to the provisions of the Walsh-Healey Act, I agree that the provisions of the Walsh-Healey Act are in any event controlling of the employees' rights here. If the Secretary of War had such plenary powers under the Act of July 2, 1940, as I have discussed, the provisions of the Walsh-Healey Act are nevertheless controlling in the present situation, because the War Department, in its contract with the operator of the plant, specifically made

the provisions of that Act applicable to the wage and overtime rights of the employees, as the Secretary of War would have the right to do under the circumstances.

If the Act of July 2, 1940, did not give the Secretary of War such plenary powers in the defense situation as I have discussed, the Walsh-Healey Act, and not the Fair Labor Standards Act, still clearly is controlling here, as a matter of general application in the field involved. In the enactment of the Walsh-Healey Act, Congress, I think, intended to constitute such employees as would be engaged in producing supplies or goods directly for the Government under an express contract, as a special legislative class, and, through the force of the Government's contracting power, to control their hours of labor, their rate of minimum pay, and their overtime rights, to the extent that it deemed it necessary in this field. It did not relate its jurisdiction in the field to any test of commerce, and the question of commerce therefore, in my opinion, has nothing to do with the rights of the class.

The Walsh-Healey Act establishes a special and complete labor policy of its own. It is intended to prevent any working of a covered employee for more than eight hours a day or forty hours a week, except with the permission of the Secretary of Labor. 41 U.S.C.A. §35. Unless the Secretary of Labor permits overtime work to be done, the employer may not allow his employees to engage in any. If the Secretary permits overtime work, he has the right to fix the rate that shall be paid therefor, "which rate shall be not less than one and one-half times the basic hourly rate received by any employee affected." Id., §40. Minimum wages must be paid the employees of not less than the minimum wages as determined by the Secretary of Labor to be the prevailing minimum wages for persons employed on similar work or in the particular or similar industries or groups of industries currently operating in

the locality in which the materials, supplies, articles, or equipment are to be manufactured or furnished under said contract." Id. §35. Where the contracting party otherwise has been engaged generally in commerce or in the production of goods for commerce, his wage scale presumably will have met the standards prescribed by the Fair Labor Standards Act, but manifestly the minimum wages determined by the Secretary of Labor to be applicable in the performance of some Government contract may exceed the Fair Labor Standards Act's requirements.

The Walsh-Healey Act further specifically recognizes that special elements of public interest may exist in the performance of such a Government contract, which command consideration, and it accordingly empowers the Secretary of Labor to make exceptions or dispensations with respect to the provisions of the Act in necessary situations, "in the public interest or to prevent injustice and undue hardship" or where otherwise it might "seriously impair the conduct of Government business." Id. §40.

All of these provisions set up standards and requirements, which are without any relationship to the Fair Labor Standards Act. And an employee to whom the Walsh-Healey Act has application cannot claim the right to come generally under the Fair Labor Standards Act, for that would nullify the power of the Secretary of Labor to exercise his judgment with respect to some of the elements which Congress recognized that he might find necessary to give consideration to, in the practical performance of, or in meeting a public need under, a Government contract.

The employees here predicate and seek to recover overtime rights on the basis of the Fair Labor Standards Act. But whatever rights they may have had in the situation, as I have pointed out, are derived from the Walsh-Healey Act, under the contract incorporating its provisions, and

not from the Fair Labor Standards Act. The incongruity of their attempt to invoke the Fair Labor Standards Act is readily apparent, I think, when the fact is taken into account that, under the Walsh-Healey Act, there could be no overtime work unless the Secretary of Labor gave his permission thereto, and that, except during the existence of Executive Order No. 9240, dated September 9, 1942, 7 F.R. 7159, as amended by Executive Order No. 9248, dated September 17, 1942, 7 F.R. 7419, which, as a war measure, limited all overtime payments in industries related to the prosecution of the war to not more than one and one-half times the regular wage rates, the Secretary of Labor, as a condition of granting such permission, could require the payments of overtime rates in excess of this amount, if he saw fit. The situation under the Walsh-Healey Act therefore was not one that was subject to the automatic overtime rate of the Fair Labor Standards Act. And whether overtime rights stemming from the Walsh-Healey Act might have been fixed in some situation at one and one-half times, or double, or treble, the regular wage scale, there would be no more right in the one case than in the others to use the Fair Labor Standards Act as a vehicle for their collection.

It must be remembered that Congress provided the Walsh-Healey Act with its own system of sanctions and procedure for accomplishing the objectives and vindicating the rights which it was intended to establish. That the Walsh-Healey Act does not permit of a direct suit by an employee on the contract between the Government and the employer may be an argument sentimentally in favor of why the Fair Labor Standards Act ought to apply, but it is hardly sound rationale legally for holding that it does. Nor does the fact that the munitions produced may have been shipped in interstate commerce weigh in favor of the application of the Fair Labor Standards Act, as against the inexorable fact that the Walsh-Healey Act stands as a

special statute, for a specific class, involving indicated factors of consideration in public interest and governmental functioning, not made applicable to the general field of the Fair Labor Standards Act, and to which the commerce test therefore has no relation.

It might further be observed that, if Congress had intended the employees of the approximately 100 government-owned munitions plants, that were established, to have rights beyond those granted by the National Defense Acts or the Walsh-Healey Act, and to be able generally to recover double damages and attorneys' fees, it hardly seems reasonable to suppose that it would have left the situation so that those working in some plant, which might by chance be making guns, ammunition, or other supplies entirely for use at some training camp or on some rifle or artillery range, existing within the same state where the plant was located, would be precluded from such benefits on the basis of a commerce test, when it had the power, and there would seem to be no reason not, to have treated them equally with the employees of other such munitions plants. It might also be added that, if the Secretary of War had no such plenary powers under the Act of July 2, 1940, to fix wage rates and overtime rights, as I have initially suggested, but he was required to act in relation to such other statutes as existed and to guide his actions by whichever was applicable, the provision which he made in the contract, subjecting it to the obligations under the Walsh-Healey Act and not the Fair Labor Standards Act, could properly be viewed as an administrative interpretation and accorded the weight to which it normally would be entitled, in the emergency situation in which it was necessary for him to resolve the question and to act.

I can see no basis for any right in the situation to maintain an action under the Fair Labor Standards Act, and I agree that the suit should be dismissed.

Sanborn, Woodrough and Riddick, Circuit Judges, besides joining in the Court's official opinion, concur also in the foregoing separate opinion.

[fol. 34] (Judgment.)

United States Court of Appeals

Eighth Circuit.

March Term, 1949.

Tuesday, April 12, 1949.

Julia Rhoda Aaron and all other plaintiffs and interveners listed in the Complaints and Interventions in the District Court in Civil Action No. L. R. 1584 Consolidated, Appellants,

No. 13,660. vs.

Ford, Bacon & Davis, Incorporated.

Appeal from the United States District Court for the Eastern District of Arkansas.

This Cause came on to be heard on the record from the United States District Court for the Eastern District of Arkansas, and on motion of appellee to tax against appellants the cost of printing supplemental record, and was argued by counsel.

On Consideration Whereof, It is now here Ordered and Adjudged by this Court that said motion to tax costs be, and the same is hereby, denied.

And It is Further Ordered and Adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed.

April 12, 1949.

[fol. 35] (Motion of Appellants for Stay of Issuance of Mandate.)

The above named appellants respectfully represent to the Court that on April 12, 1949, this Court rendered and filed its opinion in the above entitled cause, in connection with its opinion rendered and filed on the same date in the cause of The United States Cartridge Company, a corporation,

appellant, vs. R. M. Powell, et al., appellees, wherein the Court affirmed the order of the District Court for the Eastern District of Arkansas, Western Division, which dismissed the plaintiffs' complaints.

Appellants are now preparing a petition to the Supreme Court of the United States for a writ of certiorari in said cause, and have given directions to the Clerk of this Court to prepare the necessary record to accompany said petition.

Wherefore, the appellants pray that the Court enter an order staying the mandate in the above cause pending their application to the Supreme Court of the United States for a writ of certiorari.

Respectfully submitted,

CHARLES H. EARL,

PAUL TALLEY,

WAYNE W. OWEN,

COOPER JACOWAY,

GERLAND P. PATTEN,

JUNE P. WOOTEN,

Attorneys for Appellants,
By June P. Wooten

(Endorsed): Filed in U. S. Court of Appeals, Apr. 27, 1949.

[fol. 36] (Order Staying Issuance of Mandate.)

March Term, 1949.

Wednesday, April 27, 1949.

On Consideration of the motion of the appellants for a stay of the mandate in this cause pending a petition to the Supreme Court of the United States for a writ of certiorari, It is now here ordered by this Court that the issuance of the mandate herein be, and the same is hereby, stayed for a period of thirty days from and after this date, and if within said period of thirty days there is filed with the Clerk of this Court a certificate of the Clerk of the Supreme Court of the United States that a petition for writ of certiorari,

record and brief have been filed, the stay hereby granted shall continue until the final disposition of the case by the Supreme Court.

April 27, 1949.

[fol. 37] (Clerk's Certificate.)

United States Court of Appeals

Eighth Circuit

I, E. E. Koch, Clerk of the United States Court of Appeals for the Eighth Circuit, do hereby certify that the foregoing contains Record as printed by appellants and Supplemental Record as printed by appellee on which the appeal from the United States District Court for the Eastern District of Arkansas was heard in said Court of Appeals, and full, true and complete copies of the pleadings, record entries and proceedings, including the opinion, had and filed in the United States Court of Appeals, except the full captions, titles and endorsements omitted in pursuance of the rules of the Supreme Court of the United States, in a certain cause wherein Julia Rhoda Aaron and all other Plaintiffs and Interveners Listed in the Complaints and Interventions in the District Court in Civil Action No. L. R. 1584 Consolidated, were Appellants, and Ford, Bacon & Davis, Incorporated, was Appellee, No. 13,660 in the United States Court of Appeals.

And I do further certify that there is included in the foregoing transcript a copy of the Opinion of the United States Court of Appeals for the Eighth Circuit filed April 12, 1949, in the case of The United States Cartridge Company, a corporation, Appellant, vs. R. M. Powell, et al., Appellees, No. 13,663, referred to in the opinion in the instant case.

[fol. 38] In Testimony Whereof, I hereunto subscribe my name and affix the seal of the United States Court of Appeals for the Eighth Circuit, at office in the City of St. Louis, Missouri, this 28th day of April, A. D. 1949.

E. E. KOCH,
Clerk of the United States Court of Appeals for the Eighth Circuit.

(Seal)

[fol. 39] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed June 27, 1949

The petition herein for a writ of certiorari to the United States Court of Appeals for the Eighth Circuit is granted. The case is assigned for argument immediately following Creel vs. Lone Star Defense Corporation, No. 746, October Term, 1948.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

(3416)

LIBRARY
SUPREME COURT, U.S.

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1949

No. 58

ROY CREEL, ET AL., PETITIONERS,

vs.

LONE STAR DEFENSE CORPORATION

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

PETITION FOR CERTIORARI FILED APRIL 21, 1949.

CERTIORARI GRANTED JUNE 6, 1949.

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CAPTION.

BE IT REMEMBERED, that on the 3rd day of May, 1946, in the District Court of the United States for the Eastern District of Texas, in the Fifth Circuit, before the Honorable Randolph Bryant, presiding judge of said court, the following proceedings were had, at Sherman, Texas, in the case of Roy Creel, et al. vs. Lone Star Defense Corporation, Civil Action No. 191, which cause was pending in said court, the said cause having been transferred by order of court from the District Court of Bowie County, Texas to the Texarkana Division of said court, to-wit:

Style of cause:

ROY CREEL, ET AL.,
Plaintiff,

versus

LONE STAR DEFENSE CORPORATION,
Defendant.

2

REMOVAL ORDER.

In the District Court of Bowie County, Texas.

Roy Creel, et al.,
vs. No. 05137-A.
Lone Star Defense Corporation.

On this the 3 day of Dec., 1945, came on to be heard the petition of the defendant, Lone Star Defense Corporation, for the removal of the above styled and numbered

cause to the District Court of the United States for the Eastern District of Texas, Texarkana Division at Texarkana, Texas, and it appearing to the Court that said cause is one proper to be removed by said defendant, and that said petition is sufficient in law, and that said defendant Lone Star Defense Corporation, has filed therewith a bond conditioned as required by law, with good and sufficient surety. and that written notice of said petition and bond was given to the plaintiff, prior to the filing of same, in the manner and form required by law,

It Is Therefore Ordered by the Court that said petition and bond be and they are hereby approved by the Court and that said cause be, and the same is hereby removed to the District Court of the United States for the Eastern District of Texas, Texarkana Division at Texarkana, Texas, and that this Court proceed no further herein. and that the Clerk of this Court forthwith make up a certified copy of the record and proceedings in said cause for use in the District Court of the United States, and deliver the same to the Attorneys for the Defendant, Lone Star Defense Corporation.

Before the action of the Court on the petition and bond for removal, plaintiff's objections and exceptions to removal were overruled and plaintiff's except.

N. L. DALBY,
Judge of the District Court of
Bowie County, Texas, Presiding.

Indorsed: No. 05137-A. In the District Court of Bowie County, Texas. Roy Creel, et al. vs. Lone Star Defense Corporation. Removal Order. Filed Dec. 3, 1945. Sam Minnick, Dist. Clerk, Bowie County, Texas. Ora Corley, Deputy.

PLAINTIFF'S AMENDED COMPLAINT.

In the District Court of the United States, Eastern District of Texas, Texarkana Division.

Roy Creel, et al.,
vs. Civil No. 191.
Lone Star Defense Corporation.

To said Honorable Court:

Roy Creel, plaintiff, for his Amended Complaint, served before the defendant has answered herein, alleges:

I.

The plaintiff brings this suit for himself individually, and for and on behalf of and for the use and benefit of the following named persons, some of whom reside in Bowie County, Texas, and some of whom reside in the State of Arkansas, all of whom were employed by the defendant, and who will hereinafter be referred to as employees, to-wit:

Joe Adkins; Lamar Allen; Marion Ellis Allen; R. A. Anderson; Verdie M. Anderson; William B. Adams; H. D. Alston; Augustus Atkins; Gorea Allen; John J. Allen; J. E. Abercrombie; C. A. Anderson; Bill Abott;

James C. Brazell; James P. Barnes; A. C. Black; Robert S. Brown; Angeline J. Brown; Cephas Bacon; Fred Butler; Roy Brown; H. F. Bearding; Jessie Brown; Willie Bonner; Oscar J. Boddie; Roy L. Balmain; L. W. Birtcher; Henry Britt; W. R. Bateman; Thomas L. Brown; F. F. Barnett; A. M. Birtcher; Homer F. Bearden; Henry Boother, Jr.; Leroy Banks; Alom Brados; Veasey C. Buttram; Andrew Robert Brown; Jewell E. Bolden; Lush Brown; William

H. Byrd; Robert Brown; S. C. Banks; Roy Birdwell; Ben Bell; Zarrer Becks; James Braxton; Edward L. Brooks; Jewel L. Beck; R. V. Branum; Robert E. Bares; Robert Booth; P. B. Block; Virgil L. Bettes; Joseph F. Bayless; Curtis Briley.

Dillard W. Cooley; Homer E. Conger; Henderson C. Chesshir; Merrill C. Clayton; C. G. Compton; Henry C. Clement; Odis F. Clements; I. Z. Compton; James Collins; Samuel B. Cheatham; David L. Campbell; Malon Compton; W. D. Car; Thomas E. Carver; J. C. Cabaniss; W. A. Colliums; Morris Clements; Joe J. Clayton; James L. Chance; L. W. Collom; Ernest E. Cabaniss; Willie B. Chelf; Willie D. Carroll; Loyd Chatman; Wayland W. Clark; Paris Chapple; Alonzo Caldwell; William Crockett; Jolly C. Crocker; John Henry Cooper; Roosevelt Cheatham; Raymond Herbert Chasteen; Louis L. Caver; Thomas N. Coopwood;

W. A. Duncan, Sr.; Russell E. DeVance; Francis N. Dodson; Lee Erter Davis; F. C. Davis; M. D. Dickerson; H. T. Dogen; Harold Dodson; M. E. Dalton; Charlie L. Drake; Elemo Durham; B. W. Dupree; J. K. Daniels; Roosevelt Dickerson; Johnnie Donnell; Willie Dunn; Odis L. Dill; Jim Daniels; Rayfield Davis; Virgil A. Davis; Jimmie Jacob Durham;

Felton Epps; Samuel R. Edmonson; J. Elliott; Howard Edwards; Osker L. Evans; Mattie E. Ellis; Robert E. Elam;

Archie M. Fields; Theopris Fisher; Quincy W. Foshee; Clance Frinch; Lee Foster; Samuel L. Franklin; Albert Fedrick;

James W. Gholson; L. P. Garner; Aubrey F. Graves; T. A. Galbalth; Hershel Grant; Bernice Golden; William

M. Grant; Clarence D. Gantt; George Greer; Sam T. Gullion; F. L. Gaulden; Ozay Garner; Edgar L. Goodroe; James Germany; Conway Garrison; Earnest Grundy; Hugh O. Green; Nathaniel Graham; Elvin Graves; Elone Green; Zack T. Griffen; Edwin R. Gossett; William M. Green; John W. Green;

Raymond Hidgeons; Haskell T. Haynes; Ted Harvey; James G. Hollins; Willie R. Henderson; Maurice Howell; Will Hubbard; Preston Hilburn; Virgie Hatley; Bernice Henderson; Walter U. Harris; Arvel Haskins; J. E. Hargis; W. C. Hill; Clyde House; E. D. Hyman; Claud Harden; Clarence E. House; Raymond W. Huffman; C. L. Hood; Gerald B. Hoffman; M. T. Hooser; Hulie S. Hubbard; Nathan Haywood; Kermit R. Halton; Grover C. Heath; Webber Hawkins; Preston Hervey; Jesse T. Hightower; David Hawkins; Curtis Heath; Rastus G. Henderson; J. C. Hadley; Albert Hutchinson; John W. Heath; Joe Henderson; Henry Hollins; Avance Haskins; George Harmon; Olgie C. Houston; Gradie T. Hufstetler;

Houston C. Johnson; J. O. Jones; O. L. Johnson; Jewel Jones; Herbert Johnson; Robert Johnson; John H. Jackson; H. E. Jones; Morris S. James; Geo. W. Jenkins; M. C. Jiles; Johnnie Johnson; Walter M. Johnson; Paul Jones; Shelie James; L. V. Johnson Charley Johnson; Fred Jackson; Ike Jones; Edgar L. Jaggers;

Niven S. Kyles; Thomas Knight; Oscar L. Knight; Roy King; Judge Kenner; Willie B. Kenner; Clamon Knight; John Kinsey; James A. Kingston;

William A. Lee; Zaniel D. Lynn; Roosevelt Lilliard; Jeff E. Lewis; Jessie Lewis; Foster Lowers; Conraid Leonard; C. E. Lonsens; C. R. Lemley; M. L. Lemley; Jessie L. Lewis; Bennie Lockett; Henry P. Livingston; Henry Lucker;

Luther D. Litton, Jr.; Castle B. Lane; Martin Lincoln; Tom Love;

R. D. Marlar; Joe M. McPherson; James F. Moore; Dock J. Mack; Johnnie Modloer; Lee Maxwell; Jim McDuff; Lawrence D. May; Clarence H. Morgan; Horace M. Millaway; T. B. McGorry; R. H. McClurg; James O. Miller; T. C. May; Paul S. Morgan; James H. McGee; Glen W. Moore; Willie H. Miles; Frank S. McCoy; H. W. Morgan; James Martin; L. V. Munson; Sam Mitchell, Jr.; Jack McFarland; Ival L. McLarty; Joseph W. Meers; O. D. Miller; Willie Mershell; Lawson Muldrew; W. R. McDaniel; Travis McDougal; Marion Martin; W. F. Mitchell; Clarence Mitchell; Arthur Moreane; Roy Moreane; Johnny Morine;

Thomas R. Newsom; Garland A. Nottingham; C. C. Norris; Allen D. Nash; Thomas Norton; G. D. Nugam; Minion Neal; Sam Neal; Lucille E. Neal; Roscoe C. Nowlin;

Edgar B. Owens; Prentice Oliver; P. D. Oliver;

John Perkins; Murray F. Phillips; Hursel Perry; H. E. Payne; Norman L. Parker; Herbert A. Power; Lige W. Pettigrew; Bryan E. Pettigrew; Jessie B. Parks; Will Pennington; Sidney Parker; Fred Powell; Jim Pickins; Mitchell M. Paxton; Tom Paxton; Joseph A. Pierce; Jessie B. Parks;

Dean Quada;

Arthur H. Reynolds; Hery J. Rolf; John D. Richie; Robert C. Robinson; Marvin A. Rogers; Geo. F. Raulston; Sam E. Roper; Mose Rhymes; Will Richardson; Jewel Reeves; William R. Rogers; Joe B. Rains; Wm. H. Runyan;

John Rike; J. D. Reece; Henry Rose; Janie W. Roberson; Austin M. Rattler;

Alfred G. Sullivant; R. E. Strube; M. D. Stewart; W. C. Sutton; Jim C. Story; Frank Smith; Lafayette Smith; Riley A. Stafford; Essie L. Stewart; Pauline Simmons; John H. Slimer; Perry Steger; Roy Steger; Stephen W. Salisbury; David Stephens; Thomas Stephens; Jeff C. Sims; O. L. Stone; John L. Sullivan; H. M. Short; Jim Stewart; J. T. Smith; Joe Sears; K. A. Scantland; Kenneth A. Stringer; Harlan Sexton; John M. Spencer; Glynn Stephens; Ed Smith; Leonard A. Simmons, Jr.; Freeman Sanders; R. T. Strongs; John A. Smith; Fred Smith; J. R. Striplin; Henry Stanmore; Sam B. Sims; O. J. Skinner; George Satterwhite; James H. L. Shelton; Enoch Smith; Audrey M. W. Stanmore; Vernon Stanmore;

William A. Teer; Albert L. Thornhill; Owen F. Townsend; Elton Turner; E. L. Tutt; B. G. Taylor; Mart Thompson; Bishop Tyson; Jeffie Gerard Thomas; Leroy Terry; Wyven E. Tate; Copeland Thompson; Buse E. Tong; Otis L. Tong;

James C. Underwood;

Floyd F. Walker; Norman E. Westmoreland; Emmit Warren; Howard Warren; James D. Waters; George Walker; Green E. Williams; Bratten Warren; Sylvester Washton; Jeffery Washington; Lowell P. Wright; Marion Washington; Ber J. Williams; Tom Williams; Ruben Walker; W. E. Whited; W. B. Womack; Oswell Wells; Louis H. Williams; Harold Whitley; Everett Wells; John C. Wilson; L. F. Wright; V. J. Waters; L. H. Williams; James O. Wallace; James R. Watlington; Rufus W. Welborn; Leonard P. Williamson; Arthur Williams; Roy Wrather; Melvin Winters; A. J. Warren; John L. Watts; Buck Walker; Gus W. War-

ren; Lovic H. White; George Warren; W. M. Wilbanks; Leroy Warren; Lewis F. Walter; John Henry Winscher; Luke Wilson; Barix Walker; Ruth Watts Wells; Bryant H. Williams; Reather Witherspoon; Vernel Williams; Joseph White; Nurell Willis; Sam Walker; Arthur Williams;

W. L. Yates; Walter L. Yates; Joe W. Yancy; W. W. Young; Ollie Young;

Gordon R. Bell; Clarence W. Brewer; M. L. Collins; Horace Clements; Alton B. Collins; William B. Clawson; Phillip B. Chalker; A. B. Doss; C. C. Green; Charlie Green; Tom H. Harris; George W. House; R. L. Janson; Paul H. Keith; Clem L. Lamb; Curtis McClure; Jessie J. Nichols; Willis G. Rogers; Raphiel Spencer; Tom W. Shaddix; T. R. Thigpen; E. S. Thigpen; J. H. Watkins;

The plaintiff alleges that he and each of said employees have a cause of action against the defendant arising out of their employment, for overtime wages due them under the provisions of the Fair Labor Standards Act of 1938, as amended; and the plaintiff brings this suit for himself and for and on behalf of and for the use and benefit of each of said employees to recover such overtime wages due them and each of them and for liquidated damages, and attorneys' fees, all under the provisions of the said Fair Labor Standards Act of 1938, as amended; the plaintiff alleges that the amount due to him and to each of said employees is in excess of the sum of One Thousand ($1000.00) Dollars each.

II.

That the defendant, Lone Star Defense Corporation, is a corporation duly organized and existing under and by

virtue of the laws of the State of Ohio, but having a permit to do business in the State of Texas, and is authorized and does engage in business in Bowie County, Texas, where service of citation in this cause may be had.

III.

At all times hereinafter mentioned, the defendant was engaged in the manufacture, production and processing of goods, for interstate commerce at or near Texarkana, Bowie County, Texas; that during the times herein mentioned, the defendant owned, operated and maintained an ordnance plant and establishment in said County and State where it manufactured, produced and processed ammunition and other goods intended for interstate commerce, during the period of plaintiff's and of each employee's employment. Subsequently, all of the goods manufactured by the defendant during the times hereinafter mentioned were produced for interstate commerce and were sold, offered for transportation, transported, shipped and delivered in interstate commerce from the defendant's plant near Texarkana, Texas, to various points outside the State of Texas.

IV.

During the work weeks beginning August 1, 1941, and ending on the date of the filing of this petition, defendant employed plaintiff and each and all of the above named employees, at various times, as well as various other persons in the manufacture, production and processing of ammunition and goods for interestate commerce. The goods produced by plaintiff and such employees during such periods were produced for interstate commerce and sold, offered for transportation, transported, shipped and delivered in interstate commerce from defendant's plant

in Bowie County, Texas, to points outside the State of Texas.

V.

In such business defendant from August 1, 1941, to the date of the filing of this petition, employed the plaintiff and each of the said employees, in various capacities in said plant. Some of such employees, including plaintiff, were employed as truck drivers and lift-fork operators and others were employed as loaders and unloaders in what was commonly known and designated by said defendant as Departments Nos. 1400 ad 1350, being known as the Warehouse and Transportation Departments and also Plant Maintenance Department of the defendant. The functions performed by the plaintiff and each of said employees were an essential part of the production of ammunition and goods for commerce as that term is defined by the Fair Labor Standards Act of 1938, as amended, and such operations are and were necessary to the completion of such goods. Subsequently, such ammunition and goods were shipped outside the State of Texas.

VI.

The plaintiff alleges that he and each of said employees, during the time of their respective employment with the defendant and during such periods aforesaid were employed for work weeks longer than the applicable maximum number of hours under Section 7 of the Act, and defendant failed and refused to compensate them and each of them for such employment in excess of such applicable maximum in such work weeks at rates not less than one and one-half (1½) times the regular rates at which they and each of them were employed. The employment of the plaintiff and each of said employees for work weeks

in excess of the applicable maximum under Section 7 of the Act, without compensating them and each of them, for such excess hours at rates not less than one and one-half (1½) times the regular rates at which they and each of them were employed, was in violation of Section 7 of said Act.

VII.

The plaintiff and each of the said employees aver that during the time of their employment with the defendant, they did and performed work and labor for it, in excess of forty (40) hours per week for which they have not been compensated; that neither they nor any of them, have a complete record of the work and labor performed by them while employed by the defendant; the defendant has an accurate and complete record of each and every hour worked by the plaintiff and by each employee, and the wages paid or purported to have been paid by the defendant, which said record is in the exclusive possession of the defendant, not subject to the inspection of the plaintiff, nor of said employees. Said records will reflect the hour at which the plaintiff and each of said employees clocked in for their work, and the hour at which they clocked out, and will show that the plaintiff and each of said employees put in not less than thirty minutes overtime each day in their employment with defendant; and said records will also show the number of hours for which the defendant paid the plaintiff and each of the said employees, and that the defendant is justly due and owing to the plaintiff and each of said employees overtime compensation for not less than thirty minutes per day for each day they worked for the defendant. Said records will also show the rate of pay per hour for each hour or regular employment during a forty-hour week, and the overtime compensation due the plaintiff and each of said employees would be one and

one-half (1½) times the regular hourly rate for each hour of overtime worked by the plaintiff and each of said employees. They and each of them are entitled to recover from the defendant for each hour of overtime labor done and performed by them under the terms of the Fair Labor Standards Act in excess of forty (40) hours per week. They and each of them are unable to calculate the accurate amount which the defendant owes them and each of them for the reason that the time-clock records and other records of such overtime hours and rate of pay are in the sole and exclusive possession of the defendant; and the defendant should be required to prepare and return into Court an itemized statement showing the number of overtime hours reflected by the time-clock records kept by the defendant for the plaintiff and each of said employees, the rates of pay for regular work on a forty-hour week basis for each respective period, and the changes in such rates of pay from time to time with the number of overtime hours as shown by the time-clock records during each respective period where there was different compensation per hour.

Plaintiff alleges that he and each of said employees are entitled to overtime compensation against the defendant for liquidated damages in a sum of money equal to the overtime compensation due to plaintiff and to each of said employees, and to reasonable attorneys' fees upon each separate and individual claim herein presented, and for said compensation, liquidated damages and attorneys' fees, the plaintiff brings this suit.

Wherefore, premises considered, plaintiff, for himself, and on behalf of and for the use and benefit of each of said employees, the defendant having been duly cited to appear and answer herein for the length of time and in the manner required by law, prays that the defendant be required to prepare and return into Court the reports

herein called for; and that the plaintiff, for himself and for each of said employees have judgment against the defendant for their overtime compensation, together with liquidated damages and reasonable attorneys' fees, as provided by the Fair Labor Standards Act; for costs of suit, and for such other and further relief, general and special, legal and equitable, as they may show themselves justly entitled to receive.

LINCOLN, HARRIS &
KENNEDY,
By C. M. KENNEDY,
(C. M. Kennedy),
Attorneys for Plaintiff.

The above and foregoing amended complaint was served upon Defendant by mailing a true and correct copy thereof to Wheeler & Atchley, Attorneys of Record for Defendants, at their correct address in Texarkana, Texas, this the 5th day of February, 1946.

LINCOLN, HARRIS &
KENNEDY,
By C. M. KENNEDY,
(C. M. Kennedy),
Attorneys for Plaintiff.

Filed Feb. 6, 1946.

AMENDMENT TO AMENDED COMPLAINT.

12 (Title Omitted.)

To said Honorable Court:

Now comes Roy Creel, with leave of the Court had and obtained in open Court, and files this amendment to his amended complaint, and for such amendment says:

I.

The plaintiff Roy Creel brings and maintains this suit for and in behalf of himself and all other employees named in Paragraph Numbered I of his Amended Complaint, he and all other of said employees being similarly situated; and said employees named in Paragraph Numbered I of his Amended Complaint have designated him as their agent to bring and maintain this suit for and in behalf of said employees, all of whom, together with himself, are similarly situated.

II.

In the alternative, if it be held by the Court that this action may not be maintained by the plaintiff in the capacity stated in his Amended Complaint, and in Paragraph Numbered I of this Amendment, then and in that event only this suit is brought and maintained by the plaintiff Roy Creel and by all other employees named in Paragraph Numbered I of his Amended Complaint as individual plaintiffs; and in such event the plaintiff Roy Creel and all other employees named in Paragraph Numbered I of said Amended Complaint pray that judgment be rendered for them and each of them in their individual capacities as plaintiffs for all overtime com-

pensation, penalties, damages, attorneys' fees and costs alleged and sued for in said amended complaint.

(S.) C. M. KENNEDY,
(C. M. Kennedy)
LINCOLN, HARRIS &
KENNEDY,
Attornys for Plaintiffs.

312 P. & M. Building,
Texarkana, Texas.

The above and foregoing amendment to Plaintiffs' amended complaint was served upon Defendant by mailing a true and correct copy thereof to Wheeler & Atchley, Attorneys of Record for Defendants, at their correct address in Texarkana, Texas, this the 3rd day of May, 1946.

LINCOLN, HARRIS &
KENNEDY,
(S.) C. M. KENNEDY,
By C. M. KENNEDY,
Attorneys for Plaintiffs.

Filed May 3, 1946.

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14 DEFENDANT'S ANSWER.

Filed Jan. 8, 1947.

(Title Omitted.)

To said Honorable Court:

The defendant, Lone Star Defense Corporation, for its answer herein, says:

I.

The facts alleged in Plaintiffs' Original Petition, the amended pleadings and Bill of Particulars, are not true as

alleged, and the defendant denies such facts in their entirety.

II.

Defendant says that plaintiffs' causes of action, if any they have or ever had, which is not admitted but is denied, accrued more than two years prior to the institution of this suit, and the same are barred by the Two Year Statute of Limitations (Article 5526, R. C. S.) of the State of Texas, which defendant now pleads in bar thereof.

III.

Defendant has paid plaintiffs all moneys which it owed them for the services performed by them for defendant, in accordance with their contract of hire, and all laws, statutes, and lawful regulations issued pursuant thereto, as applied to the plaintiffs and their employment with defendant, and the sums of money paid plaintiffs by defendant, were sums greater in amount and in excess of the sums of money which this defendant would have been required to pay them, and which they would have been entitled to receive, under the Fair Labor Standards Act, had said Act been applicable to defendant and plaintiffs' employment with it.

IV.

Defendant alleges that during the times plaintiffs were employed by it, that neither plaintiffs nor defendant were engaged in commerce, or in the production of goods for commerce, within the meaning of the Fair Labor Standards Act, because the defendant was operating a United States Government-owned Ordnance Plant upon a cost-plus-a-fixed-fee basis for the United States Government in load-

ing and assembling ammunitions from parts, explosives, components, and materials owned by the United States Government after their delivery into the actual physical possession of the United States Government, the ultimate consumer thereof, which Government of the United States, the ultimate consumer thereof, was not a producer, manufacturer, or processor thereof.

V.

The provisions of Sections 6 and 7 (Articles 206-207 of Title 29, U. S. C. A.) of the Fair Labor Standards Act, did not and do not apply with respect to the plaintiffs named in this paragraph during the period of time set opposite their names, each respectively, because during the period of time set opposite their names, as aforesaid, they, each respectively, were employed by defendant in a bona fide executive, administrative or professional capacity, as such terms are defined and delimited by regulations of the Administrator of the Fair Labor Standards Act, and therefore are exempt under Section 13 (a)(1) of said Act; the names of the plaintiffs whose employment, and the work performed by them, each respectively, were exempt under said Act, as in this paragraph alleged, and the period of their employment during which they, each respectively, were so exempt, are as follows. to-wit:

Area Warehouse Foremen.

Name	Period of Employment From	To
Lige W. Pettigrew	12-11-1944	8- 6-1945

Building Foreman.

Green E. Williams	6-29-1942	2- 7-1944

Chief Scheduler.

Name	Period of Employment From	To
M. L. Collins	10- 9-1944	8-23-1945

Foremen, Truck Dispatchers.

B. J. Reed	7-17-1944	8- 6-1945
Ruel [redacted] Jansen	4- 9-1945	4-28-1945

Group Leader-Porter Service.

Jeffie G. Thomas	4-10-1944	8-31-1945

Inspection Supervisor.

Green E. Williams	7-24-1944	9-25-1944

Safety Inspector.

Herbert A. Power	1-25-1943	2-20-1943

Shipping Foremen.

Edgar L. Goodroe	8-14-1944	6- 9-1945
E. W. Sexton	9-20-1943	6-25-1945

Sub-Foremen.

Edwin R. Gossett	11- 6-1955	12- 4-1944
Lovic H. White	11- 6-1944	1- 1-1945

Truck Dispatcher.

B. J. Reed	6-21-1943	7-17-1944

Warehouse Foreman.

Lige W. Pettigrew	10-16-1944	12-11-1944
	8- 6-1945	8-29-1945

Wherefore, defendant prays that plaintiffs take nothing, and that this cause be dismissed.

OTTO ATCHLEY,
(Otto Atchley),
WHEELER, ATCHLEY & NEWBERRY,
Attorneys for Defendant.

700 Texarkana National Bank Building,
Texarkana, Texas.

Dated: Jan. 7, 1947.

The above and foregoing Answer of the Defendant was served upon the plaintiffs in this cause by mailing a true and correct copy thereof to Messrs. Lincoln, Harris & Kennedy, Attorneys of Record for said plaintiffs, to their address in Texarkana, Texas, on the date last above shown.

OTTO ATCHLEY,
(Otto Atchley),
One of Defendant's Attorneys.

17 AMENDED ANSWER.

Filed May 24, 1947.

(Title Omitted.)

To said Honorable Court:

The defendant, with leave of the Court first obtained, files this, its amendment to its answer herein, by adding thereto the defenses asserted in the following paragraphs:

I.

Further answering, if required, defendant alleges that the activity or activities alleged by plaintiffs to have been engaged in by them, which are made the basis of this suit, were not compensable under an express provision of any written or unwritten contract in effect at the time of such activity or activities between the plaintiffs on the one hand, and the defendant on the other; nor were such activity or activities compensable by any custom or practice in effect at the time thereof, in the establishment or other place where such plaintiffs were employed.

II.

Further answering, if required, defendant alleges that any act or acts, omission or omissions, complained of by plaintiffs herein in their pleadings, the truth of their allegations with respect to which are not admitted but are expressly denied, were in good faith, and in conformity with, and in reliance on administrative regulations, orders, rulings, approvals and/or interpretations of agencies of the United States, and in conformity with and in reliance on administrative practices and/or enforcement policies of agencies of the United States with respect to the class

of employers to which this defendant belonged during plaintiffs' employment by it.

III.

Further answering, this defendant alleges that the act or acts, omission or omissions, if any, which are not admitted but expressly denied, giving rise to this suit, were in good faith, and defendant had reasonable grounds for believing that its such act or acts, omission or omissions, if any, were not a violation of the Fair Labor Standards Act of 1938, as amended.

Wherefore, defendant prays as in its original answer.

OTTO ATCHLEY,
(Otto Atchley),
WHEELER, ATCHLEY & NEWBERRY,
Attorneys for Defendant.
700 Texarkana National Bank Building,
Texarkana, Texas.

Dated: May 23, 1947.

The above and foregoing answer was served upon plaintiffs by mailing a true and correct copy thereof to Lincoln, Harris and Kennedy, attorneys of record for plaintiffs, at their correct address in Texarkana, Texas, on the date last above written.

OTTO ATCHLEY,
(Otto Atchley),
One of Defendant's Attorneys.

ORDER FOR BILL OF PARTICULARS.

19 (Title Omitted.)

This cause came on for hearing on defendant's Motion for Bill of Particulars, and the Court being fully advised,

It is ordered that all plaintiffs and interveners in this cause, within 60 days after service of a copy of this order, service and file a Bill of Particulars of and as hereinafter directed with respect to the following matters:

The term "wage rate", as used herein, refers to the regular or base rate of compensation received by hourly and monthly salaried employees.

The term "work week", as used herein, means the period of time commencing Sunday at 12:00 o'clock P. M. midnight and ending Sunday at 12:00 o'clock P. M. midnight of the following week, except as to those employees working in the Fire Department under the two-platoon system, during which time the term "work week" refers to the period of time starting at 8:00 o'clock A. M. Monday and ending at 8:00 o'clock A. M. Monday in the following week.

I.

Each plaintiff and intervener, respectively, shall allege specifically his wage rate during each particular week worked during the period from August 1, 1941, to the date suit was filed therefor, and to allege with particularity the amount of wages due plaintiffs and each intervener, respectively, for each particular work week, that is, with particularity as regards the total number of hours worked during each work week, the date of each such

work week, and the total number of hours worked during each such work week for which compensation is claimed is due each plaintiff and intervener, respectively, in this suit.

II.

A statement as to each plaintiff and intervener, separately, showing the duties of, and a description of the work performed by each plaintiff and intervener, respectively, during each particular work week and alleging the date of each such work week for which a claim for wages is made.

III.

Whether or not plaintiffs and interveners claim that the records kept by defendant accurately reflect the actual "time worked" by them, each respectively, and the money paid them, each respectively, by defendant therefor, and if they or any of them claim that such records do not so accurately reflect actual "time worked" and payments therefor, then they, each respectively, will allege specifically and particularly in what respect the records of defendant do not reflect such facts, and for what period or periods of time, giving the respective dates of each such period by work weeks as to each of them, this is true.

IV.

A statement as to each plaintiff and intervener, respectively, of whether the amount of wages allegedly due each plaintiff and intervener, respectively, for each particular work week, as required in Paragraph 1 hereof, is based on actual working time, and if not based on actual working time, then each plaintiff and intervener, respec-

tively, shall allege specifically the regular and overtime hours for which wages are claimed due which are based on waiting time, walking time, or otherwise, during each particular work week, giving the date of each such work week.

(S.) RANDOLPH BRYANT,
Judge Presiding.

Dated: Sept. 16, 1947.

Filed Sept. 16, 1947.

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21 BILL OF PARTICULARS.

(Title Omitted.)

To the Honorable Judge of said Court:

Now come the plaintiffs in the above entitled and numbered cause in response to the Court's order for a Bill of Particulars served upon the plaintiffs on the 20th day of September, A. D. 1946, and respectfully show the Court:

The following represents:

In Column 1, the name of the employee; in Column 2, the kind of work performed by the employee; in Column 3, the period of his employment, to include the beginning period and termination period; Column 4, the hourly rate of pay for each work week employed (the overtime rate of pay being one and one-half times the sums represented under "hour pay rate"); in Column 5 is represented the overtime hours due the employee per work week; in Column 6, under the heading "Amount due work week"

represents the amount of money each employee is due for overtime hours worked each work week and is arrived at by multiplying the overtime hours due each week by one and one-half times the hourly rate of pay; Columns 7 and 8 represent overtime walking hours due and overtime working hours due each employee; Column 9, under the heading "Amount total overtime due" represents the total number of dollars each employee claims as overtime, and is arrived at by multiplying the amount due each work week in Column 6 by the total number of work weeks each employee worked, as reflected in Column 3. The table does not disclose any sums of money paid to the respective employees for which they have been compensated, but represents their total claim in the last column for the overtime work weeks worked for which they have not been paid at the overtime rate, and is as follows:

1 Name	2 Kind of Work Done	3 Period Employed	4 Hour Pay Rate	5 Overtime Hours Due Per Week	6 Amt. Due Work Week	7 Walking Time Hours	8 Working Time Hours	9 Amt. Total Overtime Due
Marion E. Allen	Rough Carpenter	~~11-16-42~~ 9-16-44	.80	4½	$5.40	1½	3	$550.80
Chas. C. Anderson	Carpenter	8- 2-43 10-19-45	$1.00	4½	6.75	1½	3	776.25
John J. Allen	Rough Carpenter	8- 2-42 8-20-45	.80	4½	5.40	1½	3	842.40
W. R. Bateman	Carpenter	1-15-43 8-15-45	.90	4½	6.07	1½	3	807.31
Weaver J. Gholson	Rough Carpenter	10- 8-42 8-19-45	.80	4½	5.40	1½	3	599.76
Claud B. Harden	Carpenter	5-12-42 8-18-45	.95	4½	6.41	1½	3	1,038.42
Aubrey F. Graves	Carpenter	10- 6-42 10- 6-45	.90	4½	6.07	1½	3	946.92
Homer E. Conyers	Rough Carpenter	10- 2-42 10-26-45	.85	4½	5.73	1½	3	819.12
Haskell T. Haynes	Rough Carpenter	9- 1-42 9-16-45	.85	4½	5.73	1½	3	811.07
Houston C. Johnson	Rough Car	11-25-42	.90	4½	6.07	1½	3	801.24

	penter	8-18-45						
Zaniel Dan Lynn.....	Rough Carpenter	7- 5-44 8-18-45	.80	4½	5.40	1½	3	302.40
Lawrence D. May.....	Rough Carpenter	5-12-42 8-18-45	.95	4½	6.41	1½	3	1,037.92
Arthur H. Reynolds....	Rough Carpenter	12-13-44 8-18-45	.85	4½	5.73	1½	3	189.09
Thomas J. Rike.....	Rough Carpenter	1- 8-45 6-20-45	.85	4½	5.73	1½	3	131.76
Robt. C. Robinson.....	Rough Carpenter	10-29-42 8-20-45	.80	4½	5.40	1½	3	756.00
Henry Jesse Rolf.....	Rough Carpenter	11- 2-42 8-18-45	.85	4½	5.73	1½	3	819.39
Wm. H. Runyan	Rough Carpenter	11-13-41 10-27-45	.90	4½	6.07	1½	3	934.78
Sam Ball Sims.....	Rough Carpenter	7-19-44 8-18-45	.80	4½	5.40	1½	3	297.00
Jim C. Story	Rough Carpenter	4-24-44 9-28-45	.85	4½	5.73	1½	3	418.29
Roy Edwin Strube....	Rough Carpenter	9-15-43 8-18-45	.90	4½	6.07	1½	3	594.86

1	2	3	4	5	6	7	8	9
Name	Kind of Work Done	Period Employed	Hour Pay Rate	Overtime Hours Due Per Week	Amt. Due Work Week	Walking Time Hours	Working Time Hours	Amt. Total Overtime Due
Alfred G. Sullivan	Rough Carpenter	7- 8-44 8-18-45	.85	4½	5.73	1½	3	320.88
Albert L. Thornhill	Rough Carpenter	6-18-42 8-20-45	.80	4½	5.40	1½	3	874.80
Floyd F. Walker	Carpenter	5-22-42 9-28-45	.85	4½	5.73	1½	3	968.37
Walter L. Yates	Carpenter	8-18-43 8-18-45	.90	4½	6.07	1½	3	619.14
Phillip B. Chalker	Lift Fork Dept.	12- 9-42 1- 4-44	.90	4½	6.07	1½	3	333.85
Raymond H. Chasteen	Lift Fork Operator	10-10-42 1- 1-44	.80	4½	5.40	1½	3	340.20
Wayland W. Clark	Lift Fork Operator	9- 9-43 12-19-44	.90	4½	6.07	1½	3	412.76
Odis F. Clements	Lift Fork Operator	5-15-44 8-18-45	.80	4½	5.40	1½	3	340.20
L. V. Collom	Lift Fork Operator	2-10-43 7- 1-43	95	4½	6.41	1½	3	128.20
Alton B. Collins	Lift Fork Operator	12-19-44 6- 5-45	.95	4½	6.41	1½	3	153.84

Otis L. Dill	Lift Fork	9-10-42	.95	4½	6.41	1½	3	1,032.01
	Operator	10-15-45						
Harold F. Dodson	Lift Fork	11-11-42	.95	4½	6.41	1½	3	910.22
	Operator	8-17-45						
Osker L. Evans	Lift Fork	10- 9-44	.95	4½	6.41	1½	3	243.58
	Operator	7- 5-45						
Archie Back Fields	Lift Fork	5-13-44	.90	4½	6.07	1½	3	388.48
	Operator	8-18-45						
E. Conway Garrison	Lift Fork	12-29-42	.90	4½	6.07	1½	3	819.45
	Operator	8-17-45						
Gerald B. Hoffman	Lift Fork	12- 1-42	.95	4½	6.41	1½	3	929.45
	Operator	9- 7-45						
Melvin T. Hooser	Lift Fork	10- 2-43	.95	4½	6.41	1½	3	576.65
	Operator	8-14-45						
Raymond H. Hugeons	Lift Fork	9-11-42	.95	4½	6.41	1½	3	934.78
	Operator	8-31-45						
John H. Jackson	Lift Fork	10- 7-43	.95	4½	6.41	1½	3	576.65
	Operator	8-18-45						
Edgar L. Jaggers	Lift Fork	11-26-42	.95	4½	6.41	1½	3	858.94
	Operator	7- 4-45						
H. E. Jones	Lift Fork	12- 1-42	.95	4½	6.41	1½	3	942.27

1	2	3	4	5	6	7	8	9
Name	Kind of Work Done	Period Employed	Hour Pay Rate	Overtime Hours Due Per Week	Amt. Due Work Week	Walking Time Hours	Working Time Hours	Amt. Total Overtime Due
	Operator	10- 5-45						
Niven S. Kyles	Lift Fork	9- 9-42	.90	4½	6.07	1½	3	928.71
	Operator	8-30-45						
Travis McDougal	Lift Fork	10- 7-43	.90	4½	6.07	1½	3	576.65
	Operator	8-19-45						
Ival L. McLarty	Lift Fork	3-13-44	.90	4½	6.07	1½	3	315.14
	Operator	3-17-45						
Thomas C. May	Lift Fork	10- 7-42	.95	4½	6.41	1½	3	999.96
	Driver	10- 7-45						
James Oscar Miller	Lift Fork	4-18-44	.90	4½	6.07	1½	3	400.62
	Operator	8-19-45						
Paul S. Morgan	Lift Fork	10-24-42	.90	4½	6.07	1½	3	934.78
	Driver	8-19-45						
Murry F. Phillips	Lift Fork	9-15-42	.90	4½	6.07	1½	3	910.50
	Operator	8-19-45						
Joe Bailey Rains	Lift Fork	12-28-42	.90	4½	6.07	1½	3	819.45
	Operator	8-19-45						
Hewitt M. Short	Lift Fork	8-24-42	.95	4½	6.41	1½	3	1,006.37
	Operator	8-31-45						

William A. Teer	Lift Fork Operator	2-11-43 8-19-45	.85	4½	5.73	1½	3	744.90
Owen F. Townsend	Lift Fork Operator	6-15-44 9- 9-45	.90	4½	6.07	1½	3	388.48
James D. Waters	Lift Fork Operator	2- 9-43 8-18-45	.90	4½	6.07	1½	3	789.10
Rufus S. Welborn	Lift Fork Operator	6- 2-42 8-18-45	.95	4½	6.41	1½	3	1,048.42
Wesley Woodrow Young	Lift Fork Operator	11-12-42 8-19-45	.90	4½	6.07	1½	3	825.52
A. C. Black	Checker	4- 6-42 8-22-43	.90	4½	6.07	1½	3	965.13
Ernest E. Cabaniss	Checker	10-14-43 8-28-45	.85	4½	5.73	1½	3	550.08
Dillard W. Cooley	Checker	4- 3-44 8- 1-45	.85	4½	5.73	1½	3	383.91
Hershel Grant	Checker	9-11-42 9-12-45	.90	4½	6.07	1½	3	940.92
Elvin Graves	Checker	8-24-42 6-15-45	.95	4½	6.41	1½	3	928.45
Edwin Ralph Gossett	Checker	4- 1-42 9-28-45	.90	4½	6.07	1½	3	965.83

1 Name	2 Kind of Work Done	3 Period Employed	4 Hour Pay Rate	5 Overtime Hours Due Per Week	6 Amt. Due Work Week	7 Walking Time Hours	8 Working Time Hours	9 Amt. Total Overtime Due
Sam Turner Gullion	Checker	8-15-44 10-25-45	.85	4½	5.73	1½	3	355.26
Kermit R. Halton	Checker	12- 3-44 8-19-45	.85	4½	5.73	1½	3	194.82
Raymond W. Huffman	Checker	9-16-42 8-22-45	.90	4½	6.07	1½	3	910.30
Paul H. Keith	Checker	11-23-42 1-21-45	.85	4½	5.73	1½	3	641.76
H. W. Morgan	Checker	3-28-44 8-22-45	.85	4½	5.73	1½	3	401.10
Lige W. Pettigrew	Checker	1-20-43 8-29-45	.85	4½	5.73	1½	3	464.13
Dean Quada	Checker	6-14-44 8-21-45	.85	4½	5.73	1½	3	338.07
Geo. Farris Raulston	Checker	3-17-43 11- 1-45	.90	4½	6.07	1½	3	831.59
Willis Garland Rogers	Checker	12-12-42 10- 7-44	.85	4½	5.73	1½	3	527.16

Tom Watson Shaddix	Checker	12- 3-42 10-19-45	.90	4½	6.07	1½	3	904.43
Leonard A. Simmons, Jr.	Checker	10-14-43 8-24-45	.90	4½	6.07	1½	3	576.65
Jeffie Gerard Thomas	Clerk	9-15-42 8-31-45	.80	4½	5.40	1½	3	799.20
Norman E. Wesmoreland	Checker	5-15-44 9-30-45	.90	4½	6.07	1½	3	443.11
Lovic H. White	Checker	12-29-42	.90	4½	6.07	1½	3	819.45
James Roy Birdwell	Shipper	11-24-42 8-15-45	.90	4½	6.07	1½	3	849.80
Edgar L. Goodroe	Shipper	11- 4-43 6- 9-45	.85	4½	5.73	1½	3	469.86
Ted Harvey	Shipper	3-20-43 9-20-45	.85	4½	5.73	1½	3	734.90
Emmit Warren	Shipper	1- 4-43 10-31-45	.60	4½	4.05	1½	3	486.00
Clem L. Lamb	Mechanic	1- 1-42 5-19-45	1.25	4½	8.43	1½	3	1,256.07
Vergle L. Bettes	Dragline Operator	7- 6-42 1-26-45	1.10	4½	7.42	1½	3	1,001.70

1 Name	2 Kind of Work Done	3 Period Employed	4 Hour Pay Rate	5 Overtime Hours Due Per Week	6 Amt. Due Work Week	7 Walking Time Hours	8 Working Time Hours	9 Amt. Total Overtime Due
William B. Clawson	Oiler	1-19-43 8-19-45	.70	4½	4.72	1½	3	672.76
Frank S. McCoy	Salvage Yd. Foreman	6-22-42 8-13-45	.95	4½	6.41	1½	3	1,048.42
Roscoe C. Nowlin	Salvage Yd. Foreman	6-13-44 6- 5-45	1.00	4½	6.75	1½	3	1,012.50
Adkins, Joe	Loader & Unloader	8-21-43 10-22-45	.60	4½	4.05	1½	3	457.65
Corea Allen	Loader & Unloader	3-22-45 8-17-45	.60	4½	4.05	1½	3	89.10
Laura Allen	Loader & Unloader	9-10-42 4- 1-43	.55	4½	3.712	1½	3	460.29
Leroy Banks	Loader & Unloader	11-28-43 10-27-45	.55	4½	3.712	1½	3	567.94
S. C. Banks	Loader & Unloader	11-17-44 8-19-45	.55	4½	3.375	1½	3	131.63
Robt. Lee Barnes	Loader & Unloader	11-19-42	.50	4½	3.375	1½	3	442.13
Ben Bell	Laborer	12-31-42 10-31-45	.50	4½	3.375	1½	3	496.12

		10-31-45						
Primes B. Block	Laborer	1-10-45 3-23-45	.50	4½	3.375	1½	3	33.75
Jewell E. Boldon	Laborer	11-27-42 10-19-45	.70	4½	4.05	1½	3	615.60
Henry Booth, Jr.	Laborer	12-23-42 11-10-45	.55	4½	3.712	1½	3	460.28
Robert Booth	Laborer	4-17-43 11-10-43	.50	4½	3.375	1½	3	101.63
Curtis Briley	Laborer	1942 1943	.60	4½	4.05	1½	3	202.50
Robert Brown	Loader & Unloader	2-22-44 10-20-45	.55	4½	3.712	1½	3	326.66
Henry Britt	Laborer	9- 9-43 11- 2-45	.50	4½	3.375	1½	3	378.00
Alonzo Caldwell	Laborer	12-19-42 8-24-45	.55	4½	3.712	1½	3	508.54
Willie D. Carroll	Laborer	12-23-44 9-31-45	.55	4½	3.712	1½	3	148.48
Rayfield Davis	Laborer	8- 9-41 2- 5-43	.90	4½	6.07	1½	3	242.80
Paris Chapple	Loader & Unloader	2- 4-43 10-25-45	.55	4½	3.712	1½	3	534.53

1 Name	2 Kind of Work Done	3 Period Employed	4 Hour Pay Rate	5 Overtime Hours Due Per Week	6 Amt. Due Work Week	7 Walking Time Hours	8 Working Time Hours	9 Amt. Total Overtime Due
Henry C. Clement	Laborer	10- 5-43 8-26-45	.60	4½	4.05	1½	3	368.55
James Collins	Loader & Unloader	1-15-43 10-19-45	.60	4½	4.95	1½	3	591.30
David Hawkins	Laborer	7-22-43 10-15-45	.60	4½	4.05	1½	3	477.90
C. G. Compton	Laborer	2- 1-43 8-13-45	.50	4½	3.375	1½	3	422.13
Jolly C. Crocker	Loader & Unloader	11-21-44 8-31-45	.50	4½	3.375	1½	3	124.88
Andrew Robt. Brown	Loader & Unloader	1-27-43 8-27-45	.55	4½	3.712	1½	3	489.98
William Crockett, Jr.	Loader	1-30-45 7-20-45	.50	4½	3.375	1½	3	84.38
Johnnie Donell	Loader & Unloader	11-24-42 8-28-45	.55	4½	3.712	1½	3	508.54
Albert Frederick	Loader		.50	4½	3.375	1½	3	155.25
Lee Foster	Loader & Unloader	9- 7-43 8-17-45	.50	4½	3.375	1½	3	334.13

Samuel Lee Franklin	Loader & Unloader	Jan. 1943 Dec. 1944	.50	4½	3.375	1½	3	303.75
T. A. Galbalth	Laborer	1- 8-45 9-14-45	.54	4½	3.375	1½	3	121.50
James Germany	Laborer	9- 8-42 7-17-45	.60	4½	4.05	1½	3	357.55
Nathaniel Graham	Laborer	6- 1-42 10-29-45	.50	4½	3.375	1½	3	597.375
Charlie Green	Laborer	12-11-44 3-18-45	.50	4½	3.375	1½	3	47.25
Elone Green	Laborer	10-19-45 7- 4-45	.50	4½	3.375	1½	3	124.88
Earnest Grundy	Loading & Unloading	May 1942 10- 2-45	.50	4½	3.375	1½	3	597.38
Curtis Heath	Laborer	7- 3-42 4-17-43	.50	4½	3.375	1½	3	138.38
Grover C. Heath	Laborer	10- 9-42 10- 2-45	.50	4½	3.375	1½	3	522.35
John W. Heath	Laborer	7-15-43 9-28-44	.50	4½	3.375	1½	3	212.13
Rastus G. Henderson	Laborer	12-28-41	.50	4½	3.37	1½	3	535.83

1	2	3	4	5	6	7	8	9
Name	Kind of Work Done	Period Employed	Hour Pay Rate	Overtime Hours Due Per Week	Amt. Due Work Week	Walking Time Hours	Working Time Hours	Amt. Total Overtime Due
Jesse T. Hightower	Laborer	5- 1-45 9-28-45	.55	4½	3.71	1½	3	77.91
Tom Henry Harris	Laborer	6-19-42 7-30-45	.60	4½	4.05	1½	3	648.00
Avance Haskins	Loader & Unloader	10-12-43 8-14-45	.50	4½	3.37	1½	3	187.72
Henry Hollins	Laborer	8-18-42 8-18-44	.55	4½	3.71	1½	3	385.84
Clyde House	Laborer	Aug. 1943 Nov. 1944	.50	4½	3.37	1½	3	215.88
George W. House	Loader & Unloader	2-18-44 12- 8-44	.50	4½	3.37	1½	3	138.17
Will Hubbard	Loader & Unloader	8-18-43 10-19-45	.60	4½	4.05	1½	3	457.65
Albert Hutchison	Laborer	4-16-43 12-30-43	.50	4½	3.37	1½	3	124.69
Fred Jackson	Laborer	7-42 1943	.50	4½	3.37	1½	3	168.50
Geo. W. Jenkins	Loader	3-10-43 9- 7-45	.60	4½	4.05	1½	3	518.40
M. C. Jiles	Laborer	10-20-43 11- 2-45	.55	4½	3.71	1½	3	396.97
Charles W. Johnson	Laborer	12-44 10-17-45	.50	4½	3.37	1½	3	138.17
Johnnie Johnson	Laborer	11-25-44 7-24-45	.50	4½	3.37	1½	3	111.21
L. V. Johnson	Loader	3-17-43 5- 5-45	.55	4½	3.71	1½	3	411.81
Walter M. Johnson	Laborer	9- 8-42 4-10-45	.50	4½	3.37	1½	3	461.69
Ike Jones	Loader & Unloader	11-26-42 Jan. 1945	.50	4½	3.37	1½	3	375.07
Roy King	Laborer	9-23-43 7-1945	.50	4½	3.37	1½	3	313.41
John Kinsey	Laborer	12-1942 3-12-43	.50	4½	3.37	1½	3	57.29
Clamon Knight	Laborer	2-14-44 10-12-45	.50	4½	3.37	1½	3	293.19
Thomas Knight	Laborer	2-16-43 8-17-45	.50	4½	3.37	1½	3	421.36
Oscar L. Knight	Laborer	9- 8-42 8-14-45	.55	4½	3.71	1½	3	560.21

1 Name	2 Kind of Work Done	3 Period Employed	4 Hour Pay Rate	5 Overtime Hours Due Per Week	6 Amt. Due Work Week	7 Walking Time Hours	8 Working Time Hours	9 Amt. Total Overtime Due
Jeffie E. Lewis	Laborer	1- 2-45 8-17-45	.50	4½	3.37	1½	3	111.21
Henry P. Livingston	Laborer	11- 2-43 11- 5-45	.60	4½	4.05	1½	3	425.25
Bennie Lockett	Loader	9- 9-44 9-30-45	.55	4½	3.71	1½	3	200.34
Willie R. McDaniel	Loading & Unloading	3-16-42 6- 6-45	.50	4½	3.37	1½	3	390.92
Joe M. McPherson	Laborer	10- 1-43 Mar. '44	.50	4½	3.37	1½	3	114.58
Dock J. Mack	Laborer	7-20-44 9-30-45	.50	4½	3.37	1½	3	208.94
Lee Maxwell	Laborer	11-28-42 10-14-45	.55	4½	4.05	1½	3	603.45
James Martin	Laborer	3-16-45 9-21-45	.55	4½	4.05	1½	3	101.35
Willie Mershall	Laborer	5- 5-44 10-31-45	.50	4½	3.37	1½	3	266.23
R. D. Marlar	Laborer	4-20-45 9-28-45	.50	4½	3.37	1½	3	77.51
O. D. Miller	Laborer	8-28-43 8-16-45	.60	4½	4.05	1½	3	356.40
Sam Mitchell, Jr.	Loader & Unloader	6- 1-42 8-30-45	.50	4½	3.37	1½	3	566.18
Arthur Moreane	Laborer	6- 1-44 9-10-45	.55	4½	4.05	1½	3	275.40
Roy Morane	Laborer	6- 1-44 10-10-45	.55	4½	4.05	1½	3	283.50
Johnny Morine	Laborer	3-24-44 7-27-45	.50	4½	3.37	1½	3	239.27
Lawson Muldrew	Laborer	6-17-42 11- 1-45	.57	4½	3.71	1½	3	460.04
L. V. Munson	Laborer	12-27-44 Aug. 1945	.55	4½	4.05	1½	3	125.55
Lucille E. Neal	Loader & Unloader	3- 1-45 8- 1-45	.50	4½	3.37	1½	3	70.77
Sam Neal	Loader	4- 1-43 9-43	.50	4½	3.37	1½	3	74.14
Prentice Oliver	Laborer	6-28-44 10-19-45	.55	4½	4.05	1½	3	291.60
Sidney Parker	Laborer	6-18-42 7- 1-45	.57	4½	4.05	1½	3	643.95

1 Name	2 Kind of Work Done	3 Period Employed	4 Hour Pay Rate	5 Overtime Hours Due Per Week	6 Amt. Due Work Week	7 Walking Time Hours	8 Working Time Hours	9 Amt. Total Overtime Due
Jessie B. Parks	Loader & Unloader	10-23-43 11- 2-45	.55	4½	4.05	1½	3	425.25
Mitchell M. Paxton	Laborer	10- 5-42 10- 2-45	.50	4½	3.37	1½	3	525.72
Tom Paxton	Loader & Unloader	8- 5-43 2-15-45	.60	4½	4.05	1½	3	384.75
Hursel Perry	Loader & Unloader	1- 1-45 Aug. 1945.	.60	4½	4.05	1½	3	125.55
Kiran Jim Pickens	Loader & Unloader	11- 5-43 2-18-44	.50	4½	3.37	1½	3	50.55
Fred Powell	Laborer	6-18-42 10-31-45	.55	4½	3.71	1½	3	652.96
Austin M. Rattler	Laborer	8- 5-43 9- 7-45	.55	4½	3.71	1½	3	408.10
J. D. Reece	Laborer	2- 1-44 10-30-45	.55	4½	3.71	1½	3	337.61
Janie W. Roberson	Loader & Unloader	4-22-44 12-12-44	.50	4½	3.37	1½	3	101.21
Marvin A. Rogers	Loader & Unloader	12-14-44 10- 1-45	.50	4½	3.37	1½	3	262.75
Henry Rose	Loader & Unloader	10-23-43 7-21-45	.65	4½	4.29	1½	3	278.83
Stephen W. Salisbury	Laborer	4-20-44 10-30-45	.50	4½	3.37	1½	3	266.62
Freeman Sanders	Laborer	2-12-43 9- 1-45	.60	4½	3.37	1½	3	538.65
Shelie James	Loader	7-15-44 4-15-45	.55	4½	3.712	1½	3	144.77
James H. L. Shelton	Laborer	8-28-43 9-28-45	.55	4½	3.71	1½	3	363.78
Jeff Charley Sims	Laborer	8- 1-43 11- 1-45	.55	4½	3.71	1½	3	415.74
George Satterwhite	Laborer	6- 1-42 8- 1-45	.50	4½	3.375	1½	3	556.87
Enoch Smith	Loader	4- 6-43 8- 1-45	.55	4½	3.71	1½	3	449.15
Frank Smith	Loader	8- 1-42 11- 1-45	.65	4½	4.29	1½	3	725.01
Fred Smith	Laborer	2- 3-43 5- 1-45	.50	4½	3.375	1½	3	344.25
Audrey M. W. Stanmore	Loader	3-11-44 May 1945	.50	4½	3.37	1½	3	199.13

1 Name	2 Kind of Work Done	3 Period Employed	4 Hour Pay Rate	5 Overtime Hours Due Per Week	6 Amt. Due Work Week	7 Walking Time Hours	8 Working Time Hours	9 Amt. Total Overtime Due
Henry Stanmore	Loader & Unloader	Dec. 1942 Jan. 1944	.50	4½	3.37	1½	3	97.88
Vernon Stanmore	Loader & Unloader	11- 5-42 9-17-45	.55	4½	3.712	1½	3	531.52
Perry Stiger	Laborer	11- 1-43 8-25-45	.50	4½	3.37	1½	3	303.75
Roy Steger	Loader & Unloader	10-14-43 8-24-45	.55	4½	3.712	1½	3	350.06
Thomas Stephens	Laborer	1- 1-45 6- 1-45	.50	4½	3.37	1½	3	57.38
David Stephens	Laborer	7- 1-43 6- 1-45	.60	4½	4.05	1½	3	405.00
R. T. Strongs	Laborer	3-29-43 12- 1-45	.55	4½	3.712	1½	3	512.27
Leroy Terry	Loader & Unloader	11-28-44 1-26-45	.55	4½	3.712	1½	3	29.69
Mart Thompson	Laborer	1-27-43 9-28-45	.55	4½	3.712	1½	3	519.68
Elton Turner	Laborer	11-28-42 10-14-45	.55	4½	3.712	1½	3	553.09
Bishop Tyson	Laborer	7-17-42 10-31-45	.55	4½	3.712	1½	3	541.95
Barix Walker	Laborer	8-14-42 9-29-44	.50	4½	3.375	1½	3	371.25
George Walker	Loader & Unloader	9- 5-43 3-23-45	.55	4½	3.712	1½	3	304.38
Sam Walker	Loader	10-27-43 3-10-45	.55	4½	3.712	1½	3	263.41
Lewis F. Walters	Laborer	7-19-42 8-15-44	.50	4½	3.375	1½	3	408.38
Bartten Warren	Laborer	2- 4-44 8-10-45	.50	4½	3.37	1½	3	266.63
Gus W. Warren	Loader & Unloader	11-24-42 10-13-43	.60	4½	4.05	1½	3	186.30
George Warren	Shipper	1- 4-43 11-23-45	.60	4½	4.05	1½	3	607.50
Howard Warren	Shipper	10-12-42 3-31-43	.60	4½	4.05	1½	3	368.55
Marion Washington	Laborer	11- 4-44 8-21-45	.50	4½	3.375	1½	3	141.75
James R. Watlington	Laborer	6-19-42 11- 1-45	.50	4½	3.375	1½	3	597.38

1 Name	2 Kind of Work Done	3 Period Employed	4 Hour Pay Rate	5 Overtime Hours Due Per Week	6 Amt. Due Work Week	7 Walking Time Hours	8 Working Time Hours	9 Amt. Total Overtime Due
Ruth Watts Wells	Loading & Unloading	5- 1-44 8- 1-45	.50	4½	3.375	1½	.3	212.63
Joseph White	Laborer	10-10-43 9- 1-44	.70	4½	4.725	1½	3	222.08
Arthur Williams	Laborer	7- 5-42 5-10-45	.60	4½	4.05	1½	3	604.40
Bryant H. Williams	Laborer	2-16-43 3-19-45	.50	4½	3.375	1½	3	667.88
Melvin Winters	Laborer	5- 1-42 10-25-45	.55	4½	3.71	1½	3	478.59
Reather W. Witherspoon	Loading & Unloading	3-10-44 7- 7-45	.50	4½	3.37	1½	3	246.01
Ollie Young	Laborer	1-21-44 12- 1-44	.50	4½	3.375	1½	3	219.38
Joe Willie Yancy	Loader & Unloader	5-30-44 10-1945	.60	4½	4.05	1½	3	368.55
Augustus Atkins	Laborer	9- 2-43 8-21-45	.50	4½	3.37	1½	3	64.03
Verdie M. Anderson	Loader	8-31-44	.40	4½	2.78	1½	3	129.60

		8-17-45						
R. A. Anderson	Loader	3-19-45 10- 2-45	.50	4½	3.37	1½	3	94.36
C. A. Anderson	Lift Fork	12-13-44 5-31-45	.80	4½	5.40	1½	3	129.60
H. D. Alston	Lift Fork	11-23-42 8-30-45	.45	4½	3.08	1½	3	434.28
Bill Abbott	Truck Driver	9-18-43 10-24-44	1.10	4½	8.75	1½	3	398.25
James P. Barnes	Loader	11- 4-43 8-22-45	.85	4½	5.73	1½	3	492.78
Willie Bonner	Loader & Unloader	7-17-42 11- 4-45	.80	4½	5.40	1½	3	928.80
William H. Byrd	Loader	12-21-42 5-17-45	.50	4½	3.37	1½	3	384.18
Robert S. Brown	Loader	9-13-44 8-17-45	.50	4½	3.37	1½	3	110.11
Angeline J. Brown	Loader	3- 9-44 9- 4-45	.50	4½	3.37	1½	3	131.43
Alom Bradoes	.....	.....	..	..	...	...	..	.....
Jessie Brown	Loader & Unloader	10-23-43 8-17-45	.55	4½	3.71	1½	3	341.32

1 Name	2 Kind of Work Done	3 Period Employed	4 Hour Pay Rate	5 Overtime Hours Due Per Week	6 Amt. Due Work Week	7 Walking Time Hours	8 Working Time Hours	9 Amt. Total Overtime Due
Fred Butler	Loader	11-14-44 9-10-45	.50	4½	3.37	1½	3	110.11
Veasey C. Buttram	Truck Driver	10-18-43 8-28-45	.80	4½	5.40	1½	3	507.60
Roy Brown	Loader	8- 8-45 8-18-45	.50	4½	3.37	1½	3	3.37
Lush Brown	Loader	8-16-44 8-17-45	.55	4½	3.71	1½	3	185.50
Cephas Bacon	Loader	7- 1-44 8-16-45	.50	4½	3.37	1½	3	104.47
Jos. F. Bayless	Lift Fork	7- 2-42 11- 4-45	.85	4½	5.75	1½	3	767.82
Zarrer Becks	Loader	8- 4-43 8-17-45	.50	4½	3.37	1½	3	138.17
Joe J. Clayton	Truck Driver	10-23-42 9- 4-45	.90	4½	6.07	1½	3	904.43
Malon Compton	Loader	7-26-45 8-17-45	.50	4½	3.37	1½	3	13.48
I. Z. Compton	.....	.....	..	...	...	...	..	.....
W. A. Colliums	Truck Driver	9- 3-42 8-20-45	.90	4½	6.07	1½	3	922.64
Merrell C. Clayton	Rough Carpenter	9-11-42 10-22-45	.90	4½	6.07	1½	3	917.27
Henderson C. Chesshir	Loader	3-17-45 8-22-45	.50	4½	3.37	1½	3	74.14
Samuel B. Cheatam	Loader	12-14-44 8-17-45	.50	4½	3.37	1½	3	117.95
Roosevelt Cheatham	Loader	11-11-43 8-21-44	.50	4½	3.37	1½	3	134.80
Loyd Chatman	Loader	8-17-43 10-15-45	.55	4½	3.71	1½	3	304.22
Louis L. Caver	Lift Fork	7-28-44 5- 1-45	.80	4½	5.40	1½	3	210.60
W. B. Carr	Truck Driver	7- 9-42 9- 5-45	.90	4½	6.07	1½	3	1,001.55
Thomas E. Carver	Truck Driver	6- 8-42 9-10-45	.80	4½	5.40	1½	3	216.00
David L. Campbell	Loader	10-23-43 5-14-45	.55	4½	3.71	1½	3	67.78
J. C. Cabaniss	.....	.....	..	...	...	...	..	.....

1	2	3	4	5	6	7	8	9
Name	Kind of Work Done	Period Employed	Hour Pay Rate	Overtime Hours Due Per Week.	Amt. Due Work Week	Walking Time Hours	Working Time Hours	Amt. Total Overtime Due
John Henry Cooper	Loader & Unloader	7-23-42 8-17-45	.55	4½	3.71	1½	3	585.78
Jim Daniels	Loader & Unloader	5-29-44 9-23-44	.50	4½	3.37	1½	3	64.03
F. C. Davis	Loader & Unloader	8- 8-45 8-18-45	.50	4½	3.37	1½	3	3.37
J. K. Daniels	Truck Driver	11- 1-43 11- 4-45	.80	4½	5.40	1½	3	421.20
Lee Ertor Davis	Loader	9- 9-43 8-17-45	.50	4½	3.37	1½	3	80.88
Russell E. DeVance	Loader & Unloader	7- 5-44 9-24-45	.50	4½	3.37	1½	3	104.47
Francis N. Dodson	Loader & Unloader	3-26-45 10- 2-45	.50	4½	3.37	1½	3	90.99
Roosevelt Dickerson	Loader & Unloader	8-20-45 8-17-45	.55	4½	3.71	1½	3	3.71
M. D. Dickerson	Loader & Unloader	4-27-44 4-20-45	.50	4½	3.37	1½	3	171.87
H. T. Dogen	.....	.....	..	...	...	...	...	.....
Charlie L. Drake	Truck Driver	10-27-42 8-20-45	.80	4½	5.40	1½	3	777.60
Willie Dunn	Loader	3-23-43 8-24-45	.50	4½	3.37	1½	3	296.56
W. A. Duncan, Sr.	Lift Fork	6-12-42 8-22-45	.80	4½	5.40	1½	3	885.60
B. W. Dupree	Lift Fork	9-24-43 8-17-45	.95	4½	6.41	1½	3	621.77
Elemo Durham	Loader	5- 9-45 8-17-45	.50	4½	3.37	1½	3	47.18
Jimmie Jacob Durham	Lift Fork	3-25-43 6- 5-44	.80	4½	5.40	1½	3	329.40
Robert E. Elam	Truck Driver	9-30-44 4-14-45	.90	4½	6.07	1½	3	169.96
J. Elliott	Truck Driver	7-30-42 8-20-45	.95	4½	6.41	1½	3	1,006.37
Mattie E. Ellis	Loader & Unloader	10-23-43 12- 8-44	.60	4½	4.05	1½	3	238.95
Felton Epps	Loader & Unloader	11-28-42 8-21-45	.50	4½	3.37	1½	3	471.80
Howard Edwards	Loader & Unloader	3-30-43 1-15-45	.50	4½	3.37	1½	3	213.41

1 Name	2 Kind of Work Done	3 Period Employed	4 Hour Pay Rate	5 Overtime Hours Due Per Week	6 Amt. Due Work Week	7 Walking Time Hours	8 Working Time Hours	9 Amt. Total Overtime Due
Quincy W. Foshee	Truck Driver	7- 9-42 10-22-45	.95	4½	6.41	1½	3	1,092.52
Theopris Fisher	Loader	8- 1-45 8-17-45	.50	4½	3.37	1½	3	6.74
Clance Frinch	.....	.....	..	...	...	...	..	.....
Bernice Golden	.....	.....	..	...	...	...	..	.....
Ozay Garner	Loader	8- 8-45 8-17-45	.55	4½	3.71	1½	3	3.71
L. P. Garner	Carpenter	6-15-42 10- 5-45	.85	4½	5.73	1½	3	985.56
Clarence D. Gantt	Loader	12-22-42 8-17-45	.80	4½	5.40	1½	3	734.40
William M. Grant	.....	.....	..	...	...	...	..	.....
John W. Green	Truck Driver	9-19-43 6- 1-45	.90	4½	6.07	1½	3	534.16
Hugh O. Green	Truck Driver	4- 6-44 8-22-45	.85	4½	5.73	1½	3	401.10
George Greer	Truck Driver	8-20-42 9-21-45	.75	4½	5.06	1½	3	814.66
Zack T. Griffin	Loader	1-26-43 7-31-44	.50	4½	3.37	1½	3	266.23
J. C. Hadley	Loader	10-12-44 1-16-45	.50	4½	3.37	1½	3	47.18
Walter U. Harris	Loader	4- 6-43 8-17-45	.55	4½	3.71	1½	3	255.99
Arvel Haskins	.....	.....	..	...	...	...	..	.....
Virgie Hatley	Loader	10-19-43 8-24-45	.50	4½	3.37	1½	3	141.54
Webber Hawkins	Loader	9- 8-42 11- 4-45	.55	4½	3.71	1½	3	607.94
Nathan Haywood	Loader	10-13-42 9- 7-45	.55	4½	3.71	1½	3	560.21
Bernice Henderson	Loader	11-25-44 8-18-45	.50	4½	3.37	1½	3	121.32
Joe Henderson	Loader	10-30-43 9-26-45	.50	4½	3.37	1½	3	330.26
Willie R. Henderson	Loader	6-12-44 8-17-45	.40	4½	2.70	1½	3	153.90
Preston Hervey	Loader	4-25-44 8-17-45	.55	4½	3.71	1½	3	255.91
Preston Hilburn	.....	.....	...	...	...	...	..	.....

1	2	3	4	5	6	7	8	9
Name	Kind of Work Done	Period Employed	Hour Pay Rate	Overtime Hours Due Per Week	Amt. Due Work Week	Walking Time Hours	Working Time Hours	Amt. Total Overtime Due
C. L. Hood	Truck Driver	6-18-42 8-20-45	.95	4½	6.41	1½	3	1,044.83
James G. Hollins	Loader	11-21-44 1- 1-45	.55	4½	3.71	1½	3	163.24
Olgie C. Houston	Truck Driver	7-22-42 6- 9-45	.95	4½	6.41	1½	3	955.09
Hulie S. Hubbard	Loader	11- 9-42 8-17-45	.55	4½	3.71	1½	3	452.62
Gradie T. Hufstetler	Truck Driver	6-16-42 9- 7-45	.90	4½	6.07	1½	3	1,025.83
E. D. Hyman	.....	.....	..	...	...	...	...	.....
Morris S. James	Truck Driver	11-16-42 8-20-45	.95	4½	6.07	1½	3	855.87
Herbert Johnson	Truck Driver	5-24-44 8-20-45	.95	4½	6.07	1½	3	376.34
Robert Johnson	Loader	5-25-42 12- 2-43	.50	4½	3.37	1½	3	266.23
J. O. Jones	Truck Driver	6-15-42 9-13-45	.95	4½	6.07	1½	3	1,025.83
Paul Jones	Loader	8- 4-45 9-11-45	.50	4½	3.37	1½	3	16.85
Judge Kenner	Loader	1-11-45 11- 4-45	.50	4½	3.37	1½	3	144.91
Willie B. Kenner	Loader	3-17-45 7- 2-45	.40	4½	2.70	1½	3	40.50
James A. Kingston	Carpenter	7-10-42 11- 4-45	.90	4½	6.07	1½	3	990.11
William Lee	Truck Driver	10-30-42 8-22-45	1.00	4½	6.75	1½	3	972.00
Conraid Leonard	Loader	8- 1-45 8-17-45	.50	4½	3.37	1½	3	6.74
Jess E. Lewis	.....	.....	..	...	...	...	..	.....
Roosevelt Lillard	Loader	7-17-44 11- 4-45	.50	4½	3.37	1½	3	229.66
Martin Lincoln	Loader	11- 8-44 1-26-45	.50	4½	3.37	1½	3	37.07
Luther D. Litton, Jr.	Lift Fork	7- 8-42 2- 5-45	.90	4½	6.07	1½	3	713.38
C. E. Lonsens	.....	.....	..	...	...	...	..	.....
Foster Lowers	.....	.....	..	...	...	...	..	.....

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1	2	3	4	5	6	7	8	9
Name	Kind of Work Done	Period Employed	Hour Pay Rate	Overtime Hours Due Per Week	Amt. Due Work Week	Walking Time Hours	Working Time Hours	Amt. Total Overtime Due
Jack McFarland	Loader	2-24-44 8-17-45	.55	4½	3.71	1½	3	277.25
James H. McGee	Truck Driver	8-18-43 8-20-45	.95	4½	6.41	1½	3	660.23
T. B. McGorry	Truck Driver	11- 3-42 8-20-45	.95	4½	6.41	1½	3	923.04
Marion Martin	Loader	8-18-43 8-23-45	.60	4½	4.05	1½	3	417.15
Willie H. Miles	Loader	8-22-44 8-21-45	.55	4½	3.71	1½	3	185.50
Horace M. Millaway	Truck Driver	12-17-42 8-20-45	.95	4½	6.41	1½	3	878.17
Clarence Mitchell	Loader	6-17-42 7-14-45	.55	4½	3.71	1½	3	601.02
W. F. Mitchell	Loader	10-14-43 10-12-45	.55	4½	3.71	1½	3	382.13
Johnnie Modloer	.....	.....	..	...	...	...	..	.....
Allen D. Nash	Truck Driver	8-12-42 8-22-45	1.00	4½	6.75	1½	3	1,046.25
Neal Minion	Loader	11-24-42 8-17-45	.55	4½	3.71	1½	3	519.40
Thomas R. Newsom	Clerk	3-29-43 8-31-45	1.00	4½	6.75	1½	3	830.25
C. C. Norris	Truck	12-10-42 8-18-45	.95	4½	6.41	1½	3	783.58
Nortoin Thomas	Checker	9- 2-43 9- 7-45	.80	4½	5.40	1½	3	572.40
G. D. Nugam	.....	.....	..	...	...	...	..	.....
Edgar B. Owens	Truck Driver	10-28-42 8-18-45	.85	4½	5.73	1½	3	779.28
Norman L. Parker	Truck Driver	10- 7-43 8-20-45	.95	4½	6.41	1½	3	608.95
H. E. Payne	Truck Driver	11-28-42 9- 4-45	.95	4½	6.41	1½	3	929.45
Will Pennington	Laborer	10-14-43 9-10-45	.55	4½	3.71	1½	3	563.52
John Perkins	Laborer	3-23-45 9-21-45	.50	4½	3.37	1½	3	87.62
Jewel Reeves	Checker	10- 9-43 8-19-45	.85	4½	5.73	1½	3	544.35

1	2	3	4	5	6	7	8	9
Name	Kind of Work Done	Period Employed	Hour Pay Rate	Overtime Hours Due Per Week	Amt. Due Work Week	Walking Time Hours	Working Time Hours	Amt. Total Overtime Due
Mose Rhymes	Laborer	11- 7-42 8-17-45	.50	4½	3.37	1½	3	478.54
Will Richardson	Laborer	8- 1-45 8-17-45	.50	4½	3.37	1½	3	6.74
John D. Richie	Checker	10-19-43 8-22-45	.85	4½	5.73	1½	3	532.89
William R. Rogers	Checker	9-22-43 8-20-45	.85	4½	5.73	1½	3	555.81
Sam E. Roper	Lift Fork	12-16-44 8-20-45	.85	4½	5.73	1½	3	194.12
Joe Sears	Checker	3- 9-43 9-15-45	.70	4½	4.72	1½	3	623.04
Pauline Simmons	Laborer	8-26-44 8-17-45	.40	4½	2.70	1½	3	132.30
O. I. Skinner	Loader	10-25-44 8-16-45	.80	4½	5.40	1½	3	216.00
John E. Slimer	.....	.....	..	...	...	...	..	.....
John A. Smith	Truck Driver	9-13-44 11-15-44	.80	4½	5.40	1½	3	48.60
Lafayette Smith	Loader	3-16-43 10- 2-45	.50	4½	3.37	1½	3	444.84
Raphiel Spencer	Loader	8- 4-42 5-21-45	.50	4½	3.37	1½	3	492.02
Glynn Stephens	Truck Driver	6-22-42 11- 4-45	1.00	4½	6.75	1½	3	1,181.25
Essie L. Stewart	Laborer	2- 2-45 8-17-45	.40	4½	2.70	1½	3	75.60
M. D. Stewart	Truck Driver	7-13-42 8-23-45	.90	4½	6.07	1½	3	971.20
O. L. Stone	Truck Driver	6- 2-42 8- 6-45	.95	4½	6.41	1½	3	1,064.06
W. C. Sutton	Truck Driver	9- 3-42 8-22-45	.85	4½	5.73	1½	3	876.69
Wyven E. Tate	Truck Driver	10- 9-42 7- 1-45	.85	4½	5.73	1½	3	509.97
Copeland Thompson	Loader	6-22-42 7- 3-44	.50	4½	3.37	1½	3	353.85
Ruben Walker	Loader	3-20-43 8-17-45	.60	4½	4.05	1½	3	498.15
Buck Walter	Loader & Unloader	5-28-43 8-17-45	.55	4½	3.71	1½	3	419.23

1	2	3	4	5	6	7	8	9
Name	Kind of Work Done	Period Employed	Hour Pay Rate	Overtime Hours Due Per Week	Amt. Due Work Week	Walking Time Hours	Working Time Hours	Amt. Total Overtime Due
A. J. Warren	Loader & Unloader	8-14-44 8-17-45	.55	4½	3.71	1½	3	196.63
Leroy Warren	Loader & Unloader	7-20-44 11- 4-45	.50	4½	3.37	1½	3	225.79
Jeff. Washington	Loader & Unloader	7-19-45 8-17-45	.50	4½	3.37	1½	3	13.48
Sylvester Washton	Loader & Unloader	10-21-43 8-17-45	.50	4½	3.37	1½	3	313.41
John L. Watts	Loader & Unloader	8- 9-44 8-17-45	.55	4½	3.71	1½	3	200.34
James H. Watkins	Truck Driver	7-10-42 6-20-45	.95	4½	6.41	1½	3	1,044.83
Everett Wells	Loader & Unloader	3-21-45 8-17-45	.50	4½	3.37	1½	3	74.15
Oswell Wells	Loader & Unloader	7-27-44 8-17-45	.60	4½	4.05	1½	3	214.65
W. E. Whited	Loader & Unloader	4-12-45 8-17-45	.50	4½	3.37	1½	3	60.66
Harold Whitely	Loader & Unloader	4-18-44 8-21-45	.50	4½	3.37	1½	3	229.16
W. M. Wilbanks	Truck Driver	9-20-43 2-27-45	.90	4½	6.07	1½	3	335.25
John C. Wilson	Loader & Unloader	10- 8-43 8-17-45	.50	4½	3.37	1½	3	320.15
Luke Wilson	Loader & Unloader	11-24-42 7-13-44	.55	4½	3.71	1½	3	315.35
Nurell Willis	Loader & Unloader	1- 4-45 10- 1-45	.55	4½	3.71	1½	3	140.98
L. H. Williams	Truck Driver	6-24-43 9- 3-45	.95	4½	6.41	1½	3	737.15
Arthur Williams	Loader & Unloader	3-10-44 4-24-45	.55	4½	3.71	1½	3	215.18
Ben Williams, Jr.	Loader & Unloader	7-13-45 8-17-45	.50	4½	3.37	1½	3	16.85
Green E. Williams	Truck Driver	8-20-41 8-23-45 7- 1-42	.90	4½	6.07	1½	3	983.34
Tom Williams	Loader	1-11-45 5-14-45	.50	4½	3.37	1½	3	57.29
Vernell Williams	Loader	12- 1-42 12-24-43	.50	4½	3.37	1½	3	185.35
Roy Wrather	.....	.....	..	...	...	...	..	.....

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1 Name	2 Kind of Work Done	3 Period Employed	4 Hour Pay Rate	5 Overtime Hours Due Per Week	6 Amt. Due Work Week	7 Walking Time Hours	8 Working Time Hours	9 Amt. Total Overtime Due
Lowell P. Wright	Truck	9- 9-42	.90	4½	6.07	1½	3	922.64
	Driver	8-20-45						
W. L. Yates	Lift Fork	8-18-43	.85	4½	5.73	1½	3	584.46
		8-19-45						
William A. Adams	Truck	6-20-42	1.00	4½	6.75	1½	3	1,103.50
	Driver	8-20-45						
James E. Abercrombie	Truck	11-10-42	.90	4½	6.07	1½	3	928.71
	Driver	9-28-45						
Roy L. Balmain	Truck	2-14-44	.80	4½	5.40	1½	3	432.00
	Driver	9- 7-45						
Farring F. Barnett	Truck	7-20-42	.80	4½	5.40	1½	3	853.00
	Driver	8-21-45						
Homer F. Bearden	Truck	10- 6-42	.90	4½	6.07	1½	3	959.06
	Driver	10-19-45						
Jewel L. Beck	Truck	4- 1-42	.90	4½	6.07	1½	3	491.67
	Driver	10-22-43						
Gordon Raymond Bell	Truck	7- 5-42	1.00	4½	6.75	1½	3	1,053.00
	Driver	7- 5-45						
Antonia M. Birtcher	Truck	6- 6-42	.95	4½	6.41	1½	3	1,127.16
	Driver	10-27-45						
L. W. Birtcher	Truck	9- 9-42	.90	4½	6.07	1½	3	940.85
	Driver	10- 1-45						
Oscar Jack Boddie	Truck	11-22-43	.85	4½	5.73	1½	3	509.97
	Driver	8-20-45						
Raymond V. Branum	Truck	4- 1-42	1.00	4½	6.75	1½	3	1,073.25
	Driver	4-15-45						
James Braxton	Truck	6-30-42	.55	4½	3.71	1½	3	597.31
	Driver	8-17-45						
James C. Brazell	Truck	7-30-43	1.00	4½	6.75	1½	3	1,026.00
	Driver	6-30-45						
Clarence W. Brewer	Truck	7-17-42	.90	4½	6.07	1½	3	675.91
	Driver	9-17-44						
Thomas L. Brown	Truck	8- 8-42	.90	4½	6.07	1½	3	934.78
	Driver	8-14-45						
Edward L. Brooks	Truck	7-14-42	.90	4½	6.07	1½	3	473.46
	Driver	1- 8-44						
James L. Chance	Truck	11-13-42	.90	4½	6.07	1½	3	861.94
	Driver	8-30-45						
Willie Brent Chelf	Truck	6-18-42	.90	4½	6.07	1½	3	1,001.55
	Driver	8-24-44						
Horace A. Clements	Truck	4-21-44	.85	4½	5.73	1½	3	349.53
	Driver	6-14-45						

1 Name	2 Kind of Work Done	3 Period Employed	4 Hour Pay Rate	5 Overtime Hours Due Per Week	6 Amt. Due Work Week	7 Walking Time Hours	8 Working Time Hours	9 Amt. Total Overtime Due
Maurice Lee Collins....	Truck Driver	7- 7-42 1-20-45	.95	4½	6.41	1½	3	1,070.47
Ardell M. Clements....	Truck Driver	May 1942 8-28-45	.95	4½	6.41	1½	3	1,057.65
Thos. M. Coopwood	Truck Driver	8- 9-43 7-20-45	1.05	4½	7.08	1½	3	686.76
Roy Creel	Truck Driver	6- 1-42 8-18-45	.90	4½	6.07	1½	3	1,001.55
Marvin E. Dalton	Truck Driver	6- 4-42 8-18-45	.95	4½	6.41	1½	3	1,051.24
Virgil A. Davis	Truck Driver	9- 2-42 1-24-45	.90	4½	6.07	1½	3	758.75
Arthur Bernard Doss...	Truck Driver	10-15-43 6- 7-45	.95	4½	6.41	1½	3	544.85
Samuel R. Edmonson...	Truck Driver	11-25-42 8-21-45	.90	4½	6.07	1½	3	849.80
Floyd S. Gaulden	Truck Driver	1- 8-43 8-16-45	.90	4½	6.07	1½	3	813.38
Clemmie C. Green.....	Truck Driver	3-29-44 June 1945	.80	4½	5.73	1½	3	355.26
William M. Green	Truck Driver	9- 9-43 7- 7-45	.95	4½	7.08	1½	3	672.60
J. E. Hargis	Truck Driver	2-22-43 8-18-45	.90	4½	6.07	1½	3	770.89
George Harmon	Truck Driver	4-28-44 3-16-45	.85	4½	5.73	1½	3	263.58
Walter Clyde Hill	Truck Driver	8- 1-42 10- 2-42, then in Army until 3-9-43 8-28-45	.80	4½	5.40	1½	3	48.60
Clarence E. House.....	Truck Driver	6- 4-42 8-18-45	.85	4½	5.73	1½	3	939.72
Maurice Howell	Truck Driver	4- 1-42 10-25-45	.95	4½	6.41	1½	3	1,185.15
Ruel Lee Jansen	Truck Driver	9- 1-42 4-29-45	.90	4½	6.07	1½	3	844.33
Odes L. Johnson	Truck Driver	5-11-42 9- 7-45	.95	4½	6.07	1½	3	1,056.18
Jewel Jones	Truck Driver	6-15-42 9-10-45	.90	4½	6.07	1½	3	1,025.83
Castle R. Lane	Driver	12- 3-42 6-15-45	1.00	4½	6.75	1½	3	884.25

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1	2	3	4	5	6	7	8	9
Name.	Kind of Work Done	Period Employed	Hour Pay Rate	Overtime Hours Due Per Week	Amt. Due Work Week	Walking Time Hours	Working Time Hours	Amt. Total Overtime Due
Cecil R. Lemley	Truck Driver	7- 9-42 9-45	1.00	4½	6.75	1½	3	1,120.50
M. L. Lemley	Truck Driver	11- 1-43 8-18-45	1.00	4½	6.75	1½	3	965.25
Jessie Lee Lewis	Truck Driver	6-22-42 11- 9-43	.90	4½	6.07	1½	3	473.46
Curtis McClure	Truck Driver	1- 8-43 8- 5-44	.90	4½	6.07	1½	3	497.74
Jim McDuff	Truck Driver	9-10-43 8-20-45	.90	4½	6.07	1½	3	595.76
Joseph W. Meers	Truck Driver	9-17-42 10-19-45	.90	4½	6.07	1½	3	977.27
Clarence H. Morgan	Truck Driver	9- 1-42 9/45	.90	4½	6.07	1½	3	952.99
Russell H. McClurg	Truck Driver	6/1944 8-18-45	.90	4½	6.07	1½	3	364.20
James F. Moore	Truck Driver	3-15-43 9-20-45	.85	4½	5.73	1½	3	552.67
Glen W. Moore	Truck Driver	9- 1-42 8-18-45	.95	4½	6.41	1½	3	974.32
Jesse J. Nichols	Truck Driver	5- 1-43 4-21-45	.80	4½	6.07	1½	3	540.23
Garland A. Nottingham	Truck Driver	7- 5-42 8-18-45	.95	4½	6.41	1½	3	1,048.42
P. D. Oliver	Truck Driver	7-29-42 10-21-43	.80	4½	5.40	1½	3	356.40
Edgar B. Owens	Truck Driver	10-28-42 Aug. 1945	.85	4½	5.73	1½	3	825.12
Bryant E. Pettigrew	Truck Driver	11-27-42 8-18-45	.95	4½	6.41	1½	3	900.99
Joseph A. Pierce, Jr.	Truck Driver	11-13-42 7-21-45	1.00	4½	6.75	1½	3	938.25
Herbert A. Power	Truck Driver	7- 3-42 10- 5-42	.90	4½	6.07	1½	3	78.91
Harlan Ewell Sexton	Truck Driver	10-10-42 Mar. 1943	1.00	4½	6.75	1½	3	121.50
Edward B. Smith	Truck Driver	5-26-42 Aug. 1945	.80	4½	5.40	1½	3	874.80
John Tillman Smith	Truck Driver	9- 9-42 8-18-45	.85	4½	5.73	1½	3	865.23

1	2	3	4	5	6	7	8	9
Name	Kind of Work Done	Period Employed	Hour Pay Rate	Overtime Hours Due Per Week	Amt. Due Work Week	Walking Time Hours	Working Time Hours	Amt. Total Overtime Due
John M. Spencer	Truck	6- 2-43	.85	4½	5.73	1½	3	658.95
	Driver	8-31-45						
Riley A. Stafford	Truck	11-27-42	.80	4½	5.40	1½	3	750.60
	Driver	8-18-45						
Kenneth A. Scantland	Truck	9- 9-43	.95	4½	6.41	1½	3	634.59
	Driver	8-17-45						
Jim D. Stewart	Truck	6-17-42	.85	4½	5.73	1½	3	212.01
	Driver	11-11-42 and 2-20-43 and 6-10-43						
Kenneth A. Stringer	Truck	6-10-44	.85	4½	5.73	1½	3	349.53
	Driver	8-24-45						
John R. Striplin	Truck	8- 7-42	.90	4½	6.07	1½	3	892.29
	Driver	6- 6-45						
John L. Sullivan	Truck	9-21-42	.85	4½	5.73	1½	3	933.99
	Driver	11- 4-45						
Gaston B. Taylor	Truck	7- 9-42	.95	4½	6.41	1½	3	1,064.06
	Driver	9- 2-45						
Ed S. Thigpen	Truck	6-12-42	.90	4½	6.07	1½	3	934.78
	Driver	6-16-45						
T. R. Thigpen	Truck	7-13-42	.90	4½	6.07	1½	3	910.50
	Driver	5- 9-45						
Buce E. Tong	Truck	2- 1-42	.95	4½	6.41	1½	3	999.96
	Driver	7- 1-45						
Otis L. Tong	Truck	9-16-42	.90	4½	6.07	1½	3	910.50
	Driver	10-10-45						
Erman L. Tutt	Truck	6-19-42	.80	4½	5.40	1½	3	847.80
	Driver	7-20-45						
James C. Underwood	Truck	2-28-44	.85	4½	5.73	1½	3	424.02
	Driver	8-18-45						
James O. Wallace	Truck	6-23-42	.95	4½	6.41	1½	3	1,115.34
	Driver	10-27-45						
Virgil J. Water	Truck	June 1942	.90	4½	6.07	1½	3	1,056.18
	Driver	10-27-45						
Louis H. Williams	Truck	6-26-43	.90	4½	6.07	1½	3	661.63
	Driver	8-14-45						
Leonard C. Williamson	Truck	9- 1-42	.95	4½	6.41	1½	3	1,051.24
	Driver	10-25-45						

1	2	3	4	5	6	7	8	9
Name	Kind of Work Done	Period Employed	Hour Pay Rate	Overtime Hours Due Per Week	Amt. Due Work Week	Walking Time Hours	Working Time Hours	Amt. Total Overtime Due
John H. Wincher.....	Truck Driver	11-15-41 3-15-42 and 7-3-43 to 12- 3-44	.80	4½	5.40	1½	3	399.60
Wm. B. Womack	Truck Driver	11- 9-42 8-18-45	.95	4½	6.41	1½	3	910.22
Lowell F. Wright	Truck	9- 9-42	.90	4½	6.07	1½	3	916.57

Under the classification of the employees listed as Truck Drivers, it is shown that such employees drove trucks upon the reservation operated by the defendant and elsewhere, in the conduct of defendant's business in the manufacture and assembling of shells, ammunition, munitions, bombs, and in the transporting of materials to the defendant's plant for the manufacture and assembling of the items, for which the defendant had a contract with the United States Government. The finished products so manufactured and assembled were shipped in Interstate Commerce.

The employees listed as Laborers performed any and all duties in Department 1400 required of them by the defendant in the operation of its plant and facilities. This character of work included, among other things, loading and unloading trucks, railroad cars, unloading materials, and loading the finished products assembled and manufactured by the defendant. These employees were classified either as Laborers or as Loaders and Unloaders. They performed such duties as were required by the defendant in the operation of its plant as Laborers.

The employees listed as Carpenters and Rough Carpenters performed such duties as ordinarily required of, and were required of, them as a carpenter in and about the premises of the plant operated by the defendant, to include all kinds of repairs on the premises. This class of workmen constructed braces and racks and supports in railroad cars, in warehouses, and elsewhere, for the maintenance and shipment of the items manufactured and assembled by the defendant for Interstate Commerce.

The defendant operated and maintained what is commonly known as a lift-fork truck. The employees listed

under the category of the "Lift Fork" were in the lift fork department and were lift fork operators. They operated the lift fork trucks and maintained the same in the loading and unloading of material coming into and going out of and within the plant.

The employees listed as Checkers checked materials coming into the plant, materials going out of the plant, and materials on hand, in storage, in warehouses, and on the premises operated by the defendant, which said materials were used in the manufacturing, assembling, and processing of the materials shipped in Interstate Commerce as aforesaid.

The employees listed as Shippers performed duties required of them by the defendant in arranging for the spotting, loading, unloading and removal of railroad cars in which the materials manufactured, processed and assembled by the defendant were shipped in Interstate Commerce, and in the checking and handling of freight bills, bills of lading and materials concerning demurrage in said cars.

The employee listed as mechanic was employed in the maintenance of transportation equipment operated by the defendant in the conduct of its business as aforesaid.

The employees listed as Drag Line Operator and Oiler were employed by the defendant in the conduct of its business to operate a dragline and to oil same and the other equipment used in the transportation department of the defendant. The Drag Line Operator and Oiler were employed by the Defendant in the conduct of its business and operated a drag line to maintain and repair the necessary roads and facillities used by the defendant in its warehouse and transportation department.

The employees listed as Grounds and Salvage Yard Foremen were employed by the defendant in maintaining and policing the grounds and premises upon which the plant operated by the defendant was located, and in salvaging and reclaiming materials not finally used in the processing, manufacturing and assembling of the various articles manufactured by the defendant, such as crates and boxes, iron and steel materials left over from the repairs of the mechanical features of the plant.

It is shown that the employees listed were paid on the basis of what is understood to be the time record maintained by the defendant. They were not paid for walking time, nor for the time listed as working time not actually reflected by the time record kept and maintained by the defendant.

It is shown that the defendant maintained gates where the various employees were admitted on to the reservation; that guards were stationed at said gates to check each person entering the reservation as an employee; that the employees listed herein carried a badge upon which was placed a number and usually a photograph of the employee carrying the badge. Guards were required, and did, check each employee hereinabove listed before he was permitted to enter the grounds. After being properly identified, plaintiffs then proceeded from the main entrance gate over a route designated by the defendant to points designated by the defendant, during which time plaintiffs were constantly under the supervision and control of the defendant through its regulations which were enforced by its guards and supervisors. At the end of the shift or daily period of work, plaintiffs again returned from their respective places of work to defendant's outermost gates over routes located upon defendant's premises

and owned, operated, and controlled by defendant, and during such time plaintiffs were under defendant's control and supervision.

The column in the compilation above designated as "Walking hours" sets forth the minimum amount of time reasonably devoted by these plaintiffs in walking from defendant's outermost gates at the beginning of the shift, or daily work period, and returning to said outermost gates at the end of the shift or daily work period, which is not shown upon defendant's clock cards or other pay records and time recording records which it was required to maintain.

The time listed as "Working time hours" set forth in that column in the above compilation means that the employees actually worked the number of hours set forth in the column opposite their names, or were on duty under the control and supervision of the defendant, during that period, all of which time was spent upon the premises controlled by the defendant, for which the respective employees were not paid. They were required to spend the time set forth in that column as employees of the defendant, but the payroll records did not include the period designated. Plaintiffs are informed, and believe, from such information alleged as facts, that the time clock records will disclose the actual working time claimed by each employee, but the payroll records or time sheet records do not disclose the actual time worked and claimed by each employee reflected in this column. Such time is, however, actually overtime claimed by the respective employees for which defendant is liable at the overtime rate of pay.

The figures set forth in the column "Amount total overtime due" represents the amount of money due each employee for the total overtime hours worked during his period of employment.

Respectfully submitted,
LINCOLN, HARRIS & KENNEDY,
By C. M. KENNEDY,
Texarkana, Texas,
CLARK, COON, HOLT & FISHER,
1918 Republic Bank Building,
Dallas, Texas.

This is to certify that a copy of the above and foregoing Bill of Particulars has been mailed to Hon. Steve M. King, United States Attorney at Beaumont, Texas, and Messrs. Wheeler & Atchley, Attorneys at Law, Texarkana, Texas.

C. M. KENNEDY,
(C. M. Kennedy),
One of the Attorneys for the Plaintiffs.

Filed Dec. 27, 1946.

PLAINTIFF'S MOTION FOR ORDER TO SEND TO APPELLATE COURT ORIGINAL RECORD OF DEFENDANT'S MOTION FOR SUMMARY JUDGMENT.

44 (Title Omitted.)

To the Honorable Judge of Said Court:

Come now the Plaintiffs herein, and respectfully move the Court, pursuant to Rule 75 of the Rules of Civil Procedure, and particularly subsection (i) thereof, to enter

an order for the Clerk of this Court to send to the Appellate Court, in lieu of copies, the original record of Defendant's Motion for Summary Judgment, together with the Exhibits thereto attached, for the following reasons:

The Defendant's Motion for Summary Judgment is supported by affidavits in support of said motion, consisting of substantially 40 pages of typewritten matter, and has attached to it, Exhibits "A", "B", "C" and "D". Exhibit "A" consists of substantially 125 pages of detailed information, which in substance is Contract No. W-ORD-516 DA-W-ORD-3, with the supplements thereof, which said contract is an intricate and detailed description, with an index and table of contents, and is so drawn and indexed that if the Court desires to refer to the same, the original will be of material value. In addition thereto, there is attached to said motion as Exhibit "B", "C" and "D", plats and charts, which, if the Appellate Court desires to study the same, will be of little value unless the actual filed copies of said maps and plats are before the Court. These exhibits disclose innumerable facts and figures, which could not be accurately described so as to be of any real value to the Court in passing upon and considering the Defendant's Motion for Summary Judgment, to which are attached the actual exhibits pointed out herein.

Wherefore, it is prayed that this Honorable Court enter its order requiring the original Motion for Summary Judgment, together with the many pages of Exhibits, Plats and Maps, to be sent to the Appellate Court, in lieu of copies, as a part of the record in this case, so that said printed matter, maps and charts, may be inspected by the Court in its original state if the Appellate Court so desires.

CLARK, COON, HOLT & FISHER,
1918 Republic Bank Bldg.,
Dallas (1), Texas.

LINCOLN, HARRIS & KENNEDY,
By C. M. KENNEDY,
Attorneys for Appellants, Roy Creel et al.
310 P'M Bldg.,
Texarkana, Texas.

TALLEY & OWEN,
Rector Bldg.,
Little Rock, Ark.,
Of Counsel.

Filed Oct. 13, 1947.

ORDER GRANTING MOTION TO SEND TO APPELLATE COURT ORIGINAL RECORD OF DEFENDANT'S MOTION FOR SUMMARY JUDGMENT.

46 (Title Omitted.)

Upon application of the Plaintiffs in this cause, it is ordered that the voluminous document designated as "Defendant's Motion for Summary Judgment", together with the Exhibits attached thereto, consisting substantially of

40 pages of affidavits, and 125 pages of matters pertaining to a contract designated as Exhibit "A", and Exhibits "B", "C" and "D" attached to said motion, consisting of plats and maps, be sent to the Appellate Court, in lieu of copies thereof, as a part of the record in this cause upon appeal, for such inspection and use as the Appellate Court may desire to make of the same.

(S.) JAMES C. WILSON,
United States District Judge.

Approved:

(S.) OTTO ATCHLEY,
Atty. for Defendant.

(S) C. M. KENNEDY,
Atty. for Plaintiff.

Filed Oct. 29, 1947.

DEFENDANT'S MOTION FOR LEAVE TO FILE ADDITIONAL AFFIDAVIT IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT.

47 (Title Omitted.)

To Said Honorable Court:

The defendant respectfully moves the Court for leave to file the attached Affidavit in Support of Defendant's Motion for Summary Judgment, and as grounds therefor, states:

I.

The facts set forth in said attached affidavit are facts in addition to those set forth in the affidavit attached to the Motion for Summary Judgment on file in this cause,

and such facts are material in connection with the grounds for said Motion for Summary Judgment, as set forth in Subdivisions (a) and (b) of Paragraph I thereof.

Respectfully submitted,

OTTO ATCHLEY,
(Otto Atchley),
WHEELER, ATCHLEY & NEWBERRY,
Attorneys for Defendant.

700 Texarkana National Bank Building,
Texarkana, Texas.

Dated: Apr. 21, 1947.

The above and foregoing motion was served upon the plaintiffs by mailing a true and correct copy thereof to Messrs. Lincoln, Harris & Kennedy, Attorneys of Record for Plaintiffs, at their address in Texarkana, Texas, on the day and date last above written.

OTTO ATCHLEY,
(Otto Atchley),
One of Defendant's Attorneys.

Filed Apr. 21, 1947.

SUPPLEMENTAL AFFIDAVIT IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT.

48 (Title Omitted.)

1.

The defendant at no time had title to the finished products of the plant, and at no time had title to any of the

component parts of such products, or of the materials supplies, machinery, equipment, or other property used in connection with the contract, title thereto and possession thereof being at all times in the United States and subject to its sole control.

2.

The Government did not purchase munitions from the defendant.

3.

The defendant did not sell munitions to the Government, or to any other party.

4.

No munitions or other products were manufactured or processed at the Lone Star Ordnance Plant except from materials belonging to the Government, and all such munitions and other products were by the Government used in the prosecution of the war.

5.

The United States furnished and shipped to Lone Star Defense Corporation approximately 90-95 per cent of all materials, supplies, machinery, equipment, and other property used in connection with the Contract for operation of the Lone Star Ordnance Plant. The remainder (approximately 5 per cent) of the materials, supplies, machinery and equipment were purchased by the defendant. The bulk of all such purchases (approximately 95 per cent of the purchased material) was approved by the Government prior to the issuance of a purchase order by

the defendant. Title to such purchased materials vested in the United States at their points of origin, and such materials were shipped to Lone Star Ordnace Plant on Government bills of lading marked "Government property for military use". The remainder of the materials purchased by the defendant, which were not shipped on a Government bill of lading, consisted of less than car lot shipments, and purchases in an amount less than Five Hundred ($500.00) Dollars; title to such purchases also vested in the United States.

6.

A Government Finance Officer in Washington, D. C., paid the freight on the Government bills of lading.

7.

The United States had title to and possession of all materials, supplies, machinery, equipment, and other property used in connection with the Contract for operation of Lone Star Ordnance Plant at all times relevant hereto.

8.

The United States maintained an Accountable Property Officer to be accountable for all property used in connection with the Contract between the Government and the defendant.

9.

Prior to the time the plant actually began operating, the United States advanced to the defendant a large sum of money to defray anticipated operating expenses. As money was withdrawn from this fund, it was replenished

by the Government. The defendant was not required to use any of its own money in the operation of Lone Star Ordnance Plant.

10.

The Government contracted for electric power, gas, telephone, telegraph, and teletype service at the plant, and paid such bills directly. The defendant acted as an agent of the Government for the purpose of causing official business messages to be transmitted.

11.

The plant was under the control and supervision of the Chief of Ordnance, United States Army. A Commanding Officer appointed by the Chief of Ordnance was on duty at the Lone Star Ordnance Plant at all times relevant hereto, and had complete control over the property and the installations thereon.

12.

By deed, Honorable Coke Stevenson, as Governor of the State of Texas, ceded jurisdiction over the Lone Star reservation to United States Government for all purposes except the service of civil process upon the defendant for causes of action growing out of the execution of its Contract, and the United States had exclusive jurisdiction over the premises embracing the Lone Star Ordnance Plant.

13.

The Government retained the right to dismiss any employee at the plant which the Contracting Officer should

deem incompetent or whose retention was by him deemed not to be in the public interest.

14.

The Government approved all wage and salary rates. The Government also required that no key employees and their principal assistants be hired or assigned to service until there had had been submitted and approved by the Contracting Officer a statement of the previous salary, proposed salary, qualifications and experience of the persons selected for such assignments.

15.

All munitions processed at the plant were processed under the direct supervisions and control of the Government.

16.

The Government specified the loading processes to be used. It directed the type and quantity of munitions, the specifications thereof, and the rate of production. Inspections were made by the Government during the various steps of their processing. Detailed rules and regulations governing safety and methods of production were promulgated by the Government. Defendant was required to comply with such rules and regulations and to meet specifications, and Government officers and employees were present to report on compliance.

17.

The Government, from time to time, sent to the defendant production schedules directing the defendant to pro-

duce munitions of certain designated specifications. The defendant was required to meet these schedules. It had no discretion as to the type of munitions to be made, the quantity thereof, or the method or process used in their manufacture, and the defendant produced no munitions except as required by Government directive.

18.

On occasion the Government transferred production schedules from other ordnance plants to the Lone Star Ordnance Plant for completion. In such cases, if the original plant had made any contracts for materials and supplies on account of such schedules, the defendant was required to take over such supply contracts and to pay the vendors in accordance therewith from funds supplied to the defendant by the Government.

19.

The defendant was not penalized if the materials processed at the plant did not meet specifications and could not be used. Under the Contract between the defendant and the Government, the defendant was allowed all costs of reworking rejected munitions and all costs of material finally rejected.

20.

Of the direct materials used in the manufacture of munitions, the Government furnished materials of the approximate value of $503,393,000.00, and the defendant purchased and paid for with Government money materials of the approximate value of $32,514,139.66.

21

The Government employees audited the time cards and payrolls, and during a part of the time, witnessed the actual payments to the employees, and during the remainder of the time, witnessed actual payments to a sufficient number of the employees to satisfy the Government that their actual payments were being made, as indicated by the defendant's payroll records.

22.

The defendant paid wages and salaries of employees by check against a bank account, the funds of which were furnished by the Government, and were subject to withdrawal by the Government.

23.

No sales tax was paid by the defendant on materials purchased for use at the Lone Star Ordnance Plant, no property taxes on real or personal property at Lone Star Ordnance Plant were paid to the State or the County, and no license or registration fees were paid on motor vehicles used in connection with the operation of the plant.

The State of Alabama,
County of Tuscaloosa.

Before me, the undersigned, a Notary Public in and for the County and State aforesaid, on this day personally appeared J. C. Herbert, who being first duly sworn, states on oath that during all the times herein mentioned, he was employed by Lone Star Defense Corporation in the capacities of Assistant Secretary, Assistant General Manager and General Manager; that he has personal knowledge of the facts stated in Paragraphs 4, 7, 11, 13, 14, 15, 16, 17, 18,

19, 22, and 23, of the above and foregoing "Supplemental Affidavit in Support of Motion for Summary Judgment"; that the facts stated in said paragraphs are true and correct, and that he is able to give competent testimony as to the truth thereof.

J. C. HERBERT.

Subscribed and sworn to before me by J. C. Herbert this the 11th day of April, A. D. 1947, to certify which witness my hand and seal of office.

DOROTHY S. McGEE,
Notary Public in and for Tuscaloosa County, Alabama.

(Seal)

My commission expires November 21, 1950.
Bonded by The Employers Liability Assurance Corporation.

The State of Ohio,
County of Summit.

Before me, the undersigned, a Notary Public in and for the County and State aforesaid, on this day personally appeared K. M. Prichard, who being first duly sworn, states on oath that he was employed by Lone Star Defense Corporation in the capacity of Assistant Secretary of the corporation on the 3rd day of June, 1943, and still holds said office; that he has personal knowledge of the facts stated in Paragraph 1, 2, 3, 11, 12, 13, 22, and 23, of the above and foregoing "Supplemental Affidavit in Support of Motion for Summary Judgment"; that the facts stated in said paragraphs are true and correct, and that he is able to give competent testimony as to the truth thereof.

K. M. PRICHARD.

Subscribed and Sworn to before me by K. B. Prichard this the 11th day of April, A. D. 1947, to certify which witness my hand and seal of office.

ALBERTA M. TEWERS,
(Alberta M. Tewers),
Notary Public in and for
Summit County, Ohio.

(Seal)

My Commission expires November 15, 1947.

The State of Ohio,
County of Summit.

Before me, the undersigned, a Notary Public in and for the County and State aforesaid, on this day personally appeared K. R. Huffman, who being first duly sworn, states on oath that he was employed by Lone Star Defense Corporation in the capacity of Controller and Assistant Treasurer on the 22nd day of July, 1941, and still holds said offices; that he has personal knowledge of the facts stated in Paragraphs 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 14, 18, 19, 20, 21, 22, and 23, of the above and foregoing "Supplemental Affidavit in Support of Motion for Summary Judgment"; that the facts stated in said paragraphs are true and correct, and that he is able to give competent testimony as to the truth thereof

K. R. HUFFMAN.

Subscribed and Sworn to before me by K. R. Huffman this the .... day of Apr. 11, 1947, A. D. 1947, to certify which witness my hand and seal of office.

R. MacGREGOR,
(Rosemary MacGregor),
Notary Public in and for
Summit County, Ohio.

(Seal)

My commission expires August 1, 1948.

Filed April 29, 1947.

PLAINTIFF'S RESPONSE TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT.

56 Filed June 16, 1947.

(Title Omitted.)

To Said Honorable Court:

Come the plaintiffs and in response to defendant's motion for summary judgment state:

I.

Plaintiffs allege that there are genuine controverted issues to material facts in this cause and that such material facts are shown in plaintiffs' complaint which are directly controverted by the general denial filed by the defendant in its answer.

II.

Plaintiffs state that the defendant is engaged in the production of goods for commerce and in acts necessary for the production of goods for commerce at all times pertinent to the complainant filed herein within the meaning of the Fair Labor Standards Act.

III.

Plaintiffs specifically deny that the defendant has paid them the moneys which it owes them under the Fair Labor Standards Act and in that connection states that pursuant to the provisions of the Fair Labor Standards Act and other Acts of Congress said plaintiffs are entitled to be remunerated at the rate of time and one-half their

regular rate of pay for all over-time in which they were engaged as alleged in their complaint.

IV.

Plaintiffs allege that they and each of them were employed under a written contract with the defendant at a specific hourly rate of pay, for a specific purpose and under specific conditions of employment.

V.

Plaintiffs further allege that in view of the controverted issues and the magnitude of necessary proof for their determination neither affidavits nor a reasonable amount of oral testimony could be adduced upon a hearing of the motion for summary judgment for the determination of such issues. The plaintiffs represent to this Honorable Court that affidavits of the many respective party plaintiffs would unnecessarily encumber the record with the many issues of dispute and render virtually impossible a final determination of such issues upon this motion. However, in that connection, the plaintiffs would respectfully show in response to the lengthy affidavit which the plaintiffs are not in present position to admit or deny in full, but which the plaintiffs do categorically deny as follows:

A. Plaintiffs do state that they were employed upon a written memorandum in writing under which the defendant obligated itself to employ and pay the plaintiffs and each of them at a certain hourly rate, under conditions and for a specific labor or service.

B. Plaintiffs specifically state that the defendant did not pay plaintiffs the full amount of pay due them; did not pay plaintiffs in accord with its contract with the Gov-

ernment of the United States; and did not correctly compute the amounts due and owing plaintiffs for said labor and services.

C. Plaintiffs here state that defendant required, directed, demanded and practiced identical methods and usages common to ordnance plants similarly engaged throughout the United States in the employment of similar employees so engaged and wholly failed and refused to compensate the plaintiffs as required so to do for their productive activity and time such plaintiffs were so engaged, as other ordnance plants did.

D. That the defendant throughout all times pertinent to this cause operated as an independent contractor upon a cost plus a fixed fee basis and by its contract with the Government of the United States specifically obligated itself to pay plaintiffs the moneys they seek under this Act.

E. That plaintiffs do not seek under this complaint recovery for so-called travel time and dressing time or any time in which they were not engaged in productive activity as that term is commonly and ordinarily defined.

F. That defendant did recognize and operate under the provisions of the Fair Labor Standards Act in so far as certain classes of employees at its ordnance plant were concerned.

G. That the failure to pay plaintiffs the amounts which they were entitled to is the result of neglect and an arbitrary decision by the defendant through its duly authorized agents which the defendant now seeks to justify after the conclusion of the war and the conclusion of its contract; that the defendant cannot justify and equitably explain its failure and refusal to comply with the Fair Labor

Standards Act in connection with the classes of employees such as the plaintiffs herein while at the same time justifying and indorsing its acts in connection with those classifications already paid their full amounts.

The above allegations "A" through "G" are intended to acquaint this Honorable Court with the true issues involved in this cause without regard to the lengthy affidavit attached to defendant's motion for summary judgment and to indicate that such issues involved in this cause can only be determined by full hearing upon the merits. In that connection plaintiffs represent to this Honorable Court that the matters raised by the affidavits attached to defendant's said motion are not appropriate in this motion for summary judgment as such matters raised in the affidavits can only be determined by a full hearing and plaintiffs allege that the only matter for determination before the Court is the question of interstate commerce presented in defendant's said motion.

Plaintiffs state that the defendant is and has been at all times incident hereto engaged in interstate commerce as that term is broadly defined under the Fair Labor Standards Act and as the Appellate Courts of this land have often held in connection with the administration of the Act.

VI.

Plaintiffs would further state that they will be pleased to enter into stipulation with counsel for the defendant or to state fully and fairly all of the real issues involved in these cases to the Court at the pre-trial conference and that such pre-trial conference should be had at an early date in order that the position of these plaintiffs with respect to these claims be made fully known to the Court.

VII.

Wherefore plaintiffs respectfully request that defendant's motion for summary judgment be in all things denied.

PAT COON,
W. J. HOLT,

Republic Bank Building,
Dallas, Texas.

LINCOLN, HARRIS & KENNEDY,
By C. M. KENNEDY,
(C. M. Kennedy),
Attorneys for Plaintiffs.

312 P. & M. Building,
Texarkana, Texas.

Dated: June 12, 1947.

The above and foregoing responses to the motion for summary judgment was served upon the defendant in the above styled and numbered cause by mailing a true and correct copy thereof to Messrs. Wheeler, Atchley and Newberry, Attorneys of Record for said defendant, at their address in Texarkana, Texas, on the day and date last above shown.

C. M. KENNEDY,
(C. M. Kennedy),
C. M. KENNEDY,
One of Plaintiffs' Attorney.

LETTER OF JUDGE BRYANT, DATED SEPT 23, 1947.

60 United States District Court,
Eastern District of Texas.

Sherman, Texas, September 23, 1947.

Atchley and Vance,
Attorneys at Law,
Beck Building,
Texarkana, Texas.

Clark, Coon, Holt & Fisher,
Attorneys at Law,
Republic Bank Bldg.,
Dallas 1, Texas.

Talley & Owen,
Attorneys at Law,
Rector Bldg.,
Little Rock, Arkansas.

Lincoln, Kennedy & Glover,
Attorneys at Law,
Texarkana, Texas.

Re: Civ. 188, 190, 203, 173, 191, 192, 186, 175, 189 and 187,
Texarkana Division Lone Star Wage-Hour Cases.

Gentlemen:

After much consideration of the motions for summary judgment filed in the above matters, I am of the opinion that the same should be and they are hereby granted, and for the controlling reason that I do not believe that the defendant was engaged in the production of goods for commerce within the meaning of the Fair Labor Standards Act.

In other words, I agree with the conclusions reached by Judge Lemly to the effect that:

Section 3(i) of the act, 29 U. S. C. A. Sec. 203(i), pro-
les that the term 'goods' as used in the phrase 'produc;
n of goods for commerce', does not include goods after
ir delivery into the actual physical possession of the
imate consumer thereof other than a producer, manu-
turer, or processor thereof. The * * * Ordnance Plant
s in its entirety the property of the United States. Prac-
ally all of the materials that went into the munitions
re furnished by the Government and were shipped to
e plant as the property of the United States, for military
e. This included powder, metal and other materials that
rmed a part of the munitions. This was known as free
ue material. The remaining materials, which were used
the main in the fabrication, packing and shipment of
e munitions, were purchased by the defendant from
tside sources, and all these materials became the prop-
y of the Government at the point of purchase, * * *
us the plaintiff was at all times working on goods of
e Government, with machines the possession of which
nained in the United States at all times. After these
ods were worked on by the plaintiff, the United States
pped the same under Government bill of lading to mili-
y facilities outside of the state. If it can be said that
e goods were in the constructive rather than actual pos-
ssion of the Government while they were being pro-
ssed, they were certainly in the actual physical posses-
n of the Government when they were shipped. The
ods in question were munitions of war and were manu-
ctured for the purpose of being consumed by the United
ates in the prosecution of the war. Hence the United
ates in our opinion was the ultimate consumer thereof
thin the meaning of the Act, and the plaintiff was not
gaged in the 'production of goods for commerce.'"

Further I am of the opinion that under the facts dis-
ssed here this Act was never intended to apply to or in-

clude the United States and that in performing the functions which it did in this matter, the United States was not only not engaged in commerce or the production of goods for commerce within the meaning of the Act, but was simply performing an administrative act of the government.

As it is my understanding that the parties have agreed that an order will only be entered in one of the pending cases for the purposes of appeal, and that the other cases will abide the result of such appeal, proper stipulation will be filed by the attorneys to this effect, and attorneys for defendant may prepare proper order within ten days time.

Yours very truly,

(S.) RANDOLPH BRYANT.

Filed Oct. 17, 1947.

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62 SUMMARY JUDGMENT.

(Entered as of Oct. 1, 1947.)

Roy Creel, et al.,

vs. Civil No. 191.

Lone Star Defense Corporation.

This cause came on to be heard upon motion of the defendant for summary judgment pursuant to Rule 56, of the Federal Rules of Civil Procedure, and the Court, having considered the pleadings in the action, defendant's said motion for summary judgment, and the affidavits of John T. Murchison, William A. Bailey, A. Kelly, J. S. Hebert, K. M. Pritchard, K. E. Huffman, A. C. Sprague, R. W. Ells and C. E. Jones accompanying and in support of said

motion for summary judgment, and there being no controverting or opposing affidavit, or other evidence in opposition to defendant's motion for summary judgment, and said accompanying affidavit; and the Court having found that there is no genuine or material issue or controversial question of fact to be submitted to the Court on the trial of this cause, the Court is of the opinion and finds that defendant is entitled to judgment on its said motion as a matter of law, to the effect that plaintiffs take nothing by this suit:

It is, therefore, Ordered, Adjudged and Decreed by the Court that the defendant's motion for summary judgment as to the whole case be, and the same is hereby sustained; and accordingly, it is further Ordered, Adjudged and Decreed by the Court that plaintiffs take nothing by this suit, and that this cause be, and the same is hereby dismissed at plaintiffs' cost for which execution may issue.

(S.) RANDOLPH BRYANT,
Judge Presiding.

Filed Oct. 1, 1947.

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63 NOTICE OF APPEAL.

Roy Creel, et al.,
vs. Civil No. 191.
Lone Star Defense Corporation.

To the Defendant, Lone Star Defense Corporation:

Notice is hereby given that Roy Creel, individually and as the duly appointed agent of all other Plaintiffs named in the Amended Complaint filed herein, for himself and as such agent of said employees similarly situated, Plain-

tiffs in the above captioned cause, hereby appeal to the Circuit Court of Appeals for the Fifth Circuit, from the order sustaining the Defendant's Motion for Summary Judgment entered in this action on October 1, 1947.

CLARK, COON, HOLT & FISHER,
1918 Republic Bank Building,
Dallas 1, Texas.

LINCOLN, HARRIS & KENNEDY,
By C. M. KENNEDY,
(C. M. Kennedy),
Attorneys for Appellants, Roy Creel, et al.
310 P. & M. Building,
Texarkana, Texas.

TALLEY & OWEN,
Rector Building,
Little Rock, Arkansas,
Of Counsel.

The original Notice of Appeal is this day mailed to the United States District Court, U. S. Court House, Sherman, Texas, and a copy has been mailed to Otto Atchley, Esq., c/o Atchley & Vance, Texarkana, Texas, and a copy has been mailed to Wheeler, Newberry & Wheeler, Attys., Texarkana National Bank Bldg., Texarkana, Texas, this 10th day of October, 1947.

C. M. KENNEDY,
(C. M. Kennedy),
One of the Attorneys for Appellants, Roy Creel, et al.

Filed Oct. 13, 1947.

64 BOND.

(Title Omitted.)

Know All Men By These Presents: That I, Roy Creel, as Principal, and The Aetna Casualty and Surety Company as Surety, are held and firmly bound unto Lone Star Defense Corporation, a corporation, in the sum of Two Hundred Fifty and No/100 ($250.00) Dollars, to be paid to the said Lone Star Defense Corporation, its attorneys, successors, or assigns, to which payment we bind ourselves, our successors and assigns, jointly and severally.

Sealed with our seals and dated this 10th day of October, A. D. 1947.

Whereas, on October 1, 1947, in an action in the District Court of the United States, for the Eastern District of Texas, Texarkana Division, between Roy Creel, et al., Plaintiffs, and Lone Star Defense Corporation, Defendant, a judgment was rendered against the said Roy Creel, et al., and the said Roy Creel has duly filed a notice of appeal from said judgment.

Now, the condition of this obligation is that if the said Roy Creel shall prosecute his appeal with effect and pay all costs, if the appeal is dismissed or the judgment is affirmed, or such costs as the Appellate Court may award if the judgment is modified, then this obligation to be void, otherwise to remain in full force and effect.

ROY CREEL,
By (S.) C. M. KENNEDY,
(C. M. Kennedy),
Agent & Attorney, Principal.

THE AETNA CASUALTY AND
(Seal) SURETY COMPANY,
By (S.) W. N. PITTS,
Attorney in Fact, Surety.

Filed Oct. 13, 1947.

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65 STATEMENT OF POINTS.

(Title Omitted.)

Now comes Roy Creel, plaintiff in the above numbered and entitled cause, and files this concise statement of the points on which he intends to rely on the appeal of this cause, as follows:

1.

The Trial Court erred in sustaining the defendant's Motion for Summary Judgment, and, in effect, holding:

a. That the goods produced by defendant during the time, at the place, and in the manner now shown by the record did not constitute "goods" as that term is defined

by the Fair Labor Standards Act of 1938, as amended; and,

b. That the delivery of such goods after production, assemblying and compounding by defendant to the agent of the United States Government at the plant site, and the subsequent consignment and shipment thereof by him to various military installations and persons outside of the State of Texas, did not constitute engaging in "commerce" as that term is defined by the Fair Labor Standards Act of 1938, as amended.

CLARK, COON, HOLT & FISHER,
Republic Bank Building,
Dallas 1, Texas.

LINCOLN, HARRIS & KENNEDY,
312 P. & M. Building,
Texarkana, Texas.

By C. M. KENNEDY,
Attorneys for Plaintiff.

TALLEY & OWEN,
Rector Building,
Little Rock, Arkansas,
Of Counsel.

Receipt of the foregoing is acknowledged this the 28th day of October, 1947, and any further notice is waived.

WHEELER, NEWBERRY AND WHEELER,
Texarkana National Bank Building,
Texarkana, Texas.

ATCHLEY AND VANCE
Beck Building,
Texarkana, Texas.

By (S.) OTTO ATCHLEY,
(Otto Atchley),
Attorneys or Defendant.

Filed Nov. 1, 1947.

67 DESIGNATION OF RECORD.

(Title Omitted.)

To the Clerk of the District Court of the United States, Eastern District of Texas, Texarkana Division:

Appellant designates the following portions of the record, proceedings, and evidence to be contained in the record on appeal in this action:

1. Order of the Court granting Defendant's Petition for removal of this cause to the District Court of the United States, Eastern District of Texas, Texarkana Division, filed on or about November 26, 1945;

2. Plaintiffs' Amended Complaint filed on or about February 6, 1946;

3. Plaintiffs' Amendment to Amended Complaint filed the .... day of February, 1946;

3A. Plaintiffs' Bill of Particulars;

4. Defendant's Original Answer filed on or about January 8, 1947;

5. Defendant's Amended Original Answer filed May 23, 1947;

6. Defendant's Motion for Summary Judgment, with Affidavits and Exhibits, filed on or about January 10, 1947 (not to be printed in record, accordance with order of the Court granting Plaintiffs' Motion to send to the Appellate Court the original record of Defendant's Motion for Summary Judgment, together with exhibits);

7. Defendant's Supplemental Affidavit to Motion for Summary Judgment;

8. Plaintiffs' Response to Defendant's Motion for Summary Judgment, filed on or about June 12, 1947;

9. Letter from Judge Randolph Bryant to Atchley and Vance, and other attorneys, dated September 23, 1947. filed October 17, 1947;

10. Order of the Court dated October 1, 1947, granting Defendant's Motion for Summary Judgment;

11. Plaintiffs' Notice of Appeal filed October 13, 1947;

12. Plaintiffs' Motion for Order to send to Appellate Court original record of Defendant's Motion for Summary Judgment, together with exhibits, in lieu of copies;

13. Order of the Court granting such Motion;

14. Appeal Bond;

15. Statement of Points upon which Appellant intends to rely;

16. This Designation;

17. Clerk's Certificate.

CLARK, COON, HOLT & FISHER,
Republic Bank Building,
Dallas, Texas.

LINCOLN KENNEDY & GLOVER,
312 P. & M. Building,
Texarkana, Texas.

By C. M. KENNEDY,
(C. M. Kennedy),
Attorneys for Plaintiff.

TALLEY & OWEN,
Rector Building,
Little Rock, Arkansas,
Of Counsel.

A true copy of the above and foregoing Designation of Record was served upon the Defendant by mailing to Atchley and Vance, as attorneys of record for such Defendant, a true copy thereof, which service was had by depositing the same in an envelope with sufficient postage affixed, duly addressed to the said Atchley and Vance, Beck Building, Texarkana, Texas, and depositing the same in the United States mail at Texarkana, Texas, on this the 30 day of October, A. D. 1947.

C. M. KENNEDY,
(C. M. Kennedy),
One of Plaintiffs' Attorneys.

Texarkana, Texas.

Filed Nov. 1, 1947.

APPELLEE'S DESIGNATION OF ADDITIONAL CONTENTS OF RECORD.

69 (Title Omitted.)

To the Clerk of the District Court of the United States, Eastern District of Texas, Texarkana Division:

Appellee, Lone Star Defense Corporation, designates the following additional portion of the record, proceedings, and evidence to be contained in the record on appeal in this action:

1. Order directing plaintiffs to file Bill of Particulars (dated September 16, 1946).

2. That portion (indicated below) of Reporter's Transcript of Pre-trial conference (Stenographically Reported) held at Sherman, Texas, May 3, 1946 (filed May 13, 1946), as follows:

a. Line 11, of page 7, to and including line 4, page 8.

b. Line 21, page 34, to and including line 2, page 35.

c. Line 10 to period in line 20, page 36.

3. That portion (indicated below) of Reporter's Transcript of hearing on Defendant's Motion for Summary Judgment (Stenographically Reported) held at Sherman, June 16, 1947. (Filed August 19, 1947), as follows:

a. Beginning at the period on line 24, page 63, and continuing to period in line 13, page 64.

b. Line 3 to and including line 12, page 80.

c. Line 16 to and including line 22, page 82.

d. Line 22, page 83, to and including line 13, page 84.

4. Appellee's Designation (this instrument) of Additional Portions of Record.

WHEELER, ATCHLEY & NEWBERRY,
Texarkana National Bank Building,
Texarkana, Texas.

OTTO ATCHLEY,
Beck Building,
Texarkana, Texas.

By OTTO ATCHLEY,
(Otto Atchley),
Attorneys for Appellee.

A true copy of the above and foregoing Designation of Additional Contents of Record was served upon the appellants' by mailing to Lincoln, Kennedy & Glover, as attorneys of record for such appellants, a true copy thereof, which service was had by depositing the same in an envelope, with sufficient postage affixed, duly addressed to the said Lincoln, Kennedy & Glover, 312 P. & M. Building, Texarkana, Texas, and depositing the same in the United States Mail at Texarkana, Texas, on this the 6th day of November, A. D. 1947.

OTTO ATCHLEY,
(Otto Atchley),
One of the Attorneys for
Appellee.

Filed Nov. 6, 1947.

(Line 11 page 7 to Line 4 page 8, Tr. of Hearing Sherman May 3, 1946):

Mr. Kennedy:

We don't seem to get any agreement, Your Honor please, on the order here, but in the original petition we asked for certain information as to the hours worked, the number of days each week, the number of weeks each month and each year, and the wage rates of these employees were asked in our original petition. We asked that the defendant be required to furnish that into open Court, and, then, they filed this motion for bill of particulars, setting up that we have plead the very things that we were asking for in our original petition, and we come along with our motion for production of records and we understand that they have made a compilation of the very thing that we want, the very things that is material to a decision in this case, as to the number of hours each week each employee worked, the number of days each week that he worked, and the wage rate that he worked at and the change in the wage rate, and the length of time from the beginning of his employment to the end of his employment, which we say would show if there is any overtime compensation due him, and they, of course, are denying that on various grounds.

* * * * * * *

(Line 21 page 34 to Line 2 page 35 Hearing of May 3, 1946):

Mr. Kennedy:

There are some eight hundred employees in this suit, about twelve hundred in Mr. Owen's suit, and our particular claims are based on this: That each one of these employees clocked in at 7:45 in the morning and he clocked out at 4:30 in the afternoon; eight and one-half

hours clock time and the Lone Star Defense Corporation paid them for only eight hours.

* * * * * * *

(Line 10 to Line 20, page 36, Hearing May 3, 1946):

The Court:

Let me ask you a question. Is your whole claim predicated on this clock time or that is, that portal to portal time?

Mr. Kennedy:

Our particular claims are, if Your Honor please. It is not true as to Mr. Owen. He has some. But ours are based on the fact that these employees clocked in and were required, mind you—

The Court:

I understand.

Mr. Kennedy:

—to stay on the ground for eight and a half hours, and they paid them for eight hours. That is our law suit exactly.

* * * * * * *

(Line 24 (beginning at period page 63) to period in line 13, page 64, June 16, 1947, Hearing):

Mr. Coon:

* * * Now, if Your Honor please, our suit today is just the same suit it was when it was filed in September, 1945. By that I mean the sole question before Your Honor today in these law suits is did these employees while engaged in production work do overtime? If they

did, they are entitled to compensation. There is no other fact question. Everything that is set out in the lengthy affidavit as made by the party defendant except a denial wherein they say these parties received their money is not material. There is only one issue. Did these employees engage in productive work overtime? And that is the sole question in the law suits before Your Honor. (Filed May 13, 1946.)

* * * * * * *

(Lines 3-12, Page 80, June 16, 1947, Hearing):

Mr. Coon:

I think we can make an explanation. At the time the bills of particulars were filed the portal suits appeared to be good, and we set off in a separate item travel time. We put it down separate. We waive and make no contention for it, and in all the negotiations and discussions we have never made a contention for travel time, dressing and waiting time. Our contention is solely on the productive time. That is the only contention we make.

* * * * * * *

(Lines 12-22, Page 82, June 16, 1947 Hearing):

The Court:

Take this down now. As I understand your statement. Speaking for all these plaintiffs in these suits that you are making no claim about walking time or dressing time or sleeping time or any other time except the individual man where engaged in actual productive work.

Mr. Coon:

That is correct, sir.

* * * * * * *

(Line 22, Page 83 to Line 13 Page 84, Hearing June 16, 1947):

Mr. Coon:

May I say one word? There is a limitation on productive work. I mean performance of duties. I don't mean he was necessarily making something. I mean he was engaged and in the performance of his duties as required by productive work.

The Court:

I understand that.

Mr. Atchley:

If the Court please, of course, I don't know. I don't know exactly. I am not clear on the plaintiff's position about that.

The Court:

What he means is the time that he was actually engaged on the job. That is what you mean, isn't it, Mr. Coon?

The Court:

Eliminating these frequent periods of walking time, dressing time and sleeping time and all that.

Mr. Coon:

Yes, sir. (Filed Aug. 19, 1947.)

CLERK'S CERTIFICATE.

In the District Court of the United States for the Eastern District of Texas, Texarkana Division.

I, RUTH B. HEAD, Clerk of the United States District Court for the Eastern District of Texas, do hereby certify that the above and foregoing is a true, full, correct and complete transcript of the record in Civil Action No. 191, Texarkana Division, entitled Roy Creel, et al., vs. Lone Star Defense Corporation, as fully as is called for in the designations of record and as remains on file and of record in my office at Texarkana, Texas.

Witness my hand officially and the seal of said Court at Texarkana, Texas, this the 19th day of November, A. D. 1947.

RUTH B. HEAD, Clerk,
By LOIS M. GRIFFIN,
(Lois M. Griffin),
Deputy.

(Seal)

SUPPLEMENTAL TRANSCRIPT OF RECORD.

IN THE

UNITED STATES CIRCUIT COURT OF APPEALS,

FIFTH CIRCUIT.

No. 12,182.

ROY CREEL, ET AL.,

Appellants,

versus

LONE STAR DEFENSE CORPORATION.

Appellee.

Appeal from the District Court of the United States for the Eastern District of Texas.

(SUPPLEMENTAL RECORD RECEIVED 11/25/47.)

CAPTION.

BE IT REMEMBERED, that at special session of Court begun and held at Sherman, Texas, on the 3rd day of May, 1946 and the 16th day of June, 1947, in and by the United States District Court for the Eastern District of Texas, the Honorable Randolph Bryant, United States District Judge, presiding, the following proceedings were had, to-wit:

ROY CREEL, ET AL.,

versus

LONE STAR DEFENSE CORPORATION.

Civil Cause No. 191.

In the Texarkana Division.

MOTION FOR EXTENSION OF TIME.

In the District Court of the United States for the Eastern District of Texas, Texarkana Division.

Roy Creel, et al.,
vs. Civil Action No. 191.
Lone Star Defense Corporation.

To the Honorable Randolph Bryant, Judge of said Court:

Roy Creel moves the Court to extend until December 22, 1947, the time within which the record on appeal in this cause may be filed in the Circuit Court of Appeals, on the ground that by reason of the designation of the

record filed by the appellee it was necessary for the appellant to file an additional designation of that part of the record of the hearings had in Sherman, Texas, on May 3, 1946, and June 16, 1947, which were omitted by the appellee in its designation of the record. No previous extensions of such time have been obtained from the adverse party or granted by this Court.

CLARK, COON, HOLT & FISHER,
Republic Bank Building,
Dallas, Texas.

LINCOLN, KENNEDY & GLOVER,
By C. M. KENNEDY,
(C. M. Kennedy).
Attorneys for Appellant.
312 P. & M. Building,
Texarkana, Texas.

TALLEY & OWEN,
Rector Building,
Little Rock, Arkansas,
Of Counsel.

A true copy of the above and foregoing Motion for Extension of Time was served upon the defendant by mailing to Otto Atchley, one of the attorneys for defendant, a true copy thereof, which service was had by depositing the name in an envelope, with sufficient postage affixed, duly addressed to said Otto Atchley, Beck Building, Texarkana, Texas, on this the 18th day of November, A. D. 1947.

C. M. KENNEDY,
(C. M. Kennedy),
One of the Attorney for
Appellant.

Filed Nov. 19, 1947.

ORDER EXTENDING TIME FOR FILING OF TRANSCRIPT OF RECORD.

(Title Omitted.)

On this, the 20 day of November, A. D. 1947, came on to be heard plaintiffs' motion to extend the time for filing the record in the Circuit Court of Appeals, and the Court after hearing such motion, and duly considering the same, and being of the opinion that it is well taken, It Is Ordered, Adjudged ad Decreed that the time allowed the plaintiff to file Transcript of the Record in the Circuit Court of Appeals be and the same is hereby extended until December 22, 1947, which is less than ninety days from the date of the filing of notice of appeal in this cause.

(S.) JAMES C. WILSON,
(Judge Presiding).

Filed Nov. 21, 1947.

TRANSCRIPT OF HEARING AT SHERMAN, TEXAS, MAY 3, 1946.

In the District Court of the United States for the Eastern District of Texas, Texarkana Division.

T. J. Caulder, et al.,
vs. Civil No. 173.
Lone Star Defense Corp.

James E. Long, et al.,
vs. Civil No. 175.
Lone Star Defense Corp.

Noble W. Black, et al.,
vs. Civil No. 203.
Lone Star Defense Corp.

Appearances:
Talley, Owen and Talley, of Little Rock, Ark., by Mr. Wayne Owen;
Messrs. W. J. Holt and Pat Coons, of Dallas, Texas,
For Plaintiffs.

Wheeler and Atchley, of Texarkana, Texas, by Mr. Otto Atchley,
For Defendant.

L. L. Mills, et al.,
vs. Civil No. 178.
Lone Star Defense Corp.

Appearances:
Talley, Owen and Talley, of Little Rock, Ark., by Mr. Wayne Owen,
For Plaintiff.

Wheeler and Atchley, of Texarkana, Texas, by Mr. Otto Atchley,
For Defendant.

Charlie H. Little,
vs. No. 186.
Lone Star Defense Corp.

W. H. Wrenchey,
vs. Civil No. 187.
Lone Star Defense Corp.

Morris U. Allen,
vs. Civil No. 188.
Lone Star Defense Corp.

James G. Spears, et al.,
vs. Civil No. 189.
Lone Star Defense Corp.

Jal A. Birts, et al.,
vs. Civil No. 190.
Lone Star Defense Corp.

Roy Creel, et al.,
vs. Civil No. 191.
Lone Star Defense Corp.

J. A. Landrum, et al.,
vs. Civil No. 192.
Lone Star Defense Corp.

Appearances.

Lincoln, Harris and Kennedy, of Texarkana, Texas, by Mr. C. M. Kennedy;
Messrs. W. J. Holt and Pat Coons of Dallas, Texas,
For Plaintiffs.

Wheeler and Atchley, of Texarkana, Texas, by Mr. Otto Atchley,
For Defendant.

Hearings on Defendant's Motion for Bill of Particulars, and Defendant's Motion to Dismiss, and Plaintiffs' Motion for Production of Documents, before his Honor, Randolph Bryant, Judge of the United States District Court for the Eastern District of Texas, heard at Sherman, Texas, on the 3rd day of May, A. D. 1946.

Mr. Kennedy:

If I may, and I would like for the record to show in these cases that Mr. W. J. Holt and Pat Coons of Dallas, Texas, are associated with the firm of Talley, Owen and Talley in cases 173, 175 and 203, and with the firm of Lincoln, Harris and Kennedy of Texarkana in 186, 187, 188, 189, 190, 191 and 192. With that explanation, we are ready to proceed.

The Court:

If you don't mind, give the appearances to the reporter.

Mr. Kennedy:

We have given that to him, but wanted you to know about it, Your Honor, please, sir.

The Court:

All right.

Mr. Kennedy:

I don't know what order the Court wants to proceed in these matters. There are several motions pending. I am sure the Court is familiar with the general nature of these suits. They are overtime suits, overtime compensation.

The Court:

Just what is this contention now that is involved in this?

Mr. Kennedy:

Well, briefly, our cases, 186 through 192, seven of them, were filed in the State District Court in Bowie County. They were later removed to this Court.

The Court:

What organization is that against now?

Mr. Kennedy:

That is against the Lone Star Defense Corporation. They are all against the same defendant. All of these cases before you this morning are against the Lone Star.

The Court:

What is that Is that a United States corporation?

Mr. Kennedy:

They are United States contractors, yes, sir. They are a subsidiary of the Goodrich, I believe, but they were operating the Lone Star Ordnan e Plant at Texarkana and all of these cases arose out of the operation down there from 1941 up to the time they closed in about October or November 1st, 1945.

The Court:

Now, what is the source of the charter of that corporation?

Mr. Kennedy:

It is an Ohio corporation.

The Court:

An Ohio Corporation.

Mr. Kennedy:

Yes, sir. They were organized under the laws of Ohio with a permit to do business in Texas, and they have transacted their business here in Texas.

The Court:

All right. You gentlemen proceed now.

Mr. Kennedy:

I don't know what the purpose of the order is.

The Court:
It doesn't make any difference. I just want to get this thing aired out fully and see where we are. These movants would have the burden of proceeding.

Mr. Kennedy:
It may be true. We are the movants in the production of the documents. The defendant is the movant for bills of particulars, and there was a motion to dismiss not fully disposed of at the prior term of Court at Texarkana.

The Court:
What ruling did Judge Davidson make in this matter?

Mr. Kennedy:
On the motion to dismiss he entered a bench docket order only. There is no formal order permitting us, the plaintiffs, to amend in five of these cases. The allegations for motion to dismiss and strike were based on the ground that was a class action and there was no allegation that the particularly named plaintiffs had authority to represent the various named employees in the bill. And that they were not authorized to proceed with those cases, and that they were not similarly situated. That is the substance of their motion to dismiss.

The Court:
Did he rule on that motion to dismiss?

Mr. Kennedy:
He didn't sustain it and he didn't overrule it.

The Court:
He didn't say "nay" and didn't say "yea".

Mr. Kennedy:

He passed it subject to our amendment and we have filed the amendment here today. Mr. Atchley says he is ready to take them up.

The Court:

Any way that is agreeable to you gentlemen is all right with me.

Mr. Atchley:

If the Court please, I believe that the substance of that motion would probably be understood after we dispose of the motion for bill of particulars. I believe the Court would get a better picture of the case by taking up first the defendant's motion for bill of particulars, and we will all get the picture of the plaintiffs' demands and then we could take up the motion to dismiss, which Judge Davidson indicated was good, but he entered the order allowing them to bring in the employees other than the nominal plaintiffs by amendment so that they would be bound by any final judgment entered.

The Court:

Just confer there and see how you want to take it up. Any way you all agree upon is agreeable to me.

Mr. Kennedy:

We don't seem to get any agreement, Your Honor please, on the order here, but in the original petition we asked for certain information as to the hours worked, the number of days each week, the number of weeks each month and each year, and the wage rates of these employees were asked in our original petition. We asked that the defendant be required to furnish that into open Court, and, then, they filed this motion for bill of particulars, setting up that we have not pled the very things that we

were asking for in our original petition, and we come along with our motion for production of records and we understand that they have made a compilation of the very thing that we want, the very thing that is material to a decision in this case, as to the number of hours each week each employee worked, the number of days each week that he worked, and the wage rate that he worked at and the change in the wage rate, and the length of time from the beginning of his employment to the end of his employment, which we say would show if there is any overtime compensation due him, and they, of course, are denying that on various grounds.

The Court:

You want them to make out your case for you.

Mr. Kennedy:

We think they have got information that is material to us.

The Court:

If your party has got a claim, it looks like they ought to have the information about it.

Mr. Kennedy:

We allege in the original petition that no man knows the exact number of days he worked. He knows he worked for the Lone Star, but he don't know what days of each week. He might have laid off one day. They have complete records. The wage hour law requires them to keep a record of each day a man worked, the hour he punched in the clock and the hour that he punched out, and the number of days each week that he worked and we have got to have that information before we can allege that he worked so many hours each day or so many days each week during the entire period of his employment. And we

say that they have that information. Under Rule 34 we are entitled to be furnished with the information if they have it. And that is our whole contention here this morning. We understand that they have made the compilation here. They have got a big record here. And we would be from this time until next year getting it up if they already have it. Getting back to the proceeding, originally these seven suits were filed in the district Court, and the United States Attorney, Mr. King, wrote us a letter and asked that they have a sixty day time to make an investigation. At that time it was—

The Court:

What is the government's interest in this?

Mr. Kennedy:

They are Government contractors. They have a contract with the government on a cost plus basis, and I don't know if there is any recovery here, but I am quite sure the government would have to pay it. That is my understanding of it, I am not familiar with the contract. These gentlemen are, but it is a government contract, and the government was interested in it, and the citations were referred to the United States Attorney and he requested that they have sixty days time in which to make an investigation of these claims, to see whether or not there was any possibility of their being valid. That was the policy of the War Department, the Navy Department and the Attorney General's Department at that time. We granted the extension. We presumed that an investigation was in progress, and about November or December 1st, motions to remand the cases to Federal Court were filed, and Mr. Atchley and Mr. Wheeler came in to represent the Lone Star on the ground that the general policy had been changed about making it an administrative investigation. That had been the policy heretofore, and we as-

sumed that it would be followed when these cases were filed, that the Wage Hour Division, the Attorney General and the War Department would all investigate these claims, to see whether or not they were valid claims, whether there was any overtime compensation due, and we followed the same procedure that had been in effect up to that time. And apparently it has been changed, and now since we can't get this information this matter has been delayed since last September, and we think we are entitled to inspect the records, we are entitled to find out just what number of days each man worked. They have got the record. They kept it. The law required them to keep it. We can't see any erason why we shouldn't have it.

Mr. Atchley:

If the Court please, may I suggest, since counsel and I can't agree upon the procedure, that we present these orders in the order that they were filed? We filed a motion for bill of particulars. We would like to present that motion without reference to the other motions so the Court can get a clear view of the question before the Court on that motion, and then take the others up in the order in which they occur.

The Court:

Go ahead and proceed.

Mr. Atchley:

All right ,sir. The motions are all alike, if the Court please.

The Court:

Now, are all of these cases of the same general nature of claim? There is no difference in the essence of the claims that are presented by these various suits, is there?

Mr. Atchley:

Well, if the Court please, they are the same only to the extent that they are filed pursuant to the Fair Labor Standards Act. They claim in these suits—may I have one of the petitions, please, in any one of the cases that Mr. Lincoln and Mr. Kennedy filed here?

The Court:

Do I understand that all of them are class suits, or are they just suing individually or what? Are they an aggregate of individuals in the various suits, or what?

Mr. Atchley:

If the Court please, the suit was originally instituted by one plaintiff, alleging—in other words, we'll take the case of J. A. Landrum against Lone Star Defense Corporation. That is typical. He brings the suit not as designated agent for the other employees named in the plaintiff's complaint, nor does he bring it in as a class suit. In other words, the Fair Labor Standards Act authorizes the suit to be instituted by one for himself and as the designated agent of other employees similarly situated, but plaintiff doesn't bring that suit in that manner. Neither does he bring it as a class suit. That was the basis of our motion to dismiss, to strike from plaintiff's complaint all employees except the nominal plaintiff in the Landrum Case, J. A. Landrum. And we had the authorities to support it. We have them here for that matter. Now, if the Court please, has the Court read the plaintiff's petition or complaint in either of these cases?

The Court:

No, I have not.

Mr. Atchley:

Well, the Court asked about the nature of these cases. Frankly, if the Court please. —

The Court:

Here is the point. Now, for instance, I notice that in general, as far as I have glanced through the dockets, that there are two firms of attorneys;—that is, Mr. Owen and Mr. Talley's firm, and then Lincoln and Harris' firm.

Mr. Atchley:

Yes, sir.

The Court:

In this 188, there is a single individual claiming, and in these others there is an individual and et als. Well, now, is there any reason why these shouldn't all be tried as one group suit or what is the situation that differentiates that to make an individual plaintiff in this matter when these others are supposed to be as class suits and brought as representatives of a class? I don't get that situation at all. And here in 199, David B. Deal, just one individual plaintiff against Lone Star Defense Corporation. It is true that seems to be a different firm of attorneys in that matter.

Mr. Atchley:

Of course, they all, if the Court please, grew out of their employment with the Lone Star Defense Corporation in one or more of the more than two hundred different classes of employment that they had at that plant.

The Court:

I see.

Mr. Atchley:

The classification for the labor there at the plant was set up so that these men worked at different jobs. Sometimes they would work at a half a dozen classifications. They would work as a guard for four or five months. They would work as a carpenter four or five months, and maybe they would go over to the production line where they were loading ammunition and work for four or five months. So different employees worked at from one to a dozen different classes of work.

The Court:

I see.

Mr. Atchley:

As it is, you could hardly bring a suit solely for the guards because if you get all the guards, you have men who have worked at other employment. So it is a conglomeration of various classes of work that is involved in each of these cases, but they all grew out of their employment with the Lone Star.

The Court:

I understand.

Mr. Atchley:

Under the Wage Hour Law. I think they have attempted perhaps to classify them. Our contentions on our motion to make more definite and certain for our bill of particulars are based upon the fact that the plaintiffs do not allege the basis of their claims. We know absolutely nothing about what they base their complaint upon, and reading their complaint or petition is the best demonstration that we can make of that. Now, the motion for bill of particulars is not involved in the cases filed by the Arkansas attorneys

except in one or two of the cases where pleas of intervention were filed and motions for bill of particulars were directed to those motions for intervention. The reason for that is that we were employed in these cases just before the deadline for answering, and we filed formal answer only to avoid default judgment until we could start investigation. The plaintiff's petition—shall I read it?

The Court:

Is that the amended petition that has been filed this morning?

Mr. Atchley:

No, sir.

The Court:

Well, have you read that amendment they have tendered?

Mr. Atchley:

It is an amendment to an amendment, if the Court please. It is not an amendment complete within itself. I am getting, of course, my motion to dismiss confused with my motion for bill of particulars. I would like to direct my remarks first, if I may, solely to the bill of particulars.

The Court:

All right.

Mr. Atchley:

Then I will come to the motion to dismiss at a later time. The plaintiff brings this suit—I am quoting—"individually and for and on behalf of and for the use and benefit of the following named persons, some of whom reside in * * *", and they are named.

"The plaintiff alleges that he and each of said employees have a cause of action against the defendant arising out of their employment, for overtime wages due them under the provisions of the Fair Labor Standards Act of 1938, as amended; and the plaintiff brings this suit for himself and for and on behalf of and for the use and benefit of each of said employees to recover such overtime wages due them and each of them and for liquidated damages, and attorneys fees, all under the provisions of the said Fair Labor Standards Act of 1938, as amended; the plaintiff alleges that the amount due to him and to each of said employees is in excess of the sum of One Thousand Dollars each."

They don't break that down. That the defendant Lone Star Defense Corporation was a corporation organized under the laws of Ohio with a permit to do business in Texas.

"At all times hereinafter mentioned, the defendant was engaged in the manufacture, production and processing of goods, for interstate commerce at or near Texarkana, Bowie County, Texas, that during the times herein mentioned, the defendant owned, operated and maintained an ordnance plant and established in said county and state where it manufactured, produced and processed ammunition and other goods intended for interstate commerce; during the period of plaintiff's and of each employee's employment. Subsequently all of the goods manufactured by the defendant during the times hereinafter mentioned were produced for interstate commercte and were sold, offered for transportation, transported, shipped and delivered in interstate commerce from the defendant's plant near Texarkana, Texas, to various points outside the State of Texas.

"During the work weeks beginning * * *"—

Here is the nearest they have come to stating a cause of action. During the work weeks beginning August 1, 1941, and ending on the date of the filing of this petition defendant employed plaintiff and each of said employees at various times as well as various other persons in the manufacture, production and processing of ammunition and for interstate commerce.

The Court:
When was that original petition filed?

Mr. Atchley:
September 1945.

The Court:
What is the statutory limitation on a claim of this kind?

Mr. Atchley:
Two years.

Mr. Kennedy:
He thnks that. We take exception to that. We think the four year statute applies.

The Court:
I surmised that since you are making claim from 1941.

Mr. Atchley:
That is true. There will probably be some contention on that. The Courts have so far held the two year in Texas. Reading on:

"In various capacities in said plant."

They have also alleged at various times. They haven't alleged when so we would know what part of the period of time they are claiming.

"Some of such employees including plaintiff were employed as mechanics in what was commonly known and designated by said defendant as departments 2165 and 2170. The functions performed by the plaintiff and each of said employees were an esssential part of the production of ammunition and goods for commerce as that term is defined by the Fair Labor Standards Act of 1938, as amended, and such operations are and were necessary to the completion of such goods. Subsequently, such ammunition and goods were shipped outside the State of Texas.

"The plaintiff alleges that he and each of said employees during the time of their respective employment with the defendant and during such periods aforesaid were employed for work weeks longer than the applicable maximum number of hours under Section 7, of the Act, and defendant failed and refused to compensate them and each of them for such employment in excess of such applicable maximum in such work weeks at rates not less than one-half times the regular rates at which they and each of them were employed. The employment of the plaintiff and each of said employees for work weeks in excess of the applicable maximum under Section 7 of the Act, without compensating them and each of them, for such excess hours at rates not less than one and one-half times the regular rates at which they and each of them were employed, was in violation of Section 7 of said Act.

"The plaintiff and each of said employees aver that during the time of their employment with the defendant, they did and performed work and labor for it, in excess

of forty hours per week for which they have not been compensated."

"There, if the Court please, is the only allegation in this complaint that they worked in excess of forty hours a week, and they don't allege the date of one single week during the four year period that they worked in excess of forty hours. That is the only allegation they have made on that score.

"That neither they nor any of them, have a complete record of the work and labor performed by them while employed by the defendant; the defendant has an accurate and complete record of each and every hour worked by the plaintiff and by each employee, and the wages paid or purported to have been paid by the defendant, which said record is in the exclusive possession of the defendant, not subject to the inspection of the plaintiff, nor of said employees. Said records will reflect the hour at which the plaintiff and each of said employees clocked in for their work, and the hour at which they clocked out, and will show that the plaintiff and each of said employees put in not less than thirty minutes overtime each day in their employment with defendant; and said records will also show the number of hours for which the defendant paid the plaintiff and each of said employees, and that the defendant is justly due and owing to the plaintiff and each of said employees overtime compensation for not less than thirty minutes per day for each day they worked for the defendant. Said records will also show the rate of pay per hour for each hour of regular employment during a forty hour week and the overtime compensation due the plaintiffs and each of said employees would be one and one-half times the regular hourly rate for each hour of overtime worked by the plaintiff and each of said employees. They and each of

them are entitled to recover from the defendant for each hour of overtime labor done and performed by them under the terms of the Fair Labor Standards Act in excess of forty hours per week. They and each of them are unable to calculate the accurate amount which the defendant owes them and each of them for the reason that the time-clock records and other records of such overtime hours and rate of pay are in the sole and exclusive possession of the defendant; and the defendant should be required to prepare and return into Court an itemized statement showing the number of overtime hours as reflected by the time-clock records kept by the defendant for the plaintiffs and each of said employees, the rates of pay for regular work on a forty hour week basis for each respective period, and the changes in such rates of pay from time to time with the number of overtime hours as shown by the time-clock records during each respective period where there was different compensation per hour."

Plaintiff alleges then that they are entitled to liquidated damages and their recovery. That is their prayer. That is identical with all the petitions filed by Messrs. Lincoln, Harris and Kennedy.

Defendant's motion for bill of particulars is brief and I will ask the Court to indulge us in reading it.

"Defendant moves the Court for an order directing the plaintiffs herein to file and serve a bill of particulars with respect to the following matters on the ground that they have not been averred in the petition with sufficient particularity to enable defendant to prepare its answer or defenses, and on the further specific grounds immediately following a statement of the details desired, to-wit:

"An itemized statement and designation of the total number of weeks, giving the respective date of each week, during which the plaintiff and the other employees named in plaintiffs' petition, each respectively, worked for defendant during the period of time from August 1, 1941, to the date this suit was filed."

I would like to make this observation: Not knowing, not having alleged the particular weeks that they claim they worked in excess of forty hours per week, we have no way of determining, if the Court please, whether they claim in excess of the time shown by our records or not. Suppose in a particular week it should develop our records show that the man worked forty-eight hours, and that he was paid. Where that is shown, they also show that he was paid forty hours regular time and eight hours time and a half, but upon the trial of the issue as to that particular plaintiff, he claims that the records were not true, that on that particular week, instead of working forty-eight hours, he in fact worked fifty-six hours. Now, unless we are advised ahead of time what they are claiming, how many hours he claims he worked each particular week, there would be no earthly way for us to determine by conferring with his co-employees for that particular week whether or not he worked in excess of the time shown by our records. In other words, he does not state how many hours he worked on any particular week. So we don't know, and can't know from plaintiff's petition, what his testimony is going to be, as to how many hours he worked in any particular week. When you spread that over a period of four years, it is quite a task.

Now, the next particular that we ask is the number of hours the plaintiff and each employee named in his petition worked during each particular week, designating the respective dates thereof for each of them from August, 41, to the date this suit was filed.

Grounds are as follows:

"Plaintiff and the employees named in said petition have not alleged, neither can this defendant determine from said petition, with any reasonable certainty, whether or not the plaintiff and the employees named in said petition, or either one or more of them, worked in excess of forty hours per week during one or more weeks, or if they, or either of them did, the number of overtime hours they and each of them worked during each such particular week, or the particular week or weeks by dates that they and each of them worked overtime during the period of time from August 1, 1941, to the date this suit was filed. Nor can defendant determine when each respective claim of the plaintiff and the other employees named in said petition for overtime compensation for each particular week accrued, so as to enable the defendant to know or determine which of the weekly overtime claims presented in such petition, each respectively, are barred by the two year statute of limitations."

Which statute the defendant will timely plead in bar of the claim. Now, no claim arises under this act unless he works in exces of forty hours per week and if he is paid on a weekly basis, and I think counsel will admit that, his cause of action for overtime claimed by him to have been worked and not paid for, would accrue upon the pay day following the week that he worked for hours in excess of forty hours that he claims he worked and didn't get paid for.

Now, not knowing which weeks he claims he worked overtime, the dates of the particular weeks, nor the number of hours that he claims he worked in excess of forty for any particular week, there is no way by which you could apply the two year statute of limitation to his claim or any part of it. They can't take an average overtime,

because the Courts have condemned that as a method of proving that as a right to recover under the Fair Labor Standards Act.

The Court:
I thought these decisions were uniform to the effect that these employees making claims of that kind had to be very specific in the enumeration of the time and the instances of it.

Mr. Atchley:
That is correct.

The Court:
Go ahead.

Mr. Atchley:
The next one, if the Court please, we ask for the hourly wage rate of plaintiff and the other employees for each particular week, and fractional part of a week where a different wage rate applied to any employee or employees named in the petition during the period, from August 1, 1941, to the date this suit was filed.

The grounds are that the:

"Defendants cannot determine with any reasonable certainty from plaintiffs' petition, the amount of wages allegedly due plaintiff and each employee named in said petition for each particular week."

No. IV. We desire a detailed statement of the duties of plaintiff and each employee named in said petition and an accurate description of the duties performed during each particular week giving the date of each during

the period of time from August 1, 1941, to the date this suit was filed.

Our grounds are that:

"Plaintiff and the other employees named in said petition have nowhere alleged their respective duties or a description of the work performed by them, each respectively, during any of the weeks between August 1, 1941, and the date this suit was filed, by reason of which defendant cannot, with any reasonable certainty, determine from plaintiffs' petition the employee classification and consequent applicable wage rates of plaintiff and the other named employees, each respectively, during each particular week which they, each respectively, claim to have worked in excess of forty hours per week, nor can defendant determine from said petition with any reasonable certainty, whether or not the work or employment of plaintiff and the other employees named in said petition, each respectively, came within the provisions of the Fair Labor Standards Act or within the exemptions and exceptions contained in said act."

Now, there are a number of situations, number of classes of employment wherein the plaintiff is not entitled to recover for work in excess of forty hours per week, such as employees working in a bona fide executive, administrative or professional capacity. They, nowhere in this petition, state the classification, the character of work they did, the nature of the work they performed nor their duties, so that we can determine whether or not any one or more of those employees are exempt under the executive, administrative and professional exemptions contained in Section 13a of the Act. And, of course, if they are bona fide executive, administrative or professional employees, regardless of the overtime they may have worked, they are not entitled to compensation

Now, if the Court please, that is the motion that is involved in—I don't have those numbers on my tongue—the cases which were removed from the State Court to this Court. We think that we are entitled to be advised by the pleadings the nature of plaintiff's claim with some degree of certainty. Indeed, with such certainty so that we can determine how many hours he claims he worked in excess of forty hours for every week during which he is making this claim. Simply to allege that I have a cause of action against the Lone Star Defense Corporation for overtime work during a period of four years without stating what week or weeks I worked in excess of forty hours—

The Court:

I see your position very clearly, what you are claiming, but what about your motion to dismiss? Are you serious about that or not?

Mr. Atchley:

I am very serious about that, if the Court please, and I have the authorities to sustain me on that position.

The Court:

What is the ground of your motion to dismiss?

Mr. Atchley:

I will read it, if the Court please. It is only a page and a half.

"Comes now Lone Star Defense Corporation, defendant herein, and moves the Court to strike from plaintiff's petition and complaint the names of all employees named in plaintiff's petition or complaint except the plaintiff himself, for the following reasons, to-wit:

"None of the employees named in plaintiff's petition or complaint except plaintiff, have joined plaintiff as parties to this action, nor have they intervened as parties in this action, nor is it alleged, nor does the record show, that plaintiff has been designated by such employees as the agent or representative to maintain this action in their behalf as authorized by Section 16-B of Title 29, U. S. C. A., Article 216-B."

"The plaintiff and the other employees named in plaintiff's petition or complaint in whose behalf plaintiff purports to maintain this action are not similarly situated in this:"

I am not going to read that. After I dictated that ground, I became convinced that it wasn't good in that the plaintiffs each and all worked at different classes of work from time to time.

The next ground is: "The action does not relate to any specific property, and there is no common question of law or fact affecting all persons claimed to constitute the alleged class."

The motion, if the Court please, is briefly this: The new Federal rules of procedure authorize class actions, but the Courts have held that this is not a truly class action, because the evidence that it would take to sustain a verdict for the plaintiff or for the defendant would be different as to each one, and because the questions of law, namely, the question of exemption, would apply to some plaintiffs; would not apply to others, so the Courts have held, and I have the authorities that it is not a truly class action as that term is defined by the new Federal rules of procedure. Then, his right to maintain this suit with the other employees rests upon the provisions of the Fair Labor Standards Act. That act authorizes a plaintiff, a number of plaintiffs to bring the suit, or a

plaintiff to bring it as a designated agent for the other plaintiffs. Now, plaintiff doesn't bring this suit in that manner at all, and we have decisions here on this very kind of question, under the Wage-Hour Law, where the Courts held that where suits were brought exactly like these were brought, and the Courts have held in every one of those cases that it is not a class action. Therefore, it can't be maintained by one for the benefit of others, and it was not brought as the designated agent of the other employees. Therefore, these other employees are not in fact parties to the suit. The Courts pointed out in those decisions that in order for them to be represented in the suit, they had to intervene, or be parties plaintiff, or be brought in by a plaintiff as their designated agent for the purpose of prosecuting the suit under this act. Otherwise, the Courts hold the plea of res ajudicata would not be good against any employee named except the plaintiff himself. If the Court would like to have those decisions I have them here, or, I have the brief that I have prepared to support them. I didn't bring the books because they were too volumnious. I imagine the Court has them here in his library. That is our position on the motion to dismiss.

The Court:
You have a brief prepared on this?

Mr. Atchley:
Yes, sir, I do.

The Court:
Do you gentlemen have a brief prepared on it?

Mr. Kennedy:
We have some authorities on it, Your Honor, but no formal brief on the question. We would like to answer, if we may, the remarks of counsel.

The Court:
I will give you a full opportunity. Are you through?

Mr. Atchley:
I am through with the exception that if the Court would like to read the decisions I have on this.

The Court:
I will read yours. I get your position very clearly.

Mr. Atchley:
I don't care to make any argument other than I wanted to get my position clearly before the Court.

The Court:
All right.

Mr. Kennedy:
Now, if the Court please, in response to the defendant's motion for bills of particulars—counsel has read the amended petitions or amended complaints to Your Honor, and you are familiar with the allegations. It is alleged in paragraph IV that during the work years 1941 and ending on the date of the filing of this petition, defendant employed plaintiff and each and all of the above named employees at various times. We contend that that information of the exact time employed by each employee is in the possession of the defendant. They have the record. The law requires them to keep a record of the daily time. We further allege over here in paragraph VII that the plaintiff and each of said employees aver that during the time of their employment with the defendant, they did and performed labor for it in excess of forty hours per week for which they have not been compensated.

"That neither they nor any of them, have a complete record of the work and labor performed by them while employed by the defendant; the defendant has an accurate and complete record of each and every hour worked by the plaintiff and by each employee, and the wages paid or purported to have been paid by the defendant, which said record is in the exclusive possession of the defendant, not subject to the inspection of the plaintiff, nor of said employees. Said records will reflect the hour at which the plaintiff and each of said employees clocked in for their work, and the hour at which they clocked out, and will show that the plaintiff and each of said employees put in not less than thirty minutes * * *"

This is our law suit. Not less than thirty minutes overtime a day. We are suing for that thirty minutes overtime period. That is a definite fixed hour that they were not paid for, and we say that the defendant has in its possession the records of each day the man worked. We don't have it. It is not possible for a man to remember the exact number of days he worked.

The Court:

Do you make any allegation at all about their failure to bring this suit sooner when they could have had a record of it?

Mr. Kennedy:

You mean of the plaintiff?

The Court:

Yes.

Mr. Kennedy:

No, sir. We never have had a record of it.

The Court:

I think they had more knowledge about it than anybody in the world if they were conscious of working overtime. They could have made a record if they had been interested in it. I don't think it is the part of any defendant to make out a law suit for you or any one else. And they are the ones who know better than anybody else about this claim of overtime if they did it. And that is the crux of the whole matter, as I see it, whether you prevail in that or not. But they had the means of making and perpetuating a record if they ever had the thought of bringing a law suit about it.

Mr. Kennedy:

It will develop—

The Court:

I know, but here is the trouble now with your position. You are just bringing a law suit, and of course, based on what these people tell you I am sure.

Mr. Kennedy:

Certainly.

The Court:

But you are just asking that these people oblige you by making out a law suit for you, and I don't understand that that is the duty of any defendant. And that the man who is making the claim has the burden of proving his claim, and it is true what you say about these people having the record. But the point is that your parties plaintiff have the means of making the records and they are more aware of what hours they worked or claim they worked than anybody in the world, and it is their burden to sustain their claim, and not for the defendant to prove it for them. And I can see the liabilities and possi-

bilities of imposition, and no criticism of your attorneys, but these enterprising gentlemen whom you represent and who want to get paid, probably some of them for nothing,—they just imagine they did, might have done it, some of them. But I don't see where it is their duty to make out a law suit for you or for them.

Mr. Kennedy:
If Your Honor please,—

The Court:
I am going to hear you fully, but that is the crux of the matter. And there is much point in Mr. Atchley's position about the liability, the imposition upon this defendant, not by you gentlemen, but by these enterprising, ambitious and seeking clients of yours, who sit by for four years and never be conscious or make any demand for payment for this overtime, and then come and use a high jack, a blackjack on somebody after the lapse of four years. Now, it is no criticism of you attorneys, but I can see the possibility of the rankest kind of imposition, which I am not going to subject anybody to, and then, I think that probably—I don't know—I am not judging any law, but I have the general impression that your claims are subject to the bar of the two year statute of limitations.

Mr. Kennedy:
That may be true.

The Court:
I am not passing any judgment on that, but that is my general disposition or belief.

Mr. Kennedy:
Be that as it may—

The Court:

Of course, if that is the law—I am not making any ruling or pronouncement, but that is my suspicion what the law is about these claims. If you did that, and you didn't require these people to specify that time, why, they would just get it for any period of time in the world.

Mr. Kennedy:

He could very easily plead the two year statute, and it would apply from the two year time he filed his law suit. He don't need any allegation of work weeks. He can plead the claim is barred by the two year statute and then the burden is upon the plaintiff to bring his claim within the two year statute. When he pleads the two year statute, that is a bar for all beyond the two years, if it is good. We are not conceding that. If it is good, that is all he would have to do, is plead the two year statute, and the plaintiff couldn't show anything beyond the two year period. He doesn't have to have a definite day or definite week for that kind of allegation. If Your Honor please, this law suit is predicated upon this fact: We are not here trying to high jack the Lone Star.

The Court:

I am not saying that critically of you gentlemen. I am sure that there are some probably good faith claims in here.

Mr. Kennedy:

Here is the history of it.

The Court:

But regardless of that, if they haven't been paid.

Mr. Kennedy:

There are some eight hundred employees in this suit, about twelve hundred in Mr. Owen's suit, and our par-

ticular claims are based on this: That each one of these employees clocked in at 7:45 in the morning and he clocked out at 4:30 in the afternoon; eight and one-half hours clock time and the Lone Star Defense Corporation paid them for only eight hours.

The Court:

And he probably did about four hours work from my observation.

Mr. Kennedy:

That may be true, but they were out there eight and a half hours.

The Court:

That is neither here nor there. But you want the clock time.

Mr. Kennedy:

I want the clock time and that is the only way we can make our case.

The Court:

I am going down and get a cup of coffee, and I will be back in fifteen minutes, and I want to cogitate a little about this matter. But I get your position very clearly, and, of course, if they are entitled to it under this law, why, they are entitled to it.

Mr. Kennedy:

That is correct. We are not trying to get anything we are not entitled to. If the law don't allow it, we don't want it.

The Court:

I think I possibly see the situation clearly between you.

(Proceedings had after recess as follows:)

The Court:

Now, Mr. Kennedy, do you have anything further to say?

Mr. Kennedy:

If Your Honor please, just a few remarks, and then Mr. Holt would like to make a remark or two if you will permit him.

The Court:

Yes, sir.

Mr. Kennedy:

On this question of the granting of the motion for bill of particulars. That seems under the authorities to be in the sound discretion of the Court whether they be granted it. Moore's Federal Practice, Vol. 11, page 656. Harper vs. Harper. Court Civil Appeals, 4, 252 Federal. 39 Alaska. Muench vs. United States, Court Civil Appeals, 8.

The Court:

Let me ask you a question. Is your whole claim predicated on this clock time or that is, that portal to portal time?

Mr. Kennedy:

Our particular claims are, if Your Honor please. It is not true as to Mr. Owen. He has some. But ours are based on the fact that these employees clocked in and were required, mind you—

The Court:

I understand.

Mr. Kennedy:

—to stay on the ground for eight and a half hours, and they paid them for eight hours. That is our law suit exactly. Here is a case, if you will permit me, Paxton against Askew in the District Court of Georgia, 1940, 35 Federal Supplement, 519.

The Court:

Let me ask you, I am going to try and convert this into more or less a pretrial if there is no violent objection. But do you concede that point about this clock time, or not?

Mr. Atchley:

That he is entitled to between the clock range?

The Court:

No, but about the facts that he is representing.

Mr. Atchley:

We are not agreeing to that. We are agreeing that the contrary is true.

The Court:

The thing, of course, that I have got probably in mind is in the event a trial is had of these matters, just the method and manner of trial. It looks like that is going to be my future occupation for the next two or three years if you have got two thousand employees' claims to try. But I was thinking about the method and manner of developing this testimony if a trial was demanded. Of course, I haven't overruled your motion to dismiss yet. I suggested the possibilities of it to my Court reporter a few minutes ago and he nearly fainted.

Mr. Atchley:

Let me give the Court the benefit of this: These employees that are named here as plaintiffs are not only wage earners. Only wage earners clocked in. The salaried employees did not clock in.

The Court:

That is neither here nor there about this matter except as to the possibility of a trial.

Mr. Kennedy:

I think we could simplify it if we could get this information. We will cooperate every way we can. We haven't been able to get much from the other side so far.

"In action to recover unpaid minimum wages and overtime compensation allegedly due under this chapter, that part of employee's motion for bill of particulars on ground that complaint did not set out what amount was being sued for by employees would be overruled where complaint, as to employee, alleged that during a designated period employee was not paid statutory minimum wage, and was required to work more than statutory hours, and employer, if within provisions of this chapter, had records which would give employee information which could not be obtained by discovery and interrogation. Paxton vs. Askew, District Court of Georgia, 1940, 35 Federal Supplement, 519."

"A motion for bill of particulars as to evidentiary matter not required to enable the moving party to prepare his respective pleading should be denied. Such information should be sought by discovery. Westmoreland Asbestos Co., Inc., vs. Johns-Manville Corporation, District Court, New York, 30 Federal Supplement, 389."

"Motion by defendant for bill of particulars will not be granted before answer if it does not aid the expeditious disposition of the case, and if the complaint states the facts with sufficient particularity to enable the defendant to answer. Fried vs. Warner Bros. Circuit Management Corp., District Court Pa. 26 Federal Supplement, 603."

"Only those particulars should be ordered which are necessary for the formulation of a responsive pleading and are not within the knowledge of the moving parties. Craft Corrogated Containers vs. Trumbull Asphalt Co., 31 Federal Supplement, 314."

We think those authorities clearly give the Court the judiciary power to either grant or deny this motion for bill of particulars, but we say under the facts that they have all of the information within their possession. It is all evidentiary matter, that they can look to their own record for just definitely what we are asking them to give us.

On the motion to dismiss, Judge Davison heard that at the last term in Texarkana, and he entered an order, I think you will find it on the docket there, that it was passed subject to an amendment. We have today filed this amendment to the five suits in which that question is involved, and the amendment reads like this:—This is 192.

"Now comes J. A. Landrum, with leave of the Court had and obtained in open Court, and files this amendment to his First Amended Original Petition or Complaint and for such amendment says:

"I. The plaintiff J. A. Landrum brings and maintains this suit for and in behalf of himself and all other em-

ployees named in Paragraph Numbered I of his first amended original petition or complaint, he and all other of said employees being similarly situated; and said employees named in Paragraph Numbered I of his first amended original petition or complaint have designated him as their agent to bring and maintain this suit for and in behalf of said employees, all of whom, together with himself, are similarly situated.

"II. In the alternative, if it be held by the Court that this action may not be maintained by the plaintiff in the capacity stated in his first amended original petition or complaint, and in Paragraph Numbered I of this amendment, then, and in that event only this suit is brought and maintained by the plaintiff J. A. Landrum and by all other employees named in Paragraph Numbered I of his first amended original petition or complaint as individual plaintiffs; and in such event the plaintiff J. A. Landrum and all other employees named in Paragraph Numbered I of said first amended original petition or complaint pray judgment be rendered for them and each of them in their individual capacities as plaintiffs for all overtime compensation * * *"—

Then the remainder of the prayer for judgment if that should be the ruling of the Court.

Now, the particular wording of the statute with respect to these actions is as follows:—This is Section 216. Says:

"Any employer who violates provisions of this Section, 206, and Section 207 of this title shall be liable to the employee or employees affected in the amount of the unpaid minimum wages or the unpaid overtime compensation as the case may be and in addition, an equal amount as liquidated damages. Action to recover such liability may be maintained in any Court of competent

jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated, or such employee or employees may designate an agent or representative to maintain such action for and in behalf of all employees similarly situated."

We might say this:

The Court:

What was the cause of the removal in this case? Was it diversity of citizenship or was it under the claim that it arose—

Mr. Kennedy:

Diversity of citizenship was the main ground, and we didn't contest it. We filed a contest to it, and we abandoned it on the removal. We frankly and conscientiously believe—

The Court:

This diversity of citizenship was the sole ground of removal?

Mr. Atchley:

Sole ground for removal was diversity of citizenship.

Mr. Kennedy:

Sole ground for removal was diversity of citizenship. We didn't contest it. We filed a contest and waived it. We think, however, it was good. But it don't make any difference. We had just as soon be in Federal Court as State Court.

The Court:

That operates both ways. I would just as soon you would be in the State Court as in the Federal Court.

Mr. Kennedy:

There are a lot of matters here that have to be threshed out. We don't want to burden the Court.

The Court:

I want more time. I am not going to rule on this matter now, because it is of too much importance now to both of you. I want an opportunity to consider it. Now, is there any possibility—I will hear you in just a moment. Is there any possibility of you gentlemen being ready for trial by the regular term of Court at Texarkana in the event this matter should be ruled on in the next four or five days?

Mr. Kennedy:

I don't see how it possibly could.

Mr. Atchley:

No, sir.

Mr. Kennedy:

If you should grant the motion for bill of particulars, we would have to re-plead. If you should grant the motion for production of documents, it would take us some time to inspect the documents and meet his bill of particulars. It looks like if you grant one, you would have to grant the other, would be our off hand opinion.

Mr. Coons:

May it please Your Honor, the first thing I would like to say in order to establish our position in this thing: I think that we had virtually a similar re-action that Your Honor has to this type of litigation when it was first brought to our attention. Mr. Holt and I sat down and looked the situation over and inquired why this case was brought at the time it was. We found it was brought

during the war and some two months prior to the closing of this plant and that it is actually a simple case, though it is very voluminous, in that either these people are entitled to this money or they are not entitled to it.

The Court:

I see it is not so complicated as it might appear. That is, so far as the issue is concerned; that is, the fact issue, but go ahead.

Mr. Coons:

I thought about it as simply this, if Your Honor please, in some of these cases, two or three of them, there are four or five hundred employees. Say, had this case been brought a year ago while the war was at its height, and we had sought this information on behalf of these employees, no doubt the Lone Star Defense Corporation would have said "here are our records. We want to satisfy our people." The Act of Congress provides that if they are working overtime, they should be paid, and here is the situation. Mr. Owen, for instance, had a case last year where this Arkansas Ordnance Plant was involved, where they readily brought in their records and said "here are our time records and here are the records of our employees", and they sat down and worked the thing out, said "yes, we do find some overtime due in this case". The situation is at this time that the Lone Star Ordnance Plant is no longer in operation. The war is over. There is no duty as far as the employer is concerned over those employees, other than possibly to take a definite stand in this case. In the event they can successfully deny these people the right to these records, they can successfully defeat their claims. For instance, if Your Honor please, there is the guards' case. That case involves some four hundred guards, who, and our contention is, on some days of the week worked more than

three hours overtime. They were required to report and put on uniforms for certain drills for which they were not paid. Those particular employees are scattered over a wide area. They are not up at Texarkana. In Arkansas and possibly on the West or East Coast. We represent those people in their claims. We are not contending for a nickel for any one of them, and I would say we would be the quickest people to kick them out if there is a false contention on their part. Every issue of fact that is raised, I believe, is contained in this compilation right here on the desk. We can sit down and go over this thing and it can be worked out in most instances. There are still going to be some doubtful issues in several of the cases that will have to come before Your Honor. But no doubt these matters can be worked out satisfactarily between the parties. The facts will be well known. We will make no false contention. We don't want anything for any one of them that we are not entitled to, and, on the other hand, if this public Act of Congress—

The Court:

The only thing is that things might be misrepresented to you by your clients. That is the only thing I was insinuating. Of course, no lawyer is responsible for that. You have perhaps seen the experience. I have had clients lie to me about their cases, but that is not of any controlling importance, except that it looks like to me that in view of all this time that has elapsed and these people who claim that they did the work should know better than anybody in the world the extent, the amount of work and the time they spent on the job.

Mr. Coons:

That is the very point that I wish to make. They are scattered around over the country now. The Act provides that one of them may bring a suit. The act itself

establishes a procedure that one of them may bring a suit for the benefit of all others similarly situated.

The Court:
I understand.

Mr. Coons:
For instance, this guard situation. We could bring one of them in here and establish what the general procedure was, but so far as establishing a liability for each one of them personally is concerned, I think we would have to bring them all in Court. I know Your Honor is not going to sit here in Court and listen to five hundred witnesses testify.

The Court:
I will if it is necessary, but I don't relish the thought.

Mr. Coons:
Our thought is we don't want anything except just what these men are entitled to and what the definite facts show. Why can't we sit down with these people and have these records that are records that were made under public contract? If it was a contract, we would go to Washington and get it. All these dilatory pleadings and motions that are filed as far as we are concerned are ridiculous, because either the facts show that we are entitled to it, or they show we are not entitled to it, and if any of them show they should be denied, we are going to be the first to kick them out. These records that they say are personal and privileged that have been compiled by government auditors should be available to us. If we are required to plead more specifically, then, we can take those records and show each one of our clients. Five hundred men can't remember 365 days each year. Those records are going to show whether he worked 365 days

a year. It is information that we must have to show those matters. We have got to take those records to shew the number of days that they were present. Certainly five hundred men can't remember each day that they were present and working during that period of time. Those records are going to establish this litigation. It is a short cut. It is one that we are entitled to under Rule 34 of discovery, and make a photostatic copy of it. We will do anything Your Honor directs, but we must have it or this litigation is going to fail. I think we are entitled to it. We feel we are entitled to it. If there are those that shouldn't be paid, they are not going to be in litigation. If there are those who should be paid, then we will contend for it.

The Court:

All right. Well, now, Mr. Atchley, if there is not any possibility of this trial at the May term down there, and in the event a trial is demanded under these rules, which I am not going to pass on today, but which I hope to do soon, I will take it up with you gentlemen by correspondence and see about fixing a specific time for it; in the event a trial is demanded, I am going to call you together though and have a pre-trial conference and see what we can do about some short cuts in eliminating a whole lot of this. But I can't do anything until I rule on these questions you have raised, and know where we are on those, and then if a trial is demanded, I am going to have a pretrial hearing and iron these things out as far as we can to the dismay of the Court reporter probably.

Mr. Atchley:

If the Court please, do I understand—

The Court:

I want your brief on it and I would like for you gentlemen to give me a memorandum of your authorities, about

your position, about your right to this information. Can you do that within ten days?

Mr. Kennedy:
Yes, sir.

The Court:
Is that time agreeable to you, Mr. Owen?

Mr. Owen:
Yes, sir.

The Court:
And you gentlemen?

Mr. Coons:
Yes, sir.

Mr. Holt:
Yes, sir.

Mr. Atchley:
If I understand, counsel has presented in a brief way his motion for production of documents. Is that under the consideration of the Court now?

The Court:
Yes, sir.

Mr. Atchley:
If the Court please, I would like to be heard on that for just a moment.

The Court:
All right.

Mr. Atchley:

If the Court please, they have made a motion under Rule 34, requiring the defendant to produce the files which the attorneys have had compiled for the defense of this law suit that contains the authorities and the brief and everything else. It is not the original time records. That isn't the thing that is before the Court. They are asking for a compilation which was made under our direction of all this information and not the official time keeping records, if the Court please. I can see, I think they are entitled to inspect and copy or photograph the original records if they make a motion designating the particular records that they want to inspect and photograph. We are perfectly willing, if the Court please, for them to do that, if they will designate those records, but not, if the Court please—Now, I have brought a sample compilation to demonstrate to the Court that this is my private files that I have prepared. This isn't any part of the official record. It was compiled after the law suit was filed. We don't think they are entitled to go into my files and examine my records.

Mr. Coons:

May I say to Mr. Atchley in that respect we don't want anything that he has made as a defensive issue.

The Court:

Their motion is just for the production of records, as I understand. Isn't that your motion?

Mr. Coons:

Our motion is for the production of this compilation which was made by auditors and clerks working for the government under Mr. Atchley's direction, which is a resume of all those things out there. Mr. Atchley says that is a privileged communication because it was made

for his use, but it was made by auditors and clerks of the government under his direction, and it is a summary of the whole thing and we think we are entitled to it.

Mr. Atchley:

It was not made by any government auditors, if the Court please. When this law-suit was filed, we realized that there were so many employees we could not remember in our mind the information applicable to each employee. We prepared a form that would give us for our benefit in pleading and in trying the case information with respect to various employees and asked the Lone Star Defense Corporation to prepare those, which they did. They are not any part of the official records. They are hearsay.

The Court:

I think I see the whole issue between you clearly, and I will give you a prompt ruling on these questions. I don't know who it will help or hurt at this time, but is your brief prepared now?

Mr. Atchley:

Yes, sir. It is just in my note book. When the Court gets through with it, I would like to have it back because I only have one copy.

The Court:

I will give you gentlemen ten days in which to reply to this.

Mr. Atchley:

We are taking the position if the Court please, that the Fair Labor Standards Act does not apply with respect to any of these employees, and we have authorities to sustain it in this particular instance, with this kind of

contract that the government has with Lone Star. Now, we think the issue of coverage of the Lone Star Defense Corporation with respect to all of these cases should be consolidated under Rule, I believe it is 74a, for the purpose of trying that issue alone before we go into the merits of the various employees' claims.

The Court:

You take the position that the law doesn't apply to these?

Mr. Atchley:

Yes, sir, I do, and I am very sincere, and we have authority to present that defense by the Department of Justice.

Mr. Coons:

We took that up with Mr. Earl Street of the Wage and Hour Division in Dallas, and he advises us that no coverage in instances between the government, in itself, should not be pled in this case, because it is so well settled that they are in commerce when they are making these things for the government.

Mr. Atchley:

That at one time, if the Court please, was a defense, which the Department of Justice would not let private counsel present. But there has been a recent case, the likes of which has never before been decided, and the Department of Justice has withdrawn that, and our pleadings have been submitted to the Department of Justice and we are authorized to submit that as a defense in all these cases. We are serious in that contention.

The Court:

What Court decided that?

Mr. Atchley:
The District Court of Florida, and it is the only case, if the Court please, on that point.

The Court:
How recent?

Mr. Atchley:
Two or three months old.

The Court:
Has it been appealed?

Mr. Atchley:
I don't know whether it has or not, if the Court please. There has been no report on it if it has been appealed.

Mr. Holt:
I just want to make this inquiry, if Your Honor please.

The Court:
All right.

Mr. Holt:
We are not furnishing them a copy of our authorities. We would if they care to exchange.

Mr. Atchley:
I only have one copy.

Mr. Kennedy:
That is all we have with the exception of the one we gave to the Court.

The Court:

I don't imagine they would be any surprise to either one of you, these authorities.

* * * * * * *

Filed May 13, 1946.

TRANSCRIPT OF HEARING AT SHERMAN, TEXAS JUNE 16, 1947.

(Title Omitted)

Appearances:

For the Plaintiffs: Mr. Pat Coon, Dallas, Texas. Mr. Wayne Owen, Little Rock, Arkansas. Mr. C. K. Kennedy, Texarkana, Texas.

For the Defendant: Mr. Otto Atchley, Texarkana, Texas.

Be It Remembered, that upon the 16th day of June, A. D. 1947, came on to be heard in the above entitled and numbered causes Defendant's, Motion for Summary Judgments, before His Honor, Randolph Bryant, Judge of the District Court of the United States for the Eastern District of Texas, situated and holding Court at Sherman, Grayson County, Texas; and,

That the following is a true and correct transcript of the proceedings shown hereinafter had at said hearing, certain parts of the proceedings had been omitted at request of Defendant's Counsel for whom this transcript is prepared.

The Court:

Are you ready to proceed with the hearing on this motion:

Mr. Atchley:

Yes, Your Honor. I believe the Court back on April 30th entered an order. We now have all those judgments ready for the Court's signature. I think that would be the proper thing to get those—Let me count them. I believe they are all here.

Mr. Coon:

With reference to those judgments,—as I understand them, they are the judgments on the partial sustaining of the motion for summary judgment. They also include the knocking out of a number of party plaintiffs, whom we failed to include in our bill of particulars,—those parties,—upon Your Honor sustaining a motion for bill of particulars, which required us to set out these parties plaintiff and what their jobs were, certain information. We attempted to contact all of them. Some of them we couldn't get this information from, and some of the names included in this order are particular party plaintiffs or individuals that we didn't have the information to file on. Under the Act in the event of success, I am not certain that these parties—that it wouldn't re-act to the benefit of all of them in the event some of them in the same classification don't recover. We just have that to point out to Your Honor with reference to these particular orders. We do recognize we did not file bills of particulars in accordance with Your Honor's order, but that was for the reason we didn't have the information, because they didn't forward it to us upon our request.

Mr. Atchley:

If the Court please, I just have this observation to make in connection with that. The Court will recall that there

was a rather vigorously contested motion here for the production of records so that plaintiffs' counsel could inspect them and the Court entered that order in January, directing us to deliver to these gentlemen for their inspection all our records of all the employment of these people. Although that order was entered in January, they have never sought to exercise that right.

The Court:
Let me have that order.

Mr. Atchley:
I don't believe they are all here. Will the Court call the list so that I will know which ones are missing? Will you call the list of cases?

The Court:
Do you have them in numerical order?

Mrs. Ruth B. Head (Clerk):
Shall I do that? T. J. Caulder, 173.

Mr. Atchley:
I have that one.

Mrs. Head:
175. James E. Long.

Mr. Atchley:
I have that one.

Mrs. Head:
178. L. L. Mills.

Mr. Atchley:
Yes.

Mrs. Head:
183. J. C. Barrett.

Mr. Atchley:
Judge, there are three, there are several judgments in connection with each one of those cases.

Mrs. Head:
183, J. C. Barrett.

Mr. Atchley:
Make a note of that 183, J. C. Barrett.

Mrs. Head:
186, Charlie H. Little.

Mr. Atchley:
186.

Mr. Kennedy:
I don't believe you have that.

Mr. Atchley:
You filed an objection to that. We want to take those up a little bit later.

Mrs. Head:
187. W. H. Wrenchey.

Mr. Atchley:
Yes, Ma'm.

Mrs. Head:
188. Morris U. Allen. 189. James C. Spears. 190. Joe A. Birts.

Mr. Atchley:
Right.

Mrs. Head:
191, Roy Creel.

Mr. Atchley:
Yes.

Mrs. Head:
192, J. A. Landrum.

Mr. Atchley:
Right.

Mrs. Head:
203, Noble W. Black.

Mr. Atchley:
Right.

(Reporter couldn't hear all that was passing between Mrs. Head and Mr. Atchley.)

The Court:
All right. Are you ready now?

Mr. Atchley:
If the Court please, there are two cases, J. C. Barrett and others, and W. C. Crumpton and others, who are plaintiffs represented by Judge Sam Watsell of Little Rock. I sent him the original judgments, also two copies to approve as to form. I have not heard from him with reference to those judgments. Of course,—he has the original. And in those cases he did not file bills of particulars at the direction of the Court, and the Court sus-

tained the defendant's motion to strike his pleading, because he had not complied with the Court's order. I have carbon copies of those judgments in my mass of files I have out here in my car. I think you could properly enter it upon one of my carbon copies. He filed no objection to the judgments. I think those judgments should be signed at this time.

The Court:
When were they forwarded to him?

Mr. Atchley:
About ten days ago. What is the date of the letter?

Mrs. Head:
June 6th.

Mr. Atchley:
June 6th, if the Court please.

The Court:
He was notified of that ruling some time ago?

Mr. Atchley:
Yes, sir. He was notified. I can get those carbon copies of judgments.

The Court:
Well, that is all right.

Mr. Atchley:
Now, there are two other cases here that the Court entered judgments on back in April, April 30th, Morris U. Allen and Charlie Little, where the Court sustained the defendant's motion for summary judgment, because all of their time in the limitation period was worked per-

formed in an executive or administrative capacity. After the Court indicated his intention to enter that judgment and requested orders to be prepared, why, counsel for plaintiff filed what they denominate as a reply to that motion for summary judgment with respect to those two plaintiffs. I don't know, hardly, what disposition should be made here. I don't know whether counsel will want to withdraw that answer. They probably don't. They will probably fall in the same category.

The Court:

They didn't contest the allegation about them being exempted?

Mr. Atchley:

They never did. I am of the opinion under that situation, and I have the decisions, the Court can't even consider that reply.

The Court:

I am not going to consider it, because they have had every opportunity to reply and deny those allegations about the character of their work and I thought I had already signed those judgments in that matter, though I think those judgments have been signed, Mr. Atchley.

Mr. Atchley:

Have been signed?

The Court:

That is my impression.

Mr. Atchley:

No, sir, they have not. If the Court please, after the objection was filed, I did not know what—

The Court:
Wasn't that the character of judgment entered just a few days ago?

Mr. Atchley:
No, sir. These, if the Court please, were entered upon the basis of these men working in an administrative and executive capacity.

The Court:
Well, there was no denial of that allegation.

Mr. Atchley:
No, sir. That is correct. I think these judgments should be entered at this time.

The Court:
Let me have them. I will sign them.

Mr. Coon:
May we make a statement in connection with those?

The Court:
Yes, sir.

Mr. Coon:
Those particular two cases,—Mr. Kennedy advises me that he was under the impression there would be a setting on the judgment, and he would have an opportunity to answer them on notification of a setting. With reference to those two cases, they are not cases for overtime compensation as are the other cases. Those parties were paid under a semblance of the Fair Standards Labor Act, but the suits are based upon the failure to compute their time properly and they are different in nature from these other suits, those two particular cases.

Mr. Atchley:

I differ with counsel on the construction of those pleadings.

The Court:

What are the pleadings in the matter?

Mr. Coon:

We have filed a reply to the motion for summary judgment. It is late.

The Court:

Well, I know, but as I recall—I don't recall the names of the individuals, but as I recall, the original claim was based upon an allegation of overtime.

Mr. Coon:

The claim in these two cases, the Little case and the other case, Allen case, are based upon the failure to compute their overtime on a proper basis.

Mr. Atchley:

If the Court please, the Court sustained it on the proposition they weren't entitled to overtime because they were executive employees.

The Court:

I thought that was the whole ruling, they were exempted employees, not subject to these overtime allowances.

Mr. Coon:

They were paying them on an overtime basis, but not a proper overtime basis.

Mr. Atchley:

Not these two.

Mr. Coon:

You were attempting to do it, but not on the right basis.

Mr. Atchley:

They were given an extended work week allowance, gratuitous gift, to maintain a differential between hourly rated employees and exempt employees. It was not overtime payment.

Mr. Coon:

With reference to those two cases we have a letter from Mr. Kennedy addressed to Your Honor and Your Honor's reply with reference to those two.

The Court:

Let me have it. Do you have a copy of his letter?

Mr. Kennedy:

Yes, sir.

The Court:

May 7th is the date of your letter, Mr. Kennedy.

Mr. Atchley:

If the Court please, I think I can explain this whole thing in just about two minutes if the Court will let me.

The Court:

All right.

Mr. Atchley:

They claim in this reply here that we have not computed overtime under the Act correctly, and that that is what the suit is about. The Court has held they were not entitled to overtime under the Fair Labor Standards

Act, because they sustained the exemption from the Act of these employees. What counsel is talking about is this: When hourly rated employees, when their basic rate of pay began to arise, there was virtually every differential,—there was at least a smaller differential between the hourly rated employees and executive and administrative employees, and there was given as a gratuity by the defendant what they term an extended work week allowance. That was a gift to these people in order to maintain a proper differential between hourly rated employees and the others. Now, the basis of their claim in this reply is assuming that these men were subject to the Act, which the Court has held they are not. The judgment should be entered at this time.

The Court:

I find here that Mr. Kennedy wrote me under date of May 7th with reference to these, though, and that I wrote him on May 9th, and told him that I would withhold the entry of orders until he had a reasonable time within while to file controverting affidavits and I am going to let him file those and I will consider them. I am not going to sign these judgments at this time.

Mr. Kennedy:

They have been filed and they were delivered to counsel for defendant.

The Court:

Have they been filed?

Mr. Kennedy:

Yes, sir.

Mr. Atchley:

Yes, sir. We have a copy. We take the position,—but I am going to argue that in connection with the other cases at one time.

The Court:

I told him he could file these and there was evidently a special understanding about that matter.

Mr. Atchley:

Here is the copy of the judgments sent to Judge Watsell and he did not file any objection to those.

The Court:

What was this instrument filed here?

Mr. Atchley:

If the Court please, it simply listed some names. Do you have it there?

Mrs. Head:

Is it in the file?

Mr. Atchley:

It was simply a bill of particulars. It was the two cases, Crumpton—no, J. C. Barrett, et al, and W. S. Crumpton, et al.

The Court:

Now, are you ready to proceed with the argument on these motions now?

Mr. Atchley:

The defendant is ready, yes, sir—

The Court:

All right.

Mr. Atchley:

If the Court please, as a preliminary, recently, last Saturday I believe it was, we were served with what is denominated as a reply to defendant's motion for summary judgment. I assume they were filed this morning or probably last Saturday. They may have reached the Clerk by the time my copies reached me. That reply if the Court please,—I would like the indulgence of the Court. It is very short. To read it. In order to demonstrate that the Court can't consider it as a reply under the rules under which it was filed, the Court will recall that it must be sworn to by competent witnesses familiar with the facts set forth therein, when in fact it is sworn to by counsel, and the evidence set out in our motion for summary judgment is sworn to by people who are competent witnesses to give evidence on the facts sworn to, and that is a requirement of the rule under which the motion was filed. In other words, hearsay statements, legal conclusions, denials and things of that sort are not considered by the Courts as a basis of a motion for summary judgment or as an affidavit, counter affidavit or denial or reply to it. The defendant says that the plaintiff—we will take one case. They are all exactly alike.

"Come the plaintiffs and in response to defendant's motion for summary judgment state:

"Plaintiffs allege that there are genuine controverted issues to material facts in this cause and that such material facts are shown in plaintiffs' complaint which are directly controverted by the general denial filed by the defendant in its answer."

That is just a conclusion.

"Plaintiffs state that the defendant is engaged in the production of goods for commerce and in acts necessary

for the production of goods for commerce at all times pertinent to the complaint filed herein within the meaning of the Fair Labor Standards Act."

That, if the Court please, is a legal conclusion and no fact stated and incidentally, later on in this reply the plaintiffs admit that the question of commerce is properly raised in this motion and that the facts with respect to commerce are not denied.

Paragraph III.

"Plaintiffs specifically deny that the defendant paid them the monies which it owes them under the Fair Labor Standards Act and in that connection states that pursuant to the provisions of the Fair Labor Standards Act and other Acts of Congress said plaintiffs are entitled to be remunerated at the rate of time and one-half their regular rate of pay for all overtime in which they were engaged as alleged in their complaint.

"Plaintiffs allege that they and each of them were employed under a written contract with the defendant at a specific hourly rate of pay for a specific purpose and under specific conditions of employment."

The facts in connection with that are alleged.

"Plaintiffs further allege that in view of the controverted issues and the magnitude of necessary proof for their determniation neither affidavits nor a reasonable amount of oral testimony could be adduced upon a hearing of the motion for summary judgment for the determination of such issues. The plaintiffs represent to this honorable Court that affidavits of the many respective party plaintiffs would unnecessary incumber the record with

the many issues of dispute and render virtually impossible a final determination of such issues upon this motion. However, in that connection, the plaintiffs would respectfully show in response to the lengthy affidavits which the plaintiffs are not in present position to admit or deny in full but which the plaintiffs do categorically deny as follows:

"A. Plaintiffs do state that they were employed upon a written memoranda in writing under which the defendant obligated itself to employ and pay the plaintiffs and each of them at a certain hourly rate, under certain conditions and for a specific labor or service."

If the Court please, that is obviously injected into this thing for the purpose of showing that the four year statute, rather than the two year statute applies. This was filed after the Court had already acted upon the limitation and held that the two year statute of limitation applied, so that is immaterial as far as this hearing is concerned.

Sub paragraph V-B. "Plaintiffs specifically state that the defendant did not pay plaintiffs the full amount of pay due them; did not pay plaintiffs in accord with its contract with the Government of the United States; and did not correctly compute the amounts due and owing plaintiffs for said labor and services."

That is a conclusion.

"Plaintiffs here state that defendant required, directed, demanded and practiced identical methods and usages common to ordnance plants similarly engaged throughout the United States in the employment of similar employees so engaged and wholly failed and refused to compen-

sate the plaintiffs as required so to do for their production activity and time such plaintiffs were so engaged as other ordnance plants did."

I cannot for the life of me see the materiality of that.

"D. That the defendant throughout all times pertinent to this cause operated as an independent contractor upon a cost plus a fixed fee basis and by its contract with the Government of the United States specifically obligated itself to pay plaintiffs the monies they seek under this Act."

"E. That plaintiffs do not seek under this complaint recovery for so-called travel time and dressing time or any time in which they were not engaged in productive activity as that term is commonly and ordinarily defined."

"F. That defendant did recognize the Fair Labor Standards Act and did recognize and operate under its provisions in so far as certain classes of employees at its ordnance plant were concerned."

"G. That the failure to pay plaintiffs the amounts which they are entitled to is the result of neglect and an arbitrary decision by the defendant through its duly authorized agents which the defendant now seeks to justify after the conclusion of the war and the conclusion of its contract; that the defendant cannot justify and equitably explain its failure and refusal to comply with the Fair Labor Standards Act in connection with the classes of employee such as the plaintiffs herein while at the same time justifying and indorsing its acts in connection with those classifications already paid their full amounts.

"The above allegations 'A' through 'G' are intended to acquaint this honorable Court with the true issues in-

volved in this cause without regard to the lengthy affidavit attached to defendant's motion for summary judgment and to indicate that such issues involved in this cause can only be determined by full hearing upon the merits. In that connection plaintiffs represent to this honorable Court that the matters raised by the affidavits attached to defendant's said motion are not appropriate in this motion for summary judgment as such matters raised in the affidavits can only be determined by a full hearing and plaintiffs allege that the only matter for determination before the Court is the question of interstate commerce presented in defendant's said motion.

Plaintiffs state that the defendant is and has been at all times incident hereto engaged in interstate commerce as that term is broadly defined under the Fair Labor Standards Act and the Appellate Courts of this land have often held in connection with the administration of the Act."

Of course, that is just a bare legal conclusion. There isn't a fact stated to support that.

"Plaintiffs would further state that they will be pleased to enter into stipulation with counsel for the defendant or to state fully and fairly all of the real issues involved in these cases to the Court at the pre-trial conference and that such pre-trial conference should be had at an early date in order that the position of these plaintiffs with respect to these claims be made known fully to the Court."

I hope I will not be imposing to state to the Court the object of Rule 56, that where there are issues in a law suit that are not seriously denied and by those facts that there is no dispute about, a law question would determine the outcome of that case. Then, the summary judgment becomes one in which the Court can summarily dispose

of that litigation without going through the farce of a trial. In this instance, if the Court please, the rule requires specifically that an affidavit in support of such a motion—that a motion for such a summary judgment may be supported by an affidavit and when it is, it must be signed by a person,—the affidavit must be made by a person competent to give testimony to the facts stated, and it must not be based upon hearsay, and a lawyer can't make it. If the Court please, that is virtually the terms of the rule itself, as construed by the Courts. Here is what the Court have held about it. The case of Seward vs. Nissen, 2 Federal Rules Decision, 45, it was held that affidavits filed by a party in support or in opposition to a motion for summary judgment must present evidence and should follow substantially the same form as though the affiant were giving testimony in Court. In this instance, if the Court please, the reply is more than half of these cases is not even sworn to and those that are sworn to, if the Court please, are sworn to by counsel for the plaintiff, and the Court, I think, could take judicial knowledge of the fact that counsel knows nothing about this law suit except what his client has told him. It is hearsay. He couldn't give competent testimony of the facts stated in it, and in order, if the Court please, for an affidavit in support of the motion or in order for an affidavit in opposition to that motion to be considered by the Court, the party making that affidavit must state in the affidavit that he is a competent witness, and competent to give testimony to the facts stated therein. I dare say, if the Court please, that none of counsel in this case are competent witnesses in this case. At least they don't make any affidavit to that effect, if the Court please, and besides, if the Court please, those that are sworn to are not sworn to as a fact. They are sworn to upon information and belief. And I have decisions here, if the Court please, that condemn that; say the Court can't con-

sider them. In which event, if the Court can't consider the replies, the motion for the summary judgment by the defendant stands unchallenged and the facts stand undenied. Case of U. S. vs. Newbury Manufacturing Company, 4 Federal R. S., 56C, 41, Case 15, says that a statement of attorney as to what he intends to prove on the trial of a case is insufficient to constitute a controverting affidavit under this Rule 56. Case of U. S. vs. Broderick, 59 Fed. Supp. 189, says that a denial by the attorneys is insufficient as a counter affidavit to an affidavit filed in support of a motion for summary judgment.

Earnest against Stacy Music Corporation, 1 Federal Rules, 720, holds that hearsay statements contained in the controverting affidavit are insufficient and cannot be considered by the Court.

By the way, that is also sustained by two decisions of the Circuit Court of Appeals. B'Espano vs. Federal Reserve Bank, 114 Federal 2nd, 438, and Walling vs. Fairmont Creamery, 139 Fed. 2nd, 318, hold that any statements contained in a controverting affidavit that are based upon hearsay cannot be considered by the Court as a controverting affidavit. And then they also hold those last two cases by the Circuit Court of Appeals hold that statements contained in the instrument which are mere legal conclusions containing no allegations of facts to support the conclusions are inadmissible and cannot be considered by the Court as opposing motion for summary judgment.

Case of Music Corporation, which I have already given the citation to, it is held that rule 56 applies, supporting affidavit must be made on personal knowledge, to set forth such facts as would be admissible in evidence and to show affirmatively that the affiant is competent to testify to the matters stated therein.

Case of U. S. vs. Newbury Manufacturing Company, 4 Federal Rules Service, Case 15, holds that the affidavit

must state that the facts therein are made on personal knowledge of the affiant. The affidavit must state that.

Case of Veeder-Root, Inc., vs. Henrietta, 52 Federal Supplement, 918, and State of Washington vs. Maricopa County, 143 Federal 2nd, 871, by the United States Circuit Court of Appeals says that the instruments are not properly sworn to so as to constitute controverting affidavits in that the affidavits were made upon information and belief, that you will not consider those, and the only affidavits, if the Court please, we have here are based upon information and belief. As I indicated to the Court, more than half of these—I can give the Court the names and numbers—are not sworn to at all. Now, here is the crux, if the Court please, of this. As I stated to the Court, in Allen vs. Radio Corporation of America, 47 Federal Supplement, 244; National War Labor Board vs. Montgomery-Ward & Company, 144 Federal 2nd, 528; Board of Public Instruction vs. Meredith, 119 Federal 2nd, 712, certiorari denied, all hold that the failure of an opposing party to file affidavits admit the facts set forth in the defendant's affidavits supporting its motion for summary judgment. From those authorities, if the Court please, I take the position in which I know I am right, from the condition this record is in, even though those instruments are denominated replies to the defendant's motion for summary judgment, that they have no legal standing in this Court. The Court cannot consider them simply because they have not complied with the rule setting forth what these affidavits must contain, by whom they must be sworn to, and how they must be sworn to. There isn't any semblance of compliance, if the Court please. Therefore, this case stands before this Court for argument upon the legal question of whether or not under the facts alleged in the defendant's motion for summary judgment this judgment should be granted on the ground that the defendant was not engaged in commerce or in the pro-

duction of goods for commerce. Neither have the plaintiffs in this case engaged in commerce or in the production of goods for commerce.

You know, it is quite interesting to me, if the Court please, to review the Congressional Findings and Declaration of Policy when the Fair Labor Standards Act was passed. I would like the Court to indulge me to just read a few lines from that declaration of policy:

"The Congress hereby finds that the existence of industries engaged in commerce or in the production of goods for commerce of labor conditions detrimental to the maintenance of efficient standards of health, necessary for health and general efficiency * * *"

(Remaining portion read was not taken by Reporter, and is omitted at request of Mr. Atchley.)

Now, if the Court please, according to this affidavit, which the Court would have to accept I think as true here, our Government in this instance engaged in a global war, the know-how of mass production of the Lone Star Defense Corporation, a subsidiary of B. F. Goodrich Company, only for the purpose of serving the Government in this war and turning over to the Government its industrial know-how so that they could recruit labor, recruit the proper kind of labor, so as to produce munitions. In competition to others? No. Were they making, if the Court please,—can it be said that the defendant in this case, working you might say in the language of Judge Dawkins as an agency of the State, to recruit labor, to make munitions to try and protect and preserve the American way of life, to try and win the war,—can it be said that it was engaged in competition with other industries making a similar product when, if the Court please, it was on a purely cost plus basis, an agreed fixed fee

basis? The only reason I mentioned that, if the Court please, was to show that Congress never intended this Act to apply to a situation of this kind, where a company was formed, where it devoted its services to the Government, and delivered to the Government its know-how in mass production. There is no such thing as unfair competition in connection with that, if the Court please.

Now, the position is taken, if the Court please, that coverage, that the application of the Fair Labor Standards Act does not apply in this case unless two things exist. The employer must be engaged in commerce or in the production of goods for commerce, and, conceding that he is engaged in one or both, then, in addition to that, the employee must be engaged in work that within itself constitutes commerce or in the production of goods for commerce. Certainly it couldn't be contended in this law suit by the plaintiffs that the Lone Star Defense Corporation was engaged in commerce. They were not engaged in transportation, if the Court please; according to this affidavit, which is true, it stands unchallenged before this Court, the Government bought the land. They furnished the machinery. They built the plant. The entire plant. When the loading of munitions was begun the entire reservation and the plant belonged to the United States Government and the title stood in its name. By reason of condemnation proceedings the land stood in its name and following that Governor Stevenson executed a deed to the United States Government by which he conceded jurisdiction to the United States Government with the exception of the right to serve civil process. So when they started work they started work in a plant that was owned entirely by the Government. They loaded munitions and did whatever they did down there, from parts, components, explosives and materials which the Government supplied through what is called free issue. The material was bought by the Government and shipped under Gov-

ernment bill of lading, marked for military use to itself at this location. Then, if the Court please, it was processed by this defendant. It was then loaded into a car, shipped on Government bill of lading under Government rates to other parts of the Country, to other military establishments, or overseas, wherever that ammunition was consigned. Every bit of it belonged to the Government, and this defendant never was engaged in any type of transportation of that material across the state line, incoming or outgoing.

Now, the position is further taken, if the Court please, --the position here is taken, of course, that they were not engaged in commerce, because the only transportation of goods inbound and outbound across state lines was an act of the sovereign, was the act of our government in the prosecution of a global war and it did not constitute commerce. Congress saw fit, if the Court please, to exempt the United States from the operation of this Act.

Now, we take the further position, we say that they are in error about that. We take the further position, if the Court please, since they were not in commerce, the only question remaining is whether or not they were engaged in the production of goods for commerce. Now, what does Congress say about that? What does it say about goods? It says:

"Goods within the meaning of this Act shall not constitute goods after their delivery into the hands of the ultimate consumer."

That is what Act says, the way the Act reads. They were not engaged in production of goods for commerce. Goods does not include goods after their delivery into the actual physical possession of the user. Under the terms of all shipping orders of inbound stuff, title to all that material that was procured for the use of this plant vest-

ed in the United States Government at the point of shipping. The title was in the Government long before it ever reached that plant according to this affidavit, and I say it is true. Stands before this Court unchallenged. Title was in it long before it came to the plant. Title was in the Government during the time it was in the plant. When the shell was finished it was loaded out, shipped by the ordnance department to wherever it needed the ammunition under Government bill of lading, at Government rates, marked for military use. Title was in the Government at all times. This defendant only worked upon the material.

We take the position, if the Court please, that since the term goods does not include goods after their delivery into the hands of the ultimate consumer, that there is no such thing as production of goods for commerce and certainly—certainly, if the Court please, no one could question with logic that the Government wasn't the ultimate consumer, unless you would go to the remote theory that the belligerent nation was the ultimate consumer of that ammunition. I don't know whether the Court has read or wants us to read the pertinent parts of our affidavit in support of the motion for summary judgment, or not. I would like to abide the wishes of the Court in that respect. There are certain paragraphs, paragraphs 1, 2, 3, 4, 5, 26, 28, 29, 30, 31, 32, 33 and 36 of the original affidavit and also all paragraphs of the supplemental motion for the summary judgment I would like to present unless the Court is sufficiently familiar with it at this moment, has it in mind, to—

The Court:

You go ahead and present your argument just like you want to. I have read it and I am familiar with it in general, but go on and present your argument.

Mr. Atchley:

By reading Judge Lemley's opinion, it sets out the identical facts that exist in this law suit. I think I shall now read to the Court the decision of Judge Harry J. Lemly.

The Court:

Has the plaintiff appealed from the decision in that case?

Mr. Atchley:

Incidentally, Judge Lemly's decision has received very favorable comment by judges over the United States and one in a reported case that I happen know about, and I have that decision here for the Court.

(At this point Mr. Atchley reads the decision of Judge Lemly above mentioned, which is omitted herefrom at the request of Mr. Atchley.)

I call the Court's attention to the fact that the only case by the Courts holding that the Government was engaged in commerce or in the production of goods for commerce was one where the contractor, the employer, did not assemble the munitions of war solely from Government property, but they manufactured, if the Court please, their own explosives; they were in the explosive business. They manufactured their own explosives. They sold those explosives to the Government for use in assembling these shells. But we have no situation such as that in this case, if the Court please. Now, following Judge Lemle's decision—incidentally that is the only case by the Circuit Court of Appeals—and Judge Lemly clearly draws the distinction there. Following that is the case of Kruger vs. Los Angeles Ship Building Corporation, where the Government seized a ship building company

who was engaged in building ships and again, to use the emloyes for the purpose of building and servicing ships to be used by the U. S. Navy: There is this significant language from that opinion I would like to read to the Court. It is very short, but it is to the point.

"Fair Labor Standards Act makes it only applicability where compensation is claimed for labor performed where the employee and employer are engaged in commerce or in the production of goods for commerce, and has to be determined from the nature of the operations of the employer and the nature of the work of the employee. Under the contract referred to and the evidence, the United States was engaged in a war and was at the ship yard manufacturing and repairing vessels as a sovereign in the prosecution of the war, which was necessary in defense of the nation."

It was not engaged in commerce or in production of goods for commerce. There was no commercial features involved in its operation of the plant as its activities were confined exclusively to the manufacture and repairing of vessels for the United States Navy and the plaintiffs were working on goods such as navy vessels and repair work on them for the United States, the exclusive ultimate consumer and owner. The whole enterprise was that of the Government's. Citing the case, if the Court please, of Lynch vs. Embry-Riddle Co., Southern District of Florida. Those are both by the United States District Court.

Now, since that time, if the Court please, Judge Donovan of the Minnesota United States District Court cites with approval—this is in the case of Pfoser vs. Federal Cartridge Corporation, 70 Federal Supplemental, 701, where they had the identical facts we have here, if the Court please, but in that case he held that the plaintiff

was an exempt employee under the terms of the Fair Labor Standards Act and it wasn't necessary for him to pass on it, and the question, the feature whether or not the employee was engaged in interstate commerce or in the production of goods for interstate commerce, but in passing he makes this statement:

"The burden of proof is upon plaintiffs in meeting defendant's contention relating to commerce. The record makes very questionable whether plaintiffs have carried their proof in the foregoing respect. Defendant denies that plaintiffs were in commerce or in the production of goods for commerce within the Act."

And citing those three cases which incidentally pyramid them, all three no stronger than the first one. It goes on:

"Respectable authorities have reached the contrary conclusion", and he cites about four cases on that. Then he cites Judge Lemly's opinion. He says: "The decisions supporting the defendant's contention that plaintiffs were not engaged in commerce or in the production of goods for commerce are collected by Judge Lemly in a well considered opinion in the Barksdale case.

If the Court please, there are other decisions here. I think some of them have been discussed by Judge Lemly. By far the greater weight of authorities among the District Courts of the United States is to the effect that in operations of this character, where the Government owned the entire facilities,—they owned every particle that went into the making of this ammunition, title to all of which vested in them at the point of origin, wherever they were bought, and holding that the act of the Government in transporting that across state lines was

acts of administrative affairs of the Government in its sovereign capacity. The only decision by the Circuit Court is one which Judge Lemly has distnigushed, where the contractor was engaged in the manufacture of the explosives used in making these shells, comingled its work, so that its employees were engaged in interstate commerce. We respectfully submit on two propositions that this judgment should be sustained. As I have indicated too many times, perhaps, the facts alleged in the affidavits supporting the motion for summary judgment stand before this Court legally and uncontested. They are admitted. They are taken as true because they have not been contested as required under Rule 56. Under those two grounds, either one of which to me entitles us, the defendant, to a summary judgment: One, that the defendant is not engaged in the transportation of the goods; never has been, and that they were not engaged in the production of goods for commerce, because, 1. The transportation across the state line was an administrative act of the Government of its own property, the Government which knows no state line, and, No. 2 is that all the work was done on this property wholly within the State of Texas, while all the component parts were in the hands, the actual physical possession of the ultimate consumer, and that is what the very terms were of the Atwell suit under which this suit was brought, and we respectfully submit, if the Court please, that these motions for summary judgments in all these cases should be granted.

The Court:
All right.

Mr. Coon:
May it please, Your Honor.

The Court:
All right.

Mr. Coon:

"I had a recent experience, if Your Honor please, with reference to a motion to dismiss, which was filed in a civil litigation. Upon studying that motion I found that the Supreme Court has recently amended the Rules with reference to motions to dismiss, and added language in substance that a trial Court may within its discretion turn a hearing on a motion to dismiss into a motion for summary judgment and hear testimony. An answer to a motion for summary judgment is not required to be sworn to. That is what our pleading is designated as, and that is what it was intended for. I will read to Your Honor from Moore's Federal Practice under the new Federal Rules, Volume 3, Rule 56, Section 3:

"Unlike the practice in other jurisdictions a motion for summary judgment under Rule 56 is not required to be supported or opposed by affidavits. Rule 56 contemplates that the motion may be heard in any of the four following ways:

"1. Wholly upon affidavits and the pleadings.

"2. Upon the pleadings, depositions and admissions on file without any supporting or opposing affidavits.

"3. Upon affidavits and upon the pleadings, depositions and admissions on file.

"4. Wholly or partly on oral testimony or depositions, the pleadings and such facts and admissions which may appear of record."

Now, if Your Honor please, the fact that the motion for summary judgment has attached to it an affidavit, which in great length outlines all of the proper conduct

of the business of this plant, doesn't lend any greater sanctity to it than the Court by its judicial interpretations and the Statute under which this suit is brought could afford it. In response and by way of analysis there sits in the Court room Mr. Allen and Mr. Little. In the affidavit which is filed by these gentlemen as executives of the Goodrich Rubber Company, who we sue, they state that these two gentlemen, Mr. Allen and Mr. Little, are executive or administrative employees, and therefore excluded from the operation of the Act. They say, why, because as the Act itself provides 20% of their time was not indulged in ordinary labor as the employees and their classifications were required so to do. Now, with reference to the motion before Your Honor, there were three points raised, two of which Your Honor has passed upon. Your Honor correctly ruled that the two year statute of limitation is applicable to it and contrary to any position we recognize the justice and correctness and would not take issue with any ruling of Your Honor.

The Court:

Now, what was this statement in this affidavit about these two particular individuals being under written contract of employment? That is the first time I have heard that claim seriously urged here. Is that in your statement in opposition to the motion for summary judgment in the Little and Allen cases?

Mr. Coon:

If Your Honor please, when we learned a little short time ago that Mr. Atchley wanted some time to amend his motion, we understood for the reason that Congress had passed a Portal Act which had been signed by the President, he filed instead of an amendment to the motion, an amendment to the answer. Is Your Honor familiar with the amendment as filed to the answer? I believe that is the way you filed it.

Mr. Atchley:

That is correct. I pleaded it in terms of the Portal to Portal Act.

Mr. Coon:

We were thinking with reference to the written contract that the Portal Act sets up, that any written contract that obligated the employer would govern in the situation, and if Your Honor please, Mr. Little has handed me this instrument which he signed together with the Lone Star Corporation. It reads as follows: It is designated Assignment Authority. It says: "Name, Charlie Henry Little. Date, 3/30/42. Address, 822 West Knight. Social Security No. 5056726. You are to report for work at once to L. C. Wolff, foreman, in Area Administration, as interchange clerk." That is the classification, if Your Honor please: "Rate, $200.00 per month. Signed, Lone Star Ordnance Corporation, Texarkana, Texas, by J. J. Conlin, Title"—I can't discern, but it is EMPID, apparently, signature of employee, Charlie Henry Little, dated 3/30/42. So that, Your Honor, is our contention that there was a written contract insofar as the applicability of any such new regulations that might come up.

The Court:

I get you on that. I didn't think that was generally involved in these cases, but I can see where it has application to this individual case.

Mr. Coon:

Further, we have other forms signed by other employees which we contend represent a contract, because the parties signed that, referred them to a specific job at a specific classification at a specific salary and a specific duty, and we say that represents a contract. But in that connection, Your Honor, these gentlemen have by

their oaths said that these two fellows, Mr. Little and Mr. Allen, are not covered by the Act, and by their affidavit they say they were not engaged more than 20% of their time in ordinary labor as required under the Act; that they occupied an excutive or administrative capacity. The Court will readily recognize that is a question of fact that can only be determined as to how much time he actually spent. In talking with this gentleman, Mr. Allen, this morning, he advises me that "I was what was known as a field mechanic foreman. I had charge of a group that would keep the machinery going. Assuming that we had a break down in a certain line, it was my duty to see that was repaired as quickly as possible, because we would have some three thousand employees; if a machine was broken down a few minutes, it could mean 1500 man hours lost. So I jumped in and helped always manually." He says in addition: "We employed people who were stating that they were mechanics. They were not really capable mechanics. I had experience and I worked every day manually." Now, I said, "Well, Mr. Allen, do you know any of these gentlemen who are executives lined up across the wall over there who made the affidavit that you didn't work 20% of your time?" He says, "I recognize one of them." Now, I venture to say the gentleman who made that affidavit here of these gentlemen with the Goodrich Rubber Company never saw him before; never had any personal experience with what he was doing. So we can offer his testimony, and we are prepared to do it for Your Honor's consideration. He has, if you please, sir,—Mr. Little, he has every check that he recived from those people. Mr. Little will testify just exactly what his duties were from day to day. He has personally calculated how much money he has recived, how much overtime he put in, how much money he received for overtime, how much money he is entitled to and here is every check that he re-

ceived. Now, we say that maybe this gentleman, Mr. Little, is not given to all the great verbiage and speech in the affidavit and maybe he can't explain himself as well as those gentlemen can, but he is entitled to put that matter in issue by stating that he did work manually, that he was not an executive and an administrative employee within the Act. If Your Honor please, since the filing of these suits there has been a great deal of water passed under the bridge. Since the filing of these suits a great rash of so called portal to portal suits broke out over the country, and the Courts were disturbed about it and looked upon them with little favor. The Congress was disturbed about it and passed an act and the President signed it. During that period of time cases that had been brought under the Fair Labor Standards Act have suffered. The Fair Labor Standards Act may or may not be a good law, but what it provides or intends to provide is a standard living wage. The Act makes no exemptions insofar as employees subject to it are concerned. It subjects all labor to it. The only concern in this question that we have is with three Sections of the Act, the definition of commerce, the definition of goods and the penal provision, for there is a criminal provision which is worthy of consideration. Those three definitions govern this situation. Now, bearing in mind that in spite of all that Your Honor has heard since this argument started, there have been two District Court cases, one by Judge Lemly, one by Judge Dawkins and one Circuit Court case involving this problem. All three involved ordnance plants. All three were suits against contractors who were working on a cost plus, a fixed fee basis. All three contractors were sued for overtime compensation and their contracts specifically provided that all employees must be paid under the Fair Labor Standards Act. That is this contract under which we sue the Goodrich Rubber Company or the Lone Star Corporation

That was the contract in each instance. Now, so far as the law of this land and the writing of any Appellate Court is concerned, Bell vs. Porter is that law, and I would read Your Honor the specific language to say that the munitions that they were making in this plant had any different classifications than in the Lone Star Plant, I am not prepared to say, but I am prepared to read specific language which is identical with the contention of the defendant in this case. "The Constitution confers upon Congress the power to regulate commerce among the several states."—This is Bell vs. Porter, decided by the 7th Circuit on December 10, 1946, and in which a writ of error has been denied. In this case Judge Lindley, Judge, I believe, in the Eastern District of Illinois, heard and wrote on this case, citing what some Circuit Judge heard and wrote on this: "This power to regulate commerce is not confined to commerce or transportation. From an early date such commerce has been held to include the transportation of persons and property, no less than the purchase, sale and exchange of commodities and goods may cover in commerce, though they may never enter the field of commercial competition. For example, the movement of people across state lines and the unrestricted ranging of cattle across the boundary of two states is commerce. The interstate transportation of whiskey for personal use, of a woman from one state to another for immoral purposes without any element of commercialism, of a kidnaped or a stolen automobile, all constitute interstate commerce in the Constitutional sense. These cases we think make it clear that interstate commerce is not limited to interstate trade."

Now, if Your Honor please, the theory that these gentlemen have and the theory that in my opinion has confused the trial Courts where it has been raised recently and the same question was brought before this Appellate Court, the 7th Circuit, they have said, "Yes, but the Gov-

ernment is engaged in a Governmental function of the prosecution of the war," and that one item alone can be the only thing that has caused them to put their finger on an error or a ground for reversal or a ground for their holding that the Act doesn't cover.

Specifically, there is nothing in the Act that could or would exclude the Government. There is no question of the interstate movement. The Governmnet was manufacturing through contracts with numerous other people shell cases and all of the many items that it wanted to assemble at this Lone Star plant, and entered into the contract with Goodrich to receive all those things down there with the Lone Star Corporation, and there was no question about the great influx of commodities and the great outgo, all across state lines. Then, this Bell vs. Porter case goes on to say with reference to the commerce question, the commerce definition, that it intended commerce in the broadest sense, the constitutional sense. "No where in the Act", the opinion in substance says, "is the government for any reason excused." There have been numerous cases, too numerous, where war contractors have been involved and have been held subject to the Act. Many of them. The definition of commerce, if Your Honor please, as defined in the Act is "Commerce means trade, transportation, transmission or communication among the several states or from any state to any place outside thereof." It is as broad as it could possibly be.

That term "commerce" never excluded anybody, and only the Congress could have specificially excluded any corporation or the Government. Now, going back to just preceding that, the purpose of this law was to eliminate detrimental labor conditions. It was to eliminate labor conditions that affected transportation in commerce, and some of the cases that were read to you by the parties—I mean from Judge Lemly's brief there concerned how

broad this Act had been construed. They have held, the Courts have held—for instance, one of them was with reference to working on a navigable river and all of those authorities that have held that you are working, that if the employees are engaged in repair or maintenance of any instrumentality of commerce, that it is so closely related to commerce that it comes within that broad definition. Trucks of motor freight lines, employees that are engaged in working on those trucks of motor freight lines come within the Act, and after all these were the employes of Lone Star. Bearing in mind that we are suing Lone Star and that all of the employees were working for Lone Star, and it is only a question of whether the employees come within the Act, and they can only be excluded by a specific exclusion under the Act. Another and the only particular exemption within the Act, if Your Honor please, is the exemption of the United States Government, every state or political subdivision thereof from the definition of an employee. That is, the employees of the United States, the employees of the State of Texas and of every political subdivision of the State of Texas are exempt. Had it been the intention of the Congress to permit employees other than such as involved in this case, not bringing them within the Act, it would have had to specifically say so, because these were not Government employees. They were employees of the Lone Star Corporation. The Government has not yet engaged and did not throughout the war engage in specific manufacturing and processing of munitions or any other articles. The most significant thing which I would call to Your Honor's attention is that during the war 18 bills were introduced in the Congress, all of which attempted to suspend or restrict the coverage of the overtime provisions with reference to war contractors, all of which recognized the applicability of the Act to these ordnance plants and to all other war contractors, because they were

thinking at that time that for the duration of the war we should alleviate all of this industry engaged and not require of them certain restrictions, such as this Act constitutes. And the Congress never passed such an act, but those 18 bills were introduced and, if Your Honor please, there were three bills introduced in the Senate in the 77th Congress, 11 introduced in the House; two in the Senate in the 78th Congress and one in the House, all of which were attempting to remedy what they considered, their authors considered restrictions against war contractors during the war, and all of which recognized the applicability of the Fair Labor Standards Act. Many, many times cost plus fixed fee contractors have been held subject to the Act. Here is another quotation from Bell vs. Porter in connection with that. "No where in the Act is it suggested that Congress intended that transportation by the Government or of Government Goods be treated differently from all other transportation."

Reading further, Section 2. "To prevent the use of channels and instrumentalities of commerce to perpetuate substandard labor conditions are thwarted whether the channels of commerce are occupied by the Government or by others."

Reading from Walling vs. Patton Transportation Company, 134 Federal 2nd, at 939: "No reason appears why contractors for the Government are to be permitted to maintain substandard labor conditions while private contractors are prohibited from so doing, and such view would thwart the clearly defined purpose of the Congress, particularly if applied at a time when all or nearly all major industries are operating under Government contract."

In that connection Waller vs. McGrady Construction Company, if Your Honor please, 156 Federal 2nd, at 932 contains the following: "The argument that it was the Congressional intention to make the Fair Labor Stan-

dards Act inapplicable to work under Government contract must be rejected. No reason appears why contractors for the Government are to be permitted to maintain substandard labor conditions while private contractors are prohibited from so doing, and such view would thwart the clearly defined purpose of the Congress, particularly if applied at a time when all or nearly all major industries are operating under Government contract."

And Bell vs. Porter contains the following language: "On the first point raised it will be enough to say that cost plus fixed fee contractors with the Government engaged in war production are not agents of the Government." And cites the Alabama King and Bozier case, Kerry vs. United States: "And it has been held that the production of goods for interstate transportation by or for the Government is production for commerce within the meaning of the act." That, Your Honor, is Bell vs. Porter, the only writing by any Appellate Court on the question before Your Honor and in which a writ has been denied. That case, and having glanced through Judge Lemly's opinion—I don't know he said anything about the Bell vs. Porter case, but the language is specific. It certainly is controlling in our situation here. The Bell vs. Porter case was an ordnance plant case. There the Government—I am told by some of these gentlemen sitting back here that some of those materials came into the Lone Star Ordnance Corporation—that a tremendous lot of the inflow there was by a truck and a tremendous lot of it was out by truck, where the shells were taken to the proving grounds. However, our position is, if Your Honor please, that it makes no difference so long as there was the interstate movement. With reference to gold shipment or the acts that are applicable to a gold shipment, calling it an administrative act, there might be something to it, but in this instance we can't see that there is anything to the contention. The only thing

that has disturbed me is by saying that we were prosecuting the war and turning this over to the Government. I have looked up Governmental functions. I have read some cases that refer to Governmental functions. Certainly the prosecution of the war is a Governmental function, but there are hundreds of Governmental functions. The engagement in a war that may mean our very destruction is the most important one we can think of, but there is little stronger Governmental function than the one Your Honor occupies now, the administration of justice in our Judiciary. I remember a case I read one time of Governmental function which involved the prosecution of farmers in Mississippi, a Federal Act required the killing of cattle down in Mississippi or through a certain area in the South, and those farmers refused to let the representatives and agents of the Agriculture department come up on their farms, and dip their cattle. They ran them off with courage and there was a conspiracy charge against all of them for violating the governmental function to protect the public health. The governmental functions today are too numerous to talk about, that all activities of the Government may be a function where there is any definition of a purpose or policy. So there is nothing in the Act that describes that Governmental function or there is nothing in the Act which says when title can pass or when title may pass. It doesn't make any difference. What difference does it make about the Government being engaged in this particular enterprise in the prosecution of the war, because at the same time it was engaged in hundreds of other governmental functions, maybe not as important as the prosecution of the war, but all of the goods that were being produced were being produced in commerce and the fact it was a governmental function doesn't excuse the Act unless the Congress indicates it should excuse the Act. It has been pointed out and emphasized that the Government is the ultimate

consumer, and thereby excused under the Act. Well, all we have got to do is to read the Act to ascertain that it just doesn't read that way. The definition of goods in Section 3(i): "Means goods, wares, products, commodities, merchandise or articles or subject of commerce of any character or any part or ingredient thereof, but does not include goods after their delivery into the physical possession of the ultimate consumer thereof, other than the producer, manufacturer or processor thereof." Now, that means—

The Court:

Who do you think these munitions were delivered to and when?

Mr. Coon:

Well, they were deliverd to the Government.

The Court:

The Government had title to them, didn't it?

Mr. Coon:

All right. The Government had title to it.

The Court:

Wasn't the Government the ultimate consumer?

Mr. Coon:

Well, was the Government the producer of it? I mean that is the converse of it, if Your Honor please.

The Court:

Well, I want to ask you if in your opinion the Government was the ultimate consumer of it.

Mr. Coon:

Yes, sir. I say the Government was the ultimate consumer of them and that they came into possession of them. "Other than a producer, manufacturer or processor thereof", and by that, if Your Honor please, in 1939, soon after this Act was passed in 1937, there was an administrative rule out of the Department of Labor, said what does that provision mean? And they held that it means that the Act does not intend to subject innnocent purchasers who may buy these goods which may have been produced in violation and the ultimate consumer of the goods will not be subjected to prosecution, and that, if Your Honor please, is brought out in numerous decisions by the Court, but the analogy is, if Your Honor please, was the Act intended to excuse the ultimate consumer who was not a producer or to get the producer when he was also the ultimate consumer.

The Court:

Well, who do you think was the producer of these goods?

Mr. Coon:

The Lone Star Corporation, subsidiary of Goodrich Rubber Company, the employer whom we sue, whose employees were producing goods for transportation in commerce.

The Court:

All right.

Mr. Coon:

And this suit is not against the sovereign. The sovereign is not involved in our suit. We have no suit against the United States of America. Our suit is against Goodrich Rubber Company, the gentlemen who anxious-

ly made those affidavits, who they represent over there, and their company is the one to suffer or should suffer for the failure to pay these people under the Act which they contracted with the Government specifically to do, Your Honor. And I would head an analogy that was made by the Department of Labor from the Hazeltine case which these gentlemen read Your Honor. That Hazeltine case was appealed to the Second Circuit and is now pending there. There the ultimate consumer provision was a primary ground for the trial Court there saying the employees are not subject to the Act, and at that time the Department of Labor filed a brief that I now hold in my hand saying that that provision isn't applicable and saying numerous other things agreeing with the Bell vs. Porter case and contending that the Government was not exempt under the Act, but it said with reference to that provision: "Since the only concern of the provision was for the ultimate consumer, it would seem to follow that if an ultimate consumer who is a producer is not exempt", —now, if he was also the producer, if the government itself was the producer, then certainly the government wouldn't be exempt because we would bring the government in. "A producer who is not an ultimate consumer would not be exempt." Now, the Lone Star Corporation was not the ultimate consumer. The Government was the ultimate consumer. The Lone Star Corporation is the producer whom we sue, who is not exempt under any provision of the Act. All of the goods,—certainly there can be no question but what they were transported in commerce. There must be a specific exemption. A specific exemption. If your government is the purchaser of these things, nothing in the Act provides that: The Congress never made a provision to that effect. Here is an analogy made in this brief, if Your Honor please. In Slover vs. Worsham, 140 Federal 2nd, 258, "One company maintained a dock at which it repaired barges owned

by an affiliated company. Employees repairing the barges were considered engaged in the production of goods for commerce, since the Court considered the two companies as one." That is, Your Honor, since they were affiliated or subsidiaries. The ultimate consumer of the barges was also the producer thereof, and the consumer clause did not apply.

The Court:

I get your point on that. I believe we will take about a twenty minute recess. (After recess.) All right. Go ahead, Mr. Coon.

Mr. Coon:

Yes, sir. Further argument with reference to the angle which we were discussing at the conclusion, Your Honor, the exemption to ultimate consumers would not exempt the defendants here, because the defendants here or the defendants here, Lone Star, is not the ultimate consumer. That is, the exemptive effect of the provision 3(i), which exempts the ultimate consumer, and from the Legislative intent and Legislative history before the Act was passed before the Joint Committee of the House, which I will read you shortly, it shouldn't be enlarged other than what the intent of the Congress was at that time. That is, that they intended to exempt a bona fide purchaser from criminal liability because he couldn't know of the production of the goods in violation of the law. Our suit is not against the sovereign, but against the Lone Star Producing Company. It was processing, it was manufacturing, it was the producer. It can claim no exemption under the Act. It was the employer and our plaintiffs were its employees. Further along this line, Hurtz Drive Yourself Station against ....., 159 ...., some employees in repairing trucks owned by their employer were held to be engaged in the production of

goods for commerce because the trucks were used in interstate transportation. Under the holding, if these gentlemen are correct, these employees who were working on these munit. ns would be working on goods if they were employed by the Government but not if they were employed—Let's see, if I have got this analogy, but not if they were employed by an independent person. I mean a third person. That is, if we were to hold that Lone Star is not a producer, not an employer because the Government was the ultimate consumer and the purchaser of these goods, it would mean that any person who was the ultimate consumer could create a third person as an independent contractor which these parties, which the Lone Star was, and say "I am the ultimate consumer. There is your producer and I am not liable under the Act for any reason. I am the ultimate consumer". And certainly the exemption didn't go that far, and carrying on further, the act specifically makes numerous exemptions. Those exemptions, if Your Honor please, apply to agricultural employees, railroad employees, and there are —it goes on at length. It specifically exempts the Government as an employer by saying government employees are not subject to the Act, either State or Federal. That particular section is no justification. will not excuse them. Now, if Your Honor please, in other words, what they seek to do is to read into the Act an exemption that is not there. The exemption doesn't exist under the act. In discussing that Legislative history the statement was made by James A. Emory, general counsel for the National Association of Manufacturers, before the Joint Committee of the Senate on education and labor with reference to this particular bill in 1937, in which he said that the only purpose was to exempt the ultimate consumer from any criminal liability for any part he might play in the interstate transportation of such unfair goods. Now, if Your Honor please, our suit today is just the

same suit it was when it was filed in September, 1945. By that I mean the sole question before Your Honor today in these law suits is did these employees while engaged in productive work do overtime? If they did, they are entitled to compensation. There is no other fact question. Everything that is set out in the lengthy affidavit as made by the party defendant except a denial wherein they say these parties received their money is not material. There is only one issue. Did these employees engage in productive work overtime? And that is the sole question in the law suits before Your Honor. Mr. George H. Davis also appeared before the Joint Committee with reference to this and he was at that time President of the Chamber of Commerce and he passed on that same interpretation in accord with this brief filed by the Department of Labor in the Hazeltine case.

To say they are attempting to read into the Act an exemption that doesn't exist, I think, is correct, if Your Honor please, but it might be more appropriately said that all of these specific exemptions indicate the certain Congressional intent to make no wider exemption. That is, they granted exemption to agricultural employees and other classifications of employees but they did not grant exemption to employees in this instance, and the only thing is the government as an ultimate consumer or is the contractor with the government where the government is the ultimate consumer, is the purchaser? Is there any reason for taking them out of the Act? Under the Act there can be no reason for it. If Your Honor please, in the Bell vs. Porter case I will read to Your Honor the statement of facts in that case. I believe it has been represented to Your Honor that that company that was operating the Elwood Ordnance Plant, which was engaged in the Bell vs. Porter case in which the Seventh Circuit Court with District Judge Lindley said, "The application to this ordnance plant is certainly under the Act because

we apply commerce in the broadest constitutional intent and there is nothing exempting the Government and if the Congress had intended to exempt the Government, it would have said so". However, as I understood it, it was said that this plant operated some differently from the Lone Star Plant. If it did, we never heard of it and we have had considerable inquiry made in other ordnance plants as to what the employees of this classification were being paid, and I believe the Elwood Ordnance Plant was being operated just as the Lone Star Plant, and I will read Your Honor the statement of facts as quoted in the Circuit Court's opinion. "The defendant operated the Elwood Ordnance Plant, at Elwood, Illinois, where they were engaged in the manufacture of shells, explosives and munitions for the armed forces under a cost plus fixed fee contract with the United States Government. This plant including all buildings and machinery was owned by the Government, but all of it was maintained by the appellants as independent contractors."—That is the Elwood Ordnance Plant, an independent contractor, if Your Honor please. Quoting further: "The government procured, owned and furnished appellants all powder and other component parts used in the manufacture of the munitions. Appellants, however, as consignees, procured certain other materials and supplies used in assembling and loading of the munitions from various consignors without the State of Illinois. Title vested in these appellants at the time of the delivery. Appellants had complete supervision of all employees including the hiring and discharging of all employees and maintaining their own fire department in which appellees were employed as fire fighters. Upon these facts, the Court can conclude that appellees were engaged in interstate commerce within the meaning of the Act."

I believe every allegation of fact in that statement of facts applies to the Lone Star. The Lone Star in one

large area was engaged in making fertilizer. Fertilizer is—well, it is a commercial product. It can't be considered as anything else. The Government was the purchaser of that fertilizer. They were machining and carrying on operations over into Arkansas to a certain machine shop we are advised about, which did a lot of work over there across the line. They were steadily bringing in all types of materials that were used in that operation there by trucks from out of the state consigned to the Lone Star Corporation. With reference to title passing, there is some authority, if Your Honor please, which would throw some light on that as to when the Government got title and whether it has any bearing or not.

Reading further from that opinion: "An attempt to distinguish Walling vs. Hale Gold Mines and Fox vs. Summit King Mines",—two similar cases,—"on the ground that in those cases the title to the goods did not pass to the government until after the interstate transportation would be unfounded. Manifestly it cannot be important that the technical passage of title occurs before delivery to the common carrier instead of when the common carrier makes delivery." There are numerous cases where parties have sought to absolve themselves from liability by contending there was no title until they received the goods. Under various Federal regulatory acts. And they all hold that title doesn't enter into the picture so far as the determination of transportation is concerned. where the articles are moving in commerce or where it is established they are moving in commerce. So the only question is whether the movement in commerce existed and the great inflow and the great outflow was certainly there. We would like this further observation, if Your Honor please, that this is a matter of great import to us and to our some 2,000 clients. It is a matter that I know means a lot to the defendant in this case. We are convinced of our position and they have sincerely argued

their side of it. We feel that on this motion, it being a matter of great importance, in the event Your Honor in your sound discretion should determine to rule upon the matter at any given time that it might best serve the interests of the parties, and we so suggest, that a hearing be had on the merits in one or several of these cases and a determination be made after a review of the full facts and a complete knowledge of what this situation is, of the soundnes of our contention, the real problem involved, and the nature of these cases that we bring. Thank you, Your Honor.

Mr. Atchley:

May it please the Court, I wanted to make a brief rejoinder. I will probably answer counsel in the inverse order. Suggestion has been made here that this motion be not decided until after a full hearing of the facts in this case on the merits. If our position is correct in this motion, if the Court please, then the very object is to prevent, to save the time and expense of assembling a lot of witnesses from all over the country to have a hearing on the question, where by reason of some legal obstacle the plaintiff couldn't recover regardless of whether or not they worked overtime. Of course, we would be at a great disagreement with counsel whether these men worked overtime and didn't receive the money, and the question is—the only question here is whether or not the defendant has presented facts that are undisputed in law before this Court that as a matter of law they can't recover regardless of what their claims might be. That is the position we are taking in this case, if the Court please. As I indicated in my opening argument, there are two reasons why this case should never be tried on its merits, and, one is that there has been no commerce in this case; transportation across state line was all by the government, shipped by the government, title in the govern-

ment, under government bill of lading, marked government property for military use

The next proposition is that, conceding that there was ever any commerce that this Act—it isn't a question of exempting because the goods have been delivered into the hands of the ultimate consumer. I think Section 213 makes various exemptions from the operation of the Act, but if the Court please, this activity was never included in the Act. It isn't a question of broadening the exemptions, extending the exemptions beyond the Congressional intent, so as to include an activity that was never intended by Congress to be covered by the Act. It is not to include goods after they have been delivered into the hands of the ultimate consumer. Counsel refers to our making fertilizer. I will tell you the kind of fertilizer we make. It was the kind that blew up Texas City, ammonia nitrate. That is the kind of fertilizer they made. Counsel said the sole determination here is did the plaintiffs do overtime work. I would have to disagree with counsel, because this is not a trial on the merits. This is a hearing where we say that because of facts that stand before this Court undisputed, as a matter of law plaintiffs can't recover. There is no coverage in this case, never was any coverage, if the Court please. To say that the Government could go and buy property, the component parts of this ammunition, buy it in its own name wherever it pleased, at prices it wanted to pay, ship it on government bill of lading marked for military use, government property, at government rates; that after it reached this location, a reservation owned exclusively by the government, under the exclusive control of the Ordnance Department, who even had a right to hire and fire an employee, or had the right to refuse the hiring of an employee, not to permit the contractor to hire some employee who proposed to go to work there, who had a right to designate the types and amounts of ammunition,

when it was to be made, the process how it would be made, the government who furnished the bank account against which these checks were paid these men were written; a government who paid no sales tax on anything it bought. I absolutely believe that Judge Dawkins—people have disagreed with him—

The Court:
Didn't your company in all these contracts executed by the government provide that these laws would provide for those employees?

Mr. Atchley:
No, sir. Counsel has had a copy of the contract in their possession since this—since February and I want them to point out where the contractor agreed to comply with the Fair Labor Standards Act and did agree to comply with the Walsh-Healy Act and any other applicable laws, rules and regulations: The Fair Labor Standards Act isn't mentioned in that contract, if the Court please. No place.

The Court:
I had the impression that it did.

Mr. Atchley:
If it does, I can't find it.

The Court:
I thought it mentioned it by reference.

Mr. Atchley:
Mr. Pritchard, here, secretary of the company, tells me it isn't in the contract. Mr. Herbert is here, general manager. He tells me there is no mention of it made in that contract.

Mr. Coon:

In that connection, this provision provides this, if Your Honor please. "Contractor shall compensate laborers and mechanics for all hours worked by them in excess of eight hours in any one calendar day at a rate of not less than one and one half times their basic rate of pay for all hours worked in one calendar day."

Mr. Atchley:

That is the Walsh-Healy Act. That Act also provides that we pay time and a half for seven consecutive days. The Fair Labor Standards Act doesn't provide that regardless of how many hours worked. It is not in the contract, if the Court please. Now, counsel has admitted in this case that the ultimate consumer should not be penalized. Counsel has also admitted that the United States Government is the ultimate consumer of these goods, and under the admissions stated in this record, if the Court please, if plaintiffs are successful in the outcome of this law suit, the ultimate consumer will be penalized to the tune of many million dollars. They are the ultimate consumer. They are the ones that will be penalized. If the Court please, there isn't any distinction in the case we have here and the gold mining case in the United States Circuit Court of Appeals, stating where the employees of a mining company that was engaged in mining operations —among the things they mined was gold. In fact, I believe they were mining gold exculsively, but they sold that gold to the United States mint in San Francisco, California. The gold was destined for interstate commerce. That is, transportation across state line, to minths located in the United States, and the Court held in that case, if the Court please, the Circuit Court of Appeals—

(At this point Reporter missed taking some of Mr. Atchley's argument due to the fact he had to change paper in Stenotype machine.)

The very object of Rule 56 was to prevent a long, tedious and expensive trial when there were facts in the case that there was no dispute about that would render a trial unnecessary. We respectfully submit in conclusion, if the Court please, again—

The Court:
Well, you will admit there is some divergence of view.

Mr. Atchley:
Yes, sir, I do.

The Court:
Some difference of opinion about this situation.

Mr. Atchley:
Yes. I agree that is correct, but I think the greater weight of authority and reason impells the conclusion that Judge Lemly's opinion is right.

The Court:
I understand you are very sympathetic with his opinion. I know that. But, now, where is this instrument that has been purportedly filed, plaintiffs' bill of particulars in this 219 and 183?

Mr. Atchley:
Here they are, if the Court please. The Court will note that he didn't furnish any information in one of them and very little in the other. There is nothing like a substantial compliance with the Court's order.

The Court:
They don't say anything in that. I think I am going to have to add in this first paragraph being insufficient and not furnishing therewith the information required

by the Court's order, and that no further attempt has been made to supply such information to date. I notice that this was filed on the 24th of January, and it is stated in there that if such information should become available, we would supply it. But there has ben no attempt and he has had this order and the benefit of the inspection of the records, and I am going to add those words, if you have no objection to it.

Mr. Atchley:
There is no objection to it. Now—

The Court:
I have added these words in there right after the word "order" in the last sentence of the first paragraph: "And that no further effort has been made to this date to comply with said order." All right. You notify him of that addition in those orders. I will get the clerk to send him a copy of it.

Mr. Atchley:
Very well, Your Honor.

The Court:
Now, what is this answer you have filed in this Allen and Little case? Do I understand you all that you are denying that he was employed in an executive or administrative capacity?

Mr Kennedy:
Yes, Your Honor. That is the intent of that response to the motion for summary judgment in those cases. That is, under Section 3 of the motion. Neither one of those two employees, Allen or Little, was employed in an executive, administrative or professional capacity. We therefore say there is a controverted issue of fact there and under Rule 56 the Court will be authorized—

The Court:

I think that makes a controversy if that is the effect of your denial. I just ruled upon that, upon the impression that there had been no denial of that allegation about them being employed in that capacity.

Mr. Kennedy:

Yes, sir.

The Court:

I am not going to grant these summary judgments in that upon that ground, Mr. Atchley, unless I should grant your motion for summary judgment on the general issue—

Mr. Atchley:

I am not sure I followed Your Honor on that order.

The Court:

Sir?

Mr. Atchley:

I say I didn't understand the Court.

The Court:

I say they make a controversy. I said I indicated the granting of this motion under the impression that there was no controversy about your allegation about them being engaged in an executive or administrative capacity; in view of the fact they controvert it, I am not going to grant it.

Mr. Atchley:

Of course, they hadn't controverted it when you made that statement.

The Court:

I understood they hadn't and I am not going to grant that motion for summary judgment on that ground.

Mr. Atchley:

Would the Court permit me to say just one more thing further? Just check this contract and the provisions that counsel has named over there, the provision of the contract for the construction of this plant and the other provisions of it here on page 16. That is all in the Walsh-Healy Act and so designated in capital letters. That is the only Act referred to by name, and, of course, sets out substantially the same terms as the Fair Labor Standards Act,—sets out substantially the same language as the Walsh-Healy Act.

Mr. Coon:

The Fair Labor Standards Act is the 40 hour a week act.

The Court:

Now, I am not going to rule on this motiion for summary judgment today, because I am not entirely clear that you are entitled to it, Mr. Atchley, and I am not entirely clear that you are not entitled to it, but there seems to be a good deal of difference of view in the decisions regarding this question, and I am going to give it a good deal more consideration before I act upon this motion for summary judgment, but, now, in the event it should be denied, I want to know if it is possible to try one or two or possibly three representative law suits here and let the result in those determine the outcome in the others, or see where we are about a trial upon the merits in the event that course should be indicated by my ruling. Now, do you gentlemen know where you are on the fact issues about the different classes of employees out there?

Mr. Atchley:

No, sir. Because in the bill of particulars, if the Court please, there is an allegation about traveling time, waiting time. Now, in the reply to these motions they say they are not claiming that. I don't know what they are doing and in some of these—You take the L. L. Mills case. There is a suit filed here by plaintiff to recover sleeping time when they were working under the platoon system, and the Circuit Court of Appeals has held in three cases that they are not entitled to it and the Supreme Court has denied certiorari.

Mr. Coon:

I think we can make an explanation. At the time the bills of particulars were filed the portal suits appeared to be good, and we set off in a separate item travel time. We put it down separate. We waive and make no contention for it, and in all the negotiations and discussions we have never made a contention for travel time, dressing and waiting time. Our contention is solely on the productive time. That is the only contention we make.

Mr. Atchley:

You mean while they were actually working.

Mr. Coon:

We make no contention for travel time or dressing time, and that is the only time that is outlawed that I can make out.

Mr. Atchley:

I don't know, if the Court please, if the Guards suit, the mechanics suit, the production employees suit and the field electricians suit—there must be 65 different classifications in each one. Each suit has many of these classifications in it I believe, with the exception of the

Mills case; maybe the Caulder case. The Caulder case doesn't have over 20 or 25 different classifications.

Mr. Coon:

The Caulder case just has two, the guards and the field mechanics, as we understand it. There are a few field mechanics. I don't know. I might be considering different classifications from what we know about classifications.

Mr. Atchley:

A man might work as a guard for 30 days and then on another job, and in many instances held as many as eight or nine jobs during the course of his employment. Each one coming up in a different category. It is complicated to me. I don't believe there are fifty men out there that didn't hold as many as two jobs, in two different classifications.

Mr. Coon:

I might mention this. Thee Caulder has got less classifications. If we are going to single out a case, the Caulder case is the first one on the Court's docket there, and we are ready to try that case. We can get ready any time.

Mr. Atchley:

If the Court please, if plaintiffs are only claiming, like Mr. Coon said here, the time they were actually working, there would be no such thing as a representative suit because each man would have to get on the stand and testify how many hours he worked each day before we would know anything about his claim. In other words, if they are only claiming actual productive work and time while they were at work, stringing wire and driving a truck and so forth, then there couldn't be any such

thing as a representative suit Each man would have to testify as to the time he worked each week and each day, each day each week. I concede I don't see how a representative suit can be tried unless there is some legal question common to a classification..

Mr. Coon:
The Caulder suit is the first one on the docket.

Mr. Atchley:
In the event the Court shall deny the defendant's motion for summary judgment; I presume the Court would want a pre-trial conference to settle these issues.

The Court:
Take this down now. As I understand your statement, Mr. Coon, speaking for all these plaintiffs in these suits that you are making no claim about walking time or dressing time or sleeping time or any other time except the individual man where engaged in actual productive work.

Mr. Coon:
That is correct, sir.

The Court:
All right. Well, that settles that any way. Is there any way by which you can segregate or separate these different law suits so as to embrace a representative class of employees that would cover the whole field of employees by the trial of a specified number of limited law suits and let the others agree to be bound by the outcome in those? Now, you all know the general set up much better than I do. I think you had better confer about that and see if there is anything you can agree upon about that, because if you can, we can at least facili-

tate this business to that extent. In other words, I assume there are different classes of employees represented in these various suits. If we could just try those classes and determine those, why, it ought to be conclusive on all similarly situated, but I don't know about that. I am going to ask you all to discuss it and see what, if anything, you can agree upon. If you can, why, that will help, and if you can't, we will know it. You all discuss that and see if you can agree upon anything. If you can, we will state it in the record.

Mr. Coon:

May I say one more word? There is a limitation on productive work. I mean performance of duties. I don't mean he was necessarily making something. I mean he was engaged and in the performance of his duties as required by productive work.

The Court:

understand that.

Mr. Atchley:

If the Court please, of course, I don't know. I don't know exactly. I am not clear on the plaintiffs' position about that.

The Court:

What he means is the time that he was actually engaged on the job. That is what you mean, isn't it, Mr. Coon?

Mr. Coon:

Yes, sir. Exactly what I mean.

The Court:

Eliminating these frequent periods of walking time, dressing time and sleeping time and all that.

Mr. Coon:
Yes, sir.

The Court:
I think that is clear enough. But you all see what you can do about some agreement about some classes of suits that can be tried as representative.

Mr. Atchley:
If it could be done, if the Court please, I am certainly all for it.

The Court:
See if you can agree on anything about that, and let me know in a few minutes whether you can or can't. Do you have your brief ready on this motion for summary judgment?

Mr. Atchley:
My brief?

The Court:
Yes, sir.

Mr. Atchley:
If the Court please, I think I presented all the authorities I had on it this morning. I have it here in sort of a rough form.

The Court:
Well, can you gave me your brief within ten days?

Mr. Atchley:
Yes, sir.

The Court:
Can you do it within five?

Mr. Atchley:
I can give it to you now.

The Court:
All right. And I will give you gentlemen ten days in which to file your reply brief.

Mr. Coon:
Yes, sir.

The Court:
I assume you have all your authorities ready any way, don't you?

Mr. Coon:
Yes, sir, we can get it up.

The Court:
It looks like it is almost impossible to agree on anything about this business of prospective trial.

Mr. Coon:
If Your Honor please, may I say something about that?

The Court:
Yes, sir.

Mr. Coon:
I would like to say that I believe that the defendant is making something big out of this thing that it really isn't. We can't see it as something big. I just got through talking with Tom Caulder, a guard here, Your Honor. I wish these gentlemen would talk to him and get what his testimony is. We are willing to make any sort of an agreement to expedite this thing. Try any sort of classification. Let them pick it out, to dispose of this matter

and get along. I just got through talking with the truck drivers. I would like for these gentlemen to talk with these truck drivers, see what their contention is, what time they weren't paid for. Mr. Caulder is right here. He said under no circumstances could he leave his radio, two way radio. He ate his lunch there every day. The thing is a simple thing. There is no reason for all this to-do. We will try the guard classification or we will try the truck driver classification, but let's get along with it. We will expedite. We want to be all the benefit to the Court we can.

Mr. Atchley:

If the Court please, we haven't talked to these guards. We don't know. Of course, that is the first information I ever had in this law suit that they were claiming time for time spent while they were eating their lunch. In the guard case, I have understood from hearsay that they are basing them on a different theory. By the way, if the Court please, with respect to that brief, Mr. Wheeler tells me we can improve on that a lot, because some of those cases we know what they are, and we have just got them cited, and if the Court will give me five days, I can re-write that and put it up in much more intelligible form.

The Court:

That is just up to you.

Mr. Atchley:

I would like to, if the Court please. That is messy, just an office work sheet. We will have it back in five days and give counsel a copy of it.

Mr. Coon:

I would like to reiterate that we will be pleased for counsel to hear any classification, guards, executives,—

we will have them any place, from 50 up to the 900 in the guard class. We would like for you to meet with them and go over it with them. We will make any kind of disposition you want about it. We say that without reservation.

Mr. Atchley:

If there is any way on earth to shorten this trial, we are for it, so long as it doesn't prejudice the right of the defendant in this case. We are trying this case under the supervision of the Department of Justice. We are trying to do our duty by them. I know from these records—I have spent virtually all my time for nearly two years on these cases. I know their complications. There is hardly any of these people who didn't work in more than one classification. Take a guard. He probably worked in six different job classifications. Try him as a guard. The question comes in my mind what are you going to do with the time he worked as a truck driver; what are you going to do about the time he worked as an electrician, productive department? All those things. I confess I am not smart enough to try out a short cut on the thing. The only thing that I know common to all cases is just the law questions.

Mr. Coon:

Why don't we pick out the classification, try him on his guard time? The truck drivers, try them on the truck drivers' time.

Mr. Atchley:

That is assuming that a guard worked during the entire two year period of time as a guard, and that isn't true with respect to all these guards. We would be paying them when they weren't working.

Mr. Coon:

Here is a gentleman that worked as a guard all the time.

Mr. Atchley:

He is one of the few exceptions.

Mr. Coon:

Most of them—if he worked nine months, we will try the guard time, what their specific duties were and what they did during that time.

Mr. Atchley:

What are you going to do with the rest of the time that they are suing for in this case?

Mr. Coon:

We wouldn't try it in the guard case.

Mr. Atchley:

Where would you try it?

Mr. Coon:

Try it on the time he was working on. There are so many technicalities it is useless to argue about. If the Court could cut it short any, we are anxious to proceed any way the Court suggests.

The Court:

I am at a considerable loss to make any suggestions about a complicated matter like this. I can see a whole lot of complex items in this and difficulties in it, and especially where there are these different classifications involved and different time periods.

Mr. Atchley:

Here, if the Court please, is another fair illustration. Take a truck driver who was allotted a 30 minute lunch period and I understand now they are claiming a lunch period. These men, some of them were allowed 30 minutes. Some of them an hour. Take a truck driver who was allotted a regular 30 minute lunch period at a definitely scheduled time and say today he was out on the road during his lunch period and had to work. There are instances of that kind. We have instances where he was paid for lunch periods and various other things, and how on earth would we ever get credit for the days in which he was paid for the lunch period, assuming they were entitled to recover for the lunch period, without you taking up each individual case and explore what his law suit is? The time he has worked and how many days he got paid for his lunch and how many days he didn't.

Mr. Coon:

This lunch period thing, there is nothing bugaboo about that. Here are some truck drivers back here. They were engaged in hauling material for the line employees. The line employees had a staggered lunch period, Your Honor. Part of them would go off at 1:30 and have their lunch and come back to work, and part of them would go off at 12:00 and have their lunch and come back at 12:30. The truck drivers were engaged in that supply all that time. They are contending for an overtime compensation based on the fact that every lunch they had, they got it while they were either driving at the wheel or while their truck was being unloaded for a period from four to five minutes. They are not entitled to a 30 minute lunch period, but they are entitled to a compensation lunch time during that period. That was a matter of routine. They are entitled to some period during that time, whatever it may be. It may be ten or five or twelve.

but during that period of time they were not compensated for that time.

Mr. Fritz Newberry (Associate counsel with Mr. Atchley):

Your Honor, in answer to that, I might state that there was nothing stereotyped as to the type of work that the truck drivers performed. There were, I imagine, somewhere around 35 or 40 different types of trucks and different job classifications within the truck drivers themselves. They had different jobs, different duties, different responsibilities. And what would apply to one truck driver wouldn't necessarily apply to another. I think that the plaintiffs' counsel is unduly simplifying a matter that is really very complicated as the records will show. Now, perhaps we can see so many technicalities and difficulties because we are familiar with the records and plaintiffs' counsel has made no effort to inspect them and to appreciate and to understand the problems that arise in our minds, and I believe, as they say in their pleadings, our records speak for themselves and they are more or less true records of what has gone on. I believe if the Judge could see what our time records show, he could appreciate the many problems that we are confronted with and which are in the way of our simplifying this matter.

Mr. Coon:

Do you have any suggestion to make that you think might do anything at all?

Mr. Atchley:

If I had, I would have made it a long time ago. I never was so tired of a piece of litigation in my life. I want to get rid of it as speedily as possible. I do reiterate it is a tremendous responsibility for me. I have had the principal responsibility in this law suit ever since it started.

There is a world of money involved. If I was derelict in my responsibilty in this law suit, I would have to live with it always and I don't want to do that. I think Mr. Newberry probably stated the situation, when one sees those records, the enormous amount of the hundreds and hundreds of problems we are faced with in these cases. if there is any man who is smart enough to take those records and figure, devise some short cut of the trial of these law suits on the merits, I would like to hire him, because I haven't been able to figure it out. Mr. Pritchard has worked diligently on it for a year, and we have discussed that hours and hours, hundreds of hours.

Mr. Coon:

I might suggest this, if Your Honor please, I don't believe we can simplify it as Your Honor suggested, but if Your Honor will set down this first case, we will get ready and we will present the proof to you.

The Court:

I don't know. We may not have to try any of them. I would sure like to reach that judgment about them, but we might. I am just trying to devise some way of simplifying the trial of the issues in the event it is necessary to try the cases upon their merits. And I can realize the diffuclties, the different job classifications concerned, because it is just a different situation applicable to the individual at varying times. If we could pick out any representative claims and try them, whv, I would like to do that, but the trouble about it, it seems to be just an individual proposition applicable to each employee, unless there was some stereotyped form of claim, which I don't see from these varying and conflicting statements, and of course, if it is necessary to take it up and thrash out each individual claim for a two year period, I guess we can do it, but it will take from here on out, as the Negro

says, to do that. I don't know of any suggestion I can make about it. You gentlemen are familiar with the facts and records. You can't agree upon anything. I don't know anything I can suggest that you agree upon. I tell you one thing, though, as soon as this motion for summary judgment is ruled upon, if it indicates a trial upon the merits, something is going to be done about lining these cases up for trial and trying them. I think though probably it is going to mean the appointment of some Master to devote a year or two taking testimony about these individual claims, because I am not going to neglect the whole business of this district for the consideration of these individual claims and all the testimony relating to those over a two year period. I know that.

Mr. Coon:

In the past history of this sort of case, Your Honor, Mr. Owens has handled a good many and he says the Courts, —although there may be a difference in the amount of overtime and liability so far as each party in a classification is concerned, the trial Courts in the cases he has been in will hear fifteen or twenty, or possibly ten or twelve, and say during this period of time if that condition has existed, it is my opinion that they are allowable and they have been gotten out of the way in that fashion without hearing all of the 2,000 witnesses where the situation becomes routine and where it is known in a classification what the conditions were throughout a certain period of time.

The Court:

Well, if you all can't agree upon anything, I can't suggest anything for you to agree upon. I will just take this on this motion for summary judgment and then you get your briefs within the stated period of time and I will rule on that, and we will see where we are then. That is all I see to do.

Mr. Coon

I might say one other thing. Of course, we believe in our points in this thing. Since there is a controversy about it, if Your Honor should sustain the motion, we hope that it may be proper to sustain it in one case and hold the others in obeyance.

The Court:

I will do that. Apply the outcome to that. There is no use having a half a dozen or a dozen appeals when one will satisfy the situation. Certainly, that is the only way I will do that at all.

* * * * * * * * *

Filed Aug. 19, 1947.

APPELLANT'S DESIGNATION OF ADDITIONAL CONTENTS OF RECORD.

(Title Omitted.)

To the Clerk of the District Court of the United States, Eastern District of Texas, Texarkana Division:

Appellant, Roy Creel, subsequent to the filing of the designation of additional contents of record of the Appellee on the 7th day of November, 1947, designates the following additional portion of the record, proceedings and evidence to be contained in the record on appeal in this action:

1. All portions of the Reporter's Transcript of the Pre-trial Conference (stenographically reported) held at Sherman, Texas, May 3, 1946 (filed May 13, 1946) other than that designated by the Appellee;

2. All portions of the Reporter's Transcript of hearing on defendant's Motion for Summary Judgment (stenographically reported) held at Sherman, Texas, June 16, 1947 (filed August 19, 1947) other than that designated by the Appellee;

3. Appellants' Motion to extend time for filing of the Transcript of Record;

4. Order of the Court Granting such Motion;

5. Appellant's Designation (this instrument) of Additional Portions of Record.

CLARK, COON, HOLT & FISHER,

Republic Bank Building,
Dallas, Texas.

LINCOLN, KENNEDY & GLOVER,

312 P. & M. Building,
Texarkana, Texas.

(Sgd.) By C. M. KENNEDY,
(C. M. Kennedy)
Attorneys for Appellant.

TALLEY & OWEN,
Of Counsel.

Rector Building,
Little Rock, Arkansas

A true copy of the above and foregoing Designation of Additional Contents of Record was served upon the defendant by mailing a true copy thereof to Otto Atchley, one of the attorneys for the defendant, which service was had by depositing the same in an envelope, with sufficient postage affixed, duly addressed to said Otto Atchley, Beck Building, Texarkana, Texas, and depositing the same in the United States Mail at Texarkana, Texas, on this the 18 day of November, A. D. 1947.

(Sgd.) C. M .KENNEDY,
(C. M. Kennedy)
One of the Attorneys for
the Appellants.

Filed Nov. 19, 1947.

CLERK'S CERTIFICATE.

In the District Court of the United States for the Eastern District of Texas, Texarkana Division.

I, RUTH B. HEAD, Clerk of the United States District Court, of the Eastern District of Texas, do hereby certify that the above and foregoing is a true, full, correct and complete supplemental transcript of the Record in Civil Action No. 191, entitled Roy Creel, et al vs. Lone Star Defense Corporation, as fully as the same is called for in the Additional Contents of Record on Appeal.

Witness My Hand and the official seal of said Court at Texarkana, Texas, this the 24th day of November, A. D. 1947.

RUTH B. HEAD,
Clerk.

(Seal)

By LOIS M. GRIFFEN,
(Lois M. Griffen)
Deputy.

[fol. 234] That thereafter the following proceedings were had in said cause in the United States Court of Appeals for the Fifth Circuit, viz:

ARGUMENT AND SUBMISSION

Extract from the Minutes of November 2, 1948

No. 12182

ROY CREEL, et al.,

versus

LONE STAR DEFENSE CORPORATION

On this day this cause was called, and, after argument by Otto Atchley, Esq., for appellees, was submitted to the Court.

[fol. 235] OPINION OF THE COURT—Filed January 18, 1949

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 12182

ROY CREEL, et al., Appellants,

versus

LONE STAR DEFENSE CORPORATION, Appellee

Appeal from the District Court of the United States for the Eastern District of Texas

(January 18, 1949)

Before Holmes, Waller, and Lee, Circuit Judges

HOLMES, Circuit Judge:

This suit was brought by appellants against appellee to recover overtime compensation, liquidated damages, and reasonable attorney's fees, under the Fair Labor Standards Act. In the court below, after issue was joined on the pleadings, the defendant filed a motion for summary judgment,

with supporting affidavits; and a hearing was duly had on [fol 236] the pleadings, affidavits, and oral statements of counsel, to determine what material facts existed without material controversy and those in good faith controverted. The question on this appeal is whether the uncontradicted facts before the court were sufficient to warrant the inference of fact that appellee was not an independent contractor engaged in commerce.

In the light of the Supreme Court's decisions on the subject,[1] we deem it necessary to write scarcely more than a statement of the uncontradicted facts before the court at the hearing of the appellee's motion for a summary judgment. This motion was submitted upon affidavits filed by the appellee. Each affiant had personal knowledge of the facts sworn to by him, and was able to give competent testimony of the truth thereof. No opposing affidavits were filed by appellants, and no testimony offered in contradiction of the facts set forth in appellee's affidavits. The court interrogated counsel at some length as to what were the genuine issues presented for decision. There were many other pleadings, such as motions to amend, motions to dismiss, motions for bills of particulars and for production of documents, and also a response to the motion for summary judgment; all of which show the value of the pretrial hearing and the summary judgment procedure; but when the sifting process was completed, it was found that there was absolutely no real controversy between the parties as to any specific fact. The uncontradicted facts were as follows:

During World War II, the appellee's plant was an ordnance facility owned and operated by the United States [fol. 237] for the production of munitions to be used in the prosecution of the war. The appellee was retained, and paid a fixed fee, to manage the operation of the plant. The Government paid all expenses of operation, including the cost of all labor and material. The premises upon which the appellants were employed, the tools furnished them by appellee, and the property with which they dealt in such employment, were in their entirety the property of the United States. The title to all parts, explosives, and ma-

[1] Kennedy v. Silas Mason Company, 334 U. S. 249; Murphy v. Reed, 335 U. S. 865.

terials, except an inconsequential amount, was vested in the Government at the point of shipment, subject to army inspection upon arrival at the plant.

The appellee did not ship any finished ammunition from the plant; all such shipments were made by the Ordnance Department on government bills of lading. The appellee at no time had title to the finished products of the plant, or of the component parts of such products, the title thereto at all times being in the United States. The latter furnished and shipped to the appellee ninety to ninety-five per cent of all material and equipment used in operating the plant; the remainder was purchased for the United States by the appellee. A Commanding Officer, appointed by the Chief of Ordnance, was on duty at all times relevant hereto.

The contract in this case provided that the appellee was operating the plant as a Government agency; that changes might be made in the contract by the Government but such changes should not excuse the appellee from proceeding with the prosecution of the work as changed; that the Government should prescribe procedures to be followed by the [fol. 238] contractor in accounting, checking, and auditing functions, and that if in the opinion of the Contracting Officer the number of employees engaged in checking, auditing, and accounting work, was excessive, the appellee should make such reductions in force as the Contracting Officer deemed necessary; that the contractor should at all times use its best efforts in all acts thereunder to protect and subserve the interest of the Government. The appellee paid wages and salaries of employees by checking against a bank account, the funds of which were furnished by the Government and were subject to withdrawal by the Government.

By a change in the contract, the Government was given the right to pay directly to the persons concerned all sums due from the contractor for labor, material, or other charges; by order dated October 12, 1943, the appellee was ordered to rework and renovate certain ammunition, which provision was reaffirmed and incorporated in a supplement to the contract; by order dated April 3, 1944, the terms of which were included in a supplement to the contract, it was provided that appellee should, as directed from time to time by the Contracting Officer, receive, inspect, assort, screen, segregate, load, renovate, recondition, and rehabilitate, any ammunition (including components and containers), even though it was not specifically mentioned in the contract, re-

gardless of its origin, in such quantities as might be directed by the Contracting Officer.

When we compare the record that was before this court in *Kennedy v. Silas Mason Company*, 164 F. (2) 1016, with [fol. 239] the record in the case at bar, we find many material facts that were not in the former record, which show that this appellee was not an independent contractor but an agency of the Government. Among these additional facts are the following:

The Government paid the freight on materials shipped to the plant. A Government officer was maintained at the plant who was accountable for all property used in connection with appellee's contract. The Government contracted for electric power, gas, telephone, telegraph, and teletype service at the plant, and paid such bills directly; the appellee acted as Government agent for the purpose of causing official business messages to be transmitted; the Government approved all wage and salary rates, and required that no key employees or their principal assistants be hired until there had been submitted and approved by the Contracting Officer a statement of the previous salary, proposed salary, qualifications, and experience, of the persons selected for such assignments; and all munitions processed at the plant were processed under direct Government supervision and control; the Government specified the loading process to be used, directed the type and quantity of munitions, the specifications thereof, and the rate of production; inspections were made by the Government during the various steps of their processing; detailed rules and regulations covering methods of production were promulgated by the Government; and appellee was required to comply with such rules and regulations; federal officers and employees were in attendance to report as to compliance. Appellee had no discretion as to the type of ammunition, the quantity [fol. 240] thereof, or the method of process used in its manufacture, and produced no munitions except as required by the Government. On different occasions, the Government trasferred production schedules from other ordnance plants to appellee for completion, and in such cases, if the original plant had made contracts for materials and supplies on account of such schedules, the appellee was required to take over such supply contracts and pay the vendors thereof from funds supplied to appellee by the Government. Ap-

pellee was not penalized if the materials processed at the plant did not meet specifications and could not be used. No sales tax was paid by appellee on materials purchased for use at the plant, nor were ad valorem taxes on real or personal property paid to the state or county, and no license or registration fees were paid on motor vehicles used in connection with the operation of the plant.

From the above uncontradicted facts, the court below inferred and found that the appellee was not engaged in the production of goods for commerce, and that the goods in question were munitions of war manufactured by the United States for the purpose of being used by it in the prosecution of the war; and accordingly, as a matter of law, the court entered summary judgment, from which this appeal was taken.

The Supreme Court, in *Kennedy v. Silas Mason Company*, 334 U. S. 249, does not condemn the summary judgment procedure if there is no genuine issue as to any material fact, and the moving party is entitled to judgment as a matter of law. There is a large number of these claims, all arising out of a common state of facts and depending for decision upon the same principles of law. The judicial process may break down under the load if the courts fail to use the new methods of procedure provided by the Federal Rules of Civil Procedure. While it is true that the appellants here denied generally the facts relied on by appellee for a summary judgment, such denial specified no controverted fact that would be admissible in evidence upon a trial on the merits. Rule 56(e) provides the form of supporting and opposing affidavits in the summary judgment procedure, and requires that the affidavits shall set forth such facts as would be admissible in evidence; moreover, the affidavits must show affirmatively that the affiant is competent to testify to the matters therein stated. On motion under this rule, paragraph (d) requires the trial court to ascertain, if practicable, what material facts exist without substantial controversy and what material facts are actually in good faith controverted. The court shall thereupon, the rule says, make an order specifying the facts that appear without substantial controversy; and, upon the trial, the facts so specified shall be deemed established.

[fol. 241]

Paragraphs II and V(D), set out below in full, contain (so far as applicable here) appellee's response to the mo-

tion for a summary judgment.[2] The averments do not meet [fol. 242] the requirements for affidavits under Rule 56(e). No witness would be permitted to testify that the appellee operated as an independent contractor and was engaged in the production of goods for commerce, which are the ultimate facts in issue. Those allegations in the pleadings were sufficient to sustain the complaint upon a motion to dismiss for failure to state a claim upon which relief could be granted;[3] but in response to a motion for summary judgment, such allegations at best were only a part of the pleadings to be examined by the court under Rule 56(d) of the Federal Rules of Civil Procedure. They presented issues of fact to be determined by the trial court, at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel.[4] The court below did this, and found as a fact that the appellee was not engaged in the production of goods for commerce within the meaning of the Fair Labor Standards Act, and that the United States was not only the actual producer but the ultimate consumer of the goods in question.[5] These findings were deduced from the uncontroverted facts; and, if judgment had not been rendered upon the whole case, an order specifying the facts that appeared without substantial controversy would have been required by Rule 56(d); but, since it appeared from the pleadings, affidavits, and statements of

[2] Paragraph II. "Plaintiffs state that the defendant is engaged in the production of goods for commerce and in acts necessary for the production of goods for commerce at all times pertinent to the complainant filed herein within the meaning of the Fair Labor Standards Act."

[3] Paragraph V(D). "That the defendant throughout all times pertinent to this cause operated as an independent contractor upon a cost plus a fixed fee basis and by its contract with the Government of the United States specifically obligated itself to pay plaintiffs the money they seek under this Act."

[3] Rule 12(b)(6) of Federal Rules of Civil Procedure.

[4] Rule 56(d) of Federal Rules of Civil Procedure.

[5] Pages 93, 94, and 95 of the Transcript; but see Rule 52(a), as amended, which provides that findings of fact and conclusions of law are unnecessary on decisions of motions under Rule 56, i. e., motions for summary judgments.

counsel, that there was no genuine issue as to any material fact and that the moving party was entitled to judgment as [fol. 243] a matter of law, the court was required to enter judgment forthwith under subdivision (c) of said rule.[6]

The question before us is not whether the trial court, upon the uncontroverted facts, reasonably might have found that the appellant was operating as an independent contractor in the production of goods for commerce, but whether a fair and impartial tribunal reasonably could have inferred from the uncontroverted facts that the United States was producing munitions for its own use in war, and that the appellee was acting merely as a government agency.

There is no hard-and-fast rule for determining who are independent contractors, but generally the term signifies one who contracts to do a piece of work, according to his own methods, and without being subject to the control of his employer, except as to the result of the work, and who has the right to employ and discharge the workmen independently of such employer and free from any superior authority in the employer to say how the specified work shall be done or what the laborers shall do as it progresses. Ordinarily the question is one of fact, and each case depends on its own facts, no one feature of the relation being determinative, but all being considered together.[7]

With these elementary principles in mind, and without needless repetition, let us summarize the uncontradicted facts upon which the court below based its inference that appellant was not an independent contractor, engaged in [fol. 244] commerce within the meaning of the Fair Labor Standards Act. Such facts are as follows:

The Army and Navy Departments were responsible for the operation of nearly one hundred government-owned giant munition plants, which were the backbone of the nation's armament program. In order fully to utilize the nation's resources and to minimize encroachments upon its industrial structure, the two departments chose to operate these plants through the agency of selected commercial contractors. All of these plants were owned outright by the United States, and all but a few were located upon military

[6] Rule 56(c) of Federal Rules of Civil Procedure.

[7] Corpus Juris Secundum, pp. 638 to 641.

reservations. All were engaged solely in war production, the work performed being of a secret, hazardous, and confidential nature.

The normal profit-making factors were lacking in the arrangement between the Government and appellee in this case. The contractor furnished only its managerial ability, qualities, and services, for which it was paid a fixed fee unaffected by risks of financial loss. The Government retained the right to dismiss any employee at the plant whom it deemed incompetent, or whose retention was deemed by it to be not in the public interest; it approved all wage and salary rates; inspected vigilantly the various processes of production, and required compliance with its detailed specifications that covered every phase of the operation. The Government owned the reservation, owned the plant, tools, working material, and the component parts from which the munitions were made or assembled; it took title at the point of origin to all goods and materials used in the operations, shipping them to the plant-site under government bills of lading.

[fol. 245] The appellee was required to comply with detailed rules and regulations, and no key employees or their assistants were permitted to be hired or assigned to service until there had been submitted and approved by the Contracting Officer a statement of the previous salary, proposed salary, qualifications, and experience of the persons selected for such assignments. In a word, all munitions processed at the plant were under the direct supervision and control of the Government, with no discretion given the contractor to produce munitions except as required by Government direction. Add to these established facts the self-evident one that the United States is not engaged in commerce in making munitions to be used by it in waging war, and we have a solid and sufficient basis from which to draw the fair and reasonable inference that the appellee was not an independent contractor and not engaged in commerce within the meaning of the Fair Labor Standards Act.

Other defenses, such as payment and statutes of limitation, are presented by the pleadings, but it is unnecessary to discuss them, because wherever we turn in this case we are confronted with the ultimate fact, established by the finding of the court below, that appellee was not an independent contractor. To ignore this fact would be to dis-

regard Rule 56, which was promulgated by the Supreme Court.' A reasonable inference fairly deduced from an uncontroverted fact or number of facts may establish the existence of an ultimate fact that entitles one of the parties to judgment as a matter of law. When this happens, as it did in this case, and summary judgment is sought, Rule 56(c) requires that "judgment shall be rendered forthwith."

[fol. 246] On the other hand, if the judgment were reversed and the cause remanded, the trial court would be required to proceed under Rule 56(d), by specifying the facts that appeared without substantial controversy; and we know what those facts are from the opinion in this record.[8] Under Rule 52, as amended, findings of fact and conclusions of law are unnecessary on decisions of motions for summary judgment, but under Rule 56(d) the court is required to make an order specifying the facts that appear to be without substantial controversy. Rule 52(a) provides that if an opinion or memorandum of decision is filed, it will be sufficient if the findings of fact and conclusions of law appear therein. Thus the court's opinion in this case, while not required under Rule 52(a), might serve the requirements of Rule 56(d), the provisions of which could not be avoided upon another trial. The intention of this rule is to put an end to useless and expensive litigation if there is no genuine issue as to any material fact.

The judgment appealed from is

Affirmed.

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[8] See opinion of the court below, pp. 93, 94, and 95 of the record, which contains findings under Rule 52(a), as amended, sufficient to require the entry of an order under Rule 56(d) specifying the facts that "shall be deemed established" upon the trial.

[fol. 247] JUDGMENT

Extract from the Minutes of January 18, 1949

No. 12182

ROY CREEL, et al.,

versus

LONE STAR DEFENSE CORPORATION

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Eastern District of Texas, and was argued by counsel;

On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed;

It is further ordered and adjudged that the appellants, Roy Creel, and others, and the surety on the appeal bond herein, The Aetna Casualty and Surety Company, be condemned, in solido, to pay the costs of this cause in this Court, for which execution may be issued out of the said District Court.

[fol. 251] ORDER DENYING REHEARING

Extract from the Minutes of February 7, 1949

No. 12182

ROY CREEL, et al.,

versus

LONE STAR DEFENSE CORPORATION

It is ordered by the Court that the petition for rehearing filed in this cause be, and the same is hereby, denied.

[fol. 252] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 252] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed June 6, 1949

The petition herein for a writ of certiorari to the United States Court of Appeals for the Fifth Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

LIBRARY
SUPREME COURT, U.S.

Vol. II
TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1949

No. 58

ROY CREEL, ET AL., PETITIONERS,

vs.

LONE STAR DEFENSE CORPORATION

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR CERTIORARI FILED APRIL 21, 1949.

CERTIORARI GRANTED JUNE 6, 1949.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1948

No. 58

ROY CREEL, ET AL., PETITIONERS,

vs.

LONE STAR DEFENSE CORPORATION

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., AUG. 24, 1949.

—3905

[fol. 248]

IN THE SUPREME COURT OF THE UNITED STATES

ROY CREEL, et al., Petitioners,

vs.

LONE STAR DEFENSE CORPORATION, Respondent

Stipulation and Addition to Record—Filed August 10, 1949

Petitioners and respondent in this cause, by their respective attorneys of record, agree and stipulate as follows:

I

That the attached material is a true and correct copy of the original motion of respondent (defendant in the District Court) for summary judgment and the affidavits and exhibits appended to and accompanying said motion, as filed in the District Court of the United States for the Eastern District of Texas.

II

Through inadvertence, said attached motion of respondent for summary judgment and the affidavits and exhibits appended to and as a part thereof (hereinafter called motion) have not been included in the record certified by the Clerk of the United States Court of Appeals for the Fifth Circuit.

[fol. 249]

III

That such motion was granted by the United States District Court, was considered by said United States Court of Appeals in deciding this case there, and formed a part of the judgment of both said courts.

IV

That said motion and the affidavits and Exhibit "A" attached to and forming a part of said motion, is proper to, and shall be included in the transcript of the record in, and for consideration by, the Supreme Court of the United States where this cause is pending on writ of certiorari to the United States Court of Appeals, Fifth Circuit, and shall be printed as a part of such record as Volume II.

V

That Exhibits "B," "C" and "D" accompanying and attached to said motion are not relevant to any issue within the scope of the order of this court granting a writ of certiorari, and should not be a part of said record, and may be omitted therefrom.

VI

That the cost of printing and the supervision of the printing of said motion and its attachments herein agreed to be included in said transcript of record, shall be taxed as a part of the costs in this cause.

Witness our hands this the 23rd day of July, A. D. 1949.

C. M. Kennedy, Kennedy, Leveo and Lee, P. & M. Building, Texarkana, Texas, One of the Attorneys of Record for Petitioners, Roy Creel, et al. Otto Atchley, Atchley and Vance, Municipal Building, Texarkana, Texas, One of the Attorneys of Record for Respondent, Lone Star Defense Corporation.

[fols. 250-251] IN THE DISTRICT COURT OF THE UNITED STATES, EASTERN DISTRICT OF TEXAS, TEXARKANA DIVISION

ROY CREEL, et al.,

vs.

LONE STAR DEFENSE CORPORATION

CLERK'S CERTIFICATE

I, Ruth B. Head, Clerk of the United States District Court in and for the Eastern District of Texas, do hereby certify that the above styled and numbered cause, when pending in this court, bore Civil No. 191, final judgment in which was entered as of October 1, 1947, was appealed to the United States Circuit Court of Appeals, Fifth Circuit, at New Orleans, and in that court bore No. 12,182. The attached is a true and correct copy of Defendant's Motion for Summary Judgment, the affidavits in support of said Motion for Summary Judgment, and Exhibits "A," "B," "C," and "D" attached to and made a part of said Motion for Summary Judgment. The granting of such motion was made the

basis of the Summary Judgment rendered in said cause by this court. When said cause was appealed, the original of said motion, and the attached affidavits and exhibits, by order of this court, was sent to the United States Circuit Court of Appeals, Fifth Circuit, at New Orleans, in lieu of having the same printed, and the same was a part of the record of this cause on appeal to said United States Circuit Court of Appeals, Fifth Circuit. When the mandate was returned from the United States Circuit Court of Appeals, Fifth Circuit, to this court, the original of said Motion for Summary Judgment, and the attached affidavits and exhibits, of which the attached is a true and correct copy, were returned to this court.

To certify all of which witness my hand and seal of office, this the 8th day of August, A. D. 1949.

Ruth B. Head, Clerk of the United States District Court, Eastern District of Texas, by Lois M. Griffen, Deputy. (Seal.)

[fol. 252] [File endorsement omitted.]

[fol. 253] IN THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF TEXAS, TEXARKANA DIVISION

Civil No. 191

ROY CREEL, et al.

vs.

LONE STAR DEFENSE CORPORATION

DEFENDANT'S MOTION FOR SUMMARY JUDGMENT—Filed January 11, 1947

To Said Honorable Court:

The defendant moves the Court as follows:

1

That it enter, pursuant to Rule 56, of the Federal Rules of Civil Procedure, a summary judgment in defendant's favor, dismissing the action on the ground that there is no genuine

controverted issue as to any material fact, and that defendant is entitled to a judgment as a matter of law, because:

(a) Plaintiffs were not engaged in commerce, nor in the production of goods for commerce, within the meaning and intendment of the Fair Labor Standards Act, while they were in the employ of the defendant.

(b) Defendant was not engaged in commerce, nor in the production of goods for commerce, within the meaning and intendment of the Fair Labor Standards Act, during the times plaintiffs were employed by it.

(c) Defendant has paid all plaintiffs all moneys which it owed them, and each of them, for the services performed by them, and each of them, for the defendant, in accordance with their contracts of hire, and all laws, statutes and lawful regulations issued pursuant thereto, as applied to all plaintiffs and their employment with defendant, and the sums of money paid said plaintiffs, each respectively, by defendant, were sums equal to, or greater in amount, and in excess of the sums of money which this defendant would have been required to pay plaintiffs, each respectively, and which they would have been entitled to receive, computed [fol. 254] in accordance with the provisions of the Fair Labor Standards Act, had said Act been applicable to defendant, and plaintiffs' employment with defendant.

2

In the alternative, that the Court, pursuant to Rule 56, of the Federal Rules of Civil Procedure, enter a summary judgment in defendant's favor dismissing the claims of all plaintiffs which are for alleged overtime compensation for services performed by plaintiffs, each respectively, more than two years before the filing of this suit, each respectively, therefor, because such claims, to the extent indicated in this numbered paragraph, are barred by the two year statute of limitation of the State of Texas (Article 5526, R. C. S. of Texas, 1925).

3

That the Court enter, pursuant to Rule 56, of the Federal Rules of Civil Procedure, a summary judgment in defendant's favor, dismissing the action as to the plaintiffs whose names are set forth in Paragraph Numbered 40, of the at-

tached affidavit supporting this motion, which is here referred to and made a part hereof, insofar as their claims are based upon services performed by them, each, respectively, during the period or periods of time set opposite the name of each such plaintiff in said Paragraph 40, because during said period or periods of time, said plaintiffs, each respectively, were employed by defendant in a bona fide executive, administrative or professional capacity, as in said Paragraph 40 indicated, as such terms are defined and delimited by regulations of the Administrator of the Fair Labor Standards Act.

4

In the alternative, if the summary judgment is not rendered in defendant's favor upon the whole case, and a trial is necessary, that the Court, at the hearing on this motion, by examining the pleadings and the evidence before it, and by interrogating counsel, ascertain what material facts exist without substantial controversy, and what material facts are actually and in good faith controverted, and thereupon make an order specifying the facts that appear without substantial controversy, and directing such further proceedings in the action as are just.

[fol. 255] 5

To support this motion, there is attached hereto an "Affidavit supporting Motion for Summary Judgment."

Otto Atchley, Wheeler & Atchley, 700 Texarkana National Bank Building, Texarkana, Texas, Attorneys for Defendant.

Dated: Jan. 10, 1947.

The above and foregoing Motion for Summary Judgment, and the affidavit and exhibits attached thereto and made a part thereof, were served upon the plaintiffs herein by mailing a true and correct copy thereof to Messrs. Lincoln, Harris & Kennedy, Attorneys of Record for plaintiffs, at their address in Texarkana, Texas, on this the 10 day of Jan., 1947.

Otto Atchley, One of Defendant's Attorneys.

[fol. 256] IN UNITED STATES DISTRICT COURT

[Title omitted]

AFFIDAVIT IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

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[fol. 259] 1. In June 1941 representatives of the United States Ordnance Department approached The B. F. Goodrich Company of Akron, Ohio, stating that the services of The B. F. Goodrich Company, along with those of other large manufacturing concerns, was essential to the execution of the War Department's plans for national security. The B. F. Goodrich Company was advised that the Government desired to avail itself of the company's key personnel, industrial organization, mass production "know how", and industrial technique, and The B. F. Goodrich Company was requested to undertake the design, construction, equipping,

staffing, and operation of a shell and bomb loading plant to be located near Texarkana, Texas. As a result of the Government's request, Lone Star Defense Corporation was incorporated under the laws of Ohio in the year 1941 for the sole purpose of fulfilling and performing cost-plus-fixed-fee Contract W-ORD-516 DA-W-ORD-3, as amended, which will hereinafter be referred to as the "Contract", which it executed with the United States Government on the 23rd day of July, 1941. A certified copy of Contract W-ORD-516 DA-W-ORD-3, as amended, is attached hereto marked "Exhibit A". Said exhibit consists of the original Contract dated July 23, 1941, Notice of Termination, Supplements Nos. 1, 8, 11, 16, 18, 19, 20 and 21, and Change Orders Nos. 2, 3, 4, 5, 6, 7, 9, 10, 12, 13, 14, 15 and 17.

2. The Contract provided for Loan Star Defense Corporation to design, construct, and equip and staff a new ordnance facility by furnishing to the Government management services for such designing, constructing, and equipping, by procuring the production equipment to be installed therein, and by subcontracting with third parties for necessary Architect-Engineer Services and for constructing the new ordnance facility and installing the production equipment therein; to train key personnel and to operate said ordnance facility for the loading of fixed rounds, shells, bombs, boosters, fuzes, detonators, artillery primers, and other similar ordnance items.

3. The Government procured the plant site consisting of approximately 22,000 acres located between U. S. Highways 67 and 82 about ten miles west of Texarkana, Texas. The Government-owned plant site was designated by the Govern- [fol. 260] ment as the Lone Star Ordnance Plant, which will hereinafter be referred to as the "Plant", and the plant site was officially designated by the Government as a United States Military reservation.

4. In accordance with the provisions of the Contract, Lone Star Defense Corporation entered into subcontracts on subcontract forms prescribed by the Government, with Architect-Engineers and with Constructors and said Constructors, under said subcontracts, actually performed the construction work necessary in building the Plant. The cost of such construction work was paid direct by the Government to the subcontractors.

5. By the terms of the Contract, the title to all materials, tools, machinery, equipment, supplies, and all other property of, upon, located at, and used by the Plant, including all parts, components, explosives and materials from which the defendant assembled ammunition under the Contract, was in the United States Government, and title to all items purchased by the Lone Star Defense Corporation, immediately vested in the Government, at the point of shipment, subject to inspection upon arrival at the Plant.

6. Because the operation of the Plant was vital to the prosecution of the War, and because of the potential hazards to thousands of employees from the huge quantities of explosives which were stored and used at the Plant, it was necessary that extreme precautions be taken to protect the Plant and its various areas from sabotage and unauthorized entry. The entire reservation was protected by a wire fence surrounding it, and each explosive area therein into which the Plant was subdivided, was separately enclosed by a cyclone fence, as specified in Paragraph 8 hereof, all of which fences were patrolled by guards twenty-four hours per day. There were five entrance gates in the outside reservation fence, four of which permitted entry at various points from United States Highway 82 (the north side) and the other permitted entry from United States Highway 67 (the south side). Plant guards were stationed twenty-four hours per day at each reservation fence entrance gate, when open.

7. Because of the possibility of explosions, the Plant was so designed that if an explosion occurred in any building or at any place on the reservation it would not detonate other [fol. 261] explosives. This required that the buildings wherein explosives were stored or handled be located at prescribed distances from each other. These distances were known as "safety distances." The Government determined and prescribed the safety distances and the Plant was designed and constructed in accordance with the Government's schedule of safety distances. The safety distances were dependent upon the quantity of explosives which were to be used or stored in each building. The safety distances account for the large amount of space required by the Plant. There were over 665 separate major buildings at the Plant and a large number of secondary buildings. Lone Star

Defense Corporation restricted the number of employees who were authorized to be present in any building, portion of a building, or other place where explosives were stored or used so that if an explosion did occur, a minimum number of employees would be exposed to injury.

8. The actual loading of shells, bombs, fuzes, detonators, etc., was performed in a group of buildings known as "load lines". Particular load lines were identified as "Area B", "Area C", and "Area E", etc. There were fourteen such load line areas. There were three "igloo" areas and one upground magazine area where explosive materials and finished ammunition were stored. Each load line and each area wherein explosives were used or stored was completely enclosed by cyclone fence which was patrolled by guards twenty-four hours per day. Each employee was provided with credentials and a numbered badge containing his picture which authorized his admittance through the reservation main gates and to his regularly assigned work area or areas. Plant guards were stationed at the gates to each load line or explosive area and admittance thereto was restricted to those employees displaying proper credentials for admittance to the particular area.

9. In the administration area, Area I, there was located the administration building, the central fire station and guard headquarters building, the main plant cafeteria and employees' recreation building, four large dormitories for employees, Area I boiler house, the employment building, a twenty-nine bed hospital building, and the main reservation entrance gate and guard house.

10. The Plant had its own telephone system and private switchboard. To provide the Plant with an adequate supply [fol. 262] of water, there were constructed two dams which created artificial lakes and provided water for the Plant's water treatment plant. There were approximately fifty-two miles of large water mains, twenty-four miles of sewers, and a sewage disposal plant. To provide for the intraplant distribution of materials and access to the work areas, there was a total of approximately one hundred thirty-one miles of bituminous, concrete and gravel roads and highways, all of which were ditched and drained. The Plant also operated its own freight railroad system which consisted of several Diesel locomotives, freight cars, and ap-

proximately forty-three miles of standard gauge railroad track which connected with both the Cotton Belt and Texas and Pacific Railroads.

11. For the transportation of materials, the Plant maintained and used a fleet of approximately 350 trucks and tractors and 100 trailers in addition to several Diesel locomotives and plant owned box cars. To provide for plant supervision, maintenance and repair, guard and fire protection, passenger automobiles and other light vehicles were provided for army officers and officials, executives, engineers, etc., whose work required them to go from their headquarters to various areas during the day.

12. The number of persons that were employed by Lone Star Defense Corporation in operating the Plant varied from time to time depending on the production schedules that were given by the Ordnance Department to Lone Star Defense Corporation. During the last two years of operation of the Plant, prior to V-E Day, the number employed at any particular time varied from approximately seven thousand to ten thousand five hundred employees. Due to labor turnover and men being drafted for the armed services, it is estimated that during the entire period of operation of the Plant, Lone Star Defense Corporation employed from thirty thousand to forty thousand different individuals.

13a. All employees of Lone Star Defense Corporation were hired under an oral agreement of hire for an indefinite period of time and all such employees were subject to termination at any time without advance notice although it was the policy of the company to give advance notice of termination or layoff whenever same was possible. The company did not use or enter into written contracts of hire.

[fol. 263] 13b. All newly hired production and inspection hourly rated employees were given "induction training" by Lone Star Defense Corporation's Training Department. During the course of such training these employees were instructed with reference to the defendant's safety rules, plant policies and procedures, including the procedure for filing a wage adjustment claim for any incorrect payment for time worked. At the conclusion of the induction training, the employees classified as explosive operators and inspectors were told the name of their foreman and change house attendant and the place and time to report for work.

Hourly rated employees, other than explosive operators and inspectors, were transported by the training instructor to their work place and introduced to their foreman who took them in charge.

13c. Newly hired salaried employees were given an induction talk by the training department or foreman and were informed, among other things, as to the Plant's organization, their hours of work, and pay system.

14. The worker assigned to a particular shift in a load line could gain admittance to the reservation in a privately owned conveyance at any time at any of the main reservation gates selected by him, by displaying his employee's badge to the Plant guard stationed at such entrance, and then proceed in his conveyance, by such a route as he might select, to a parking lot which was located adjacent to each load line entrance gate, or if he entered the reservation for some purpose other than going to work immediately, he could proceed to such other parts of the reservation where entrance was not restricted or his presence prohibited. The parking lots adjacent to the various areas were provided free of charge in all areas for the employees' convenience. The employees then proceeded through the area entrance gate to the change house and time clock alley. Lone River Bus Company, a public carrier which operated a fleet of buses transporting members of the public and employees of the defendant, to and from Texarkana and other points along U. S. Highway 82, by permission of the army and the Plant executives, entered the reservation and carried employees to the various areas where such employees were working. The defendant Plant received no part of the fare paid by the employees. At each shift change time these buses would pick up employees at the various areas within the reservation and carry them out of the Plant and [fol. 264] to their final destination. This type of transportation was used by those employees who did not own their own cars or belong to a "share the ride" group. Each employee selected his own method and means of transportation to and from the particular place or area where he worked.

15. Within each load line area there was provided for the employees a "change house" where they could change clothes, wash and bathe, and a "bombproof" wherein the

employees could smoke, eat their lunch, and obtain food from the load line cafeteria which was open to the employees during their lunch periods on all shifts. First Aid rooms, in charge of a registered nurse, were maintained in those load lines where the employee census warranted such service.

16. There were other designated areas at the Plant where explosives were not kept or used. Those areas were not enclosed by an area cyclone fence. Examples of such areas were Area BB, the machine shop, carpenter shop, and equipment area, and Areas D and H where inert materials were stored and warehoused.

17. Employees, who were not regularly assigned to work in the load lines or explosive areas, went to their work area either by their privately owned car, share a ride arrangement, or by riding the public carrier operated bus line. Such employees would not have to pass though a guarded area gate and they could go direct to their regularly assigned time clock alley.

18. During most of the time that the Plant was operated, it was operated twenty-four hours per day, six days per week, on a three shift basis. Eight hours working time constituted the normal shift.

19. With but relatively few exceptions, all hourly rated employees reporting for work at their assigned work areas checked in by passing through a clock alley and ringing a time clock. Most hourly rated employees were employed on work shifts which commenced when the Plant's whistles were sounded at 12:00 midnight (known as first shift), 8:00 o'clock A. M. (Known as second shift), and 4:00 o'clock P. M. (known as third shift), although the shift change time in some departments varied from these hours. Hourly rated employees were permitted to ring the time clock at any time within the fifteen minute period immediately preceding the starting time of the work shift to which they were assigned. Under the "Timekeeping and Payroll Procedure" of the defendant, which was approved or ratified [fol. 265] by the Contracting Officer's Representative, the work time of the employees was considered as commencing with the sounding of the air whistle which announced the start of the work shift. They were not required to ring the time clock at any particular time during said fif-

teen minute period next preceding the beginning of their shift, and no deduction in working time was made unless the time clock ring appearing on the clock card indicated that the employee checked through the clock alley at a time subsequent to the starting time of his work shift. It was necessary to confine the period for ringing the time clock to the fifteen minutes preceding the start of the shift, due to the fact that many employees came to the Plant one or two hours prior to the start of their work shift for their own social purposes, to visit and converse with other employees on the same shift, and unless so prevented, would ring the time clock when they entered the area; such early time clock rings would have caused confusion in computing work time, and permit idle employees of one shift to be in the load line with employees of another shift, causing confusion and interference in the performance of the work by the shift then on duty, and in addition thereto, the idle employees, when added to those on duty, would have exceeded the explosive limits of the number of authorized and permitted employees in the load line work places at one time.

20. The hourly rated employees, unless they were assigned to additional or overtime work, clocked out at the end of their work shift, but were permitted, at their discretion, to clock out at any time within fifteen minutes immediately following the end of their work shift. A total of from thirty to thirty-seven time clocks were provided at the Plant in order to avoid congestion and waiting in the time clock alleys to in-ring or out-ring the time clock.

21. The maximum number of hourly rated employees using the time clocks on any given shift did not exceed approximately three thousand six hundred employees, and on the night shifts, the number of employees using the time clocks was, for the most part, from forty to sixty-seven percent less.

22a. All employees working in the load lines and in most of the company's other departments were given a lunch period of thirty minutes duration. Lunch period time was not considered work time and the employees were not paid for such time. During the lunch period the employees per- [fol. 266] formed no work and were free to use the lunch period time in any manner that they chose. If, due to an emergency, an employee did not receive a lunch period

during his shift, he was compensated for such work time. Hourly rated employees did not in-ring or out-ring a time clock when they took their lunch period. In a few departments where it was impracticable to assign a regular thirty minute lunch period, such employees were permitted to eat their lunch on a "snatch lunch" basis, that is, whenever they had free time to do so, and no deduction of time was made for a lunch period. Only a relatively few employees were employed on the "snatch lunch" basis. Employees on a "snatch lunch" basis were not allowed to leave their work place; all others were.

22b. Salaried employees, who normally worked from 8:15 A. M. to 5:00 P. M., were given a forty-five minute lunch period during which time they performed no work and were free to use such lunch period in any manner they chose.

22c. On September 24, 1943, a work schedule was established for employees in the guard department whereby they received a lunch period of one hour. Due to a reduction in the guard forces it subsequently became necessary to revise the lunch period schedules and to place some of the area guards on a "snatch lunch" basis.

22d. Employees in the fire department received lunch periods, the length of which was changed from time to time in accordance with changed work schedules. From on or about September 6, 1943, until the adoption of the "Two-Platoon System" (a method of operation in the fire department), the fire department employees were on a work schedule which provided for a forty-five minute lunch period. Under the Two-Platoon System the fire department employees received a lunch period of one hour for the noonday meal and such additional time as they desired for other meals. When the Two-Platoon System method of operation was discontinued and the three shift system reinstated, the fire department employees were given a one hour lunch period.

23. Hourly rated load line employees, who were subject to various safety regulations which required them to change from their ordinary clothes to special work uniforms or shoes, and (at one time) be at their assigned work places when the starting whistle blew, were compensated in full for [fol. 267] all such preparatory time and activities (both

prior and subsequent to the work shift) by a flat allowance of thirty minutes each day worked.

24. Employees, who were paid on a salary basis, were not required to ring time clocks. Such employees reported to their supervisor at their assigned work place and weekly signed a "Salary Employees Weekly Attendance Report" form which set forth, opposite the employee's signature, the number of hours worked each day, together with the total number of hours worked during the work week, and each salaried employee was paid in full, at proper overtime rates, if applicable, for all hours shown on such signed weekly attendance reports.

25. In general, in operating the Plant, the loading of a particular ordnance item was assigned to a particular load line. For instance, Area E load line was designed and equipped to load 105 mm shells. Each load line was so designed to be self sufficient for this purpose so that it was only necessary to deliver the explosives, components, and packing materials to the area and all operations incident to the loading, packing, and shipping of the finished rounds were accomplished in said area. From time to time the machinery and equipment located in various load lines were changed to load various and different ordnance items in accordance with the production schedules given to Lone Star Defense Corporation by the Ordnance Department.

26. Under the Contract, the Government furnished, supplied and caused to be shipped into the Plant, all parts, components, explosives and materials used in the assembly and loading of ammunition, except such small quantities of small metal parts (inconsequential in amount) as the Contracting Officer, from time to time, directed the company to furnish, and under said Contract, the title to such plant purchased material immediately vested in the Government at the point of shipment, subject to army inspection upon arrival at the Plant.

27. Incoming railroad shipments of explosives, components, and materials were delivered by the common carrier inside of the Plant where railroad crews, employees of Lone Star Defense Corporation, hauled the freight cars to the proper area for unloading by using the Plant's Diesel locomotives (which locomotives likewise belonged to the Government). Wherever practicable an effort was made to

[fol. 268] schedule incoming materials so that materials were sent direct to the railroad unloading docks in particular lines for immediate use in the assembly of finished ammunition. Cars of TNT, powder, or other explosives were unloaded directly from cars to trucks and the materials hauled either to a load line or storage igloo.

28. As above stated, each load line was a distinct working establishment complete within itself as a load or assembly line, or factory unit. Buildings located therein were connected by covered ramps and served by roadways, and each of the major caliber load lines was supplied with heat and power by its individual boiler house. One boiler house furnished such power to two or more minor caliber load lines. The major caliber load lines were so designed that incoming materials were delivered to the unloading docks located at the north end of the load line, and as the materials moved from building to building, all work necessary to the loading of the particular item was accomplished so that finished, packed ammunition was shipped from the shipping docks located at the southerly end of the load line. The load lines were also supplied with components and materials which were delivered by trucks from warehouses or igloos where said materials had been temporarily stored.

29a. In the operation of the Plant the Ordnance Department specified the various items which it desired to have loaded and supplied production schedules which set forth the quantities of the various items that it desired loaded each month. The quantities specified in the production schedules were revised by the Ordnance Department from month to month, and it was a frequent and common occurrence that the schedule would be increased or decreased in the month due to the fluidity of the War and the resulting demand for different ordnance items, or for larger or smaller quantities of particular items. During the operation of the Plant, the indicated quantities of the particular ammunition items, as shown in paragraph 29b, were loaded in the Plant's various load lines.

[fol. 269]

29b. Ammunition Description	Total Loaded
500 Lb. Bombs	172,392
250 Lb. Bombs	406,548
100 Lb. Bombs	100,544
23 Lb. Bomb, Cluster	150,717
23 Lb. Bomb, Fragmentation	498,471
20 Lb. Bomb, Cluster (6)	858,580
20 Lb. Bomb, Practice Cluster	14,951
20 Lb. Bomb, Cluster (20)	477,345
155 mm Howitzer Shell	384,943
105 mm Howitzer Semi-Fix	14,260,167
57 mm Armor Piercing	1,499,858
40 mm High Explosive	13,612,580
40 mm Armor Piercing	225,057
37 mm High Explosive	306,650
20 mm Armor Piercing with Tracer	3,855,003
20 mm Ball	2,041,385
20 mm High Explosive, Incendiary	24,472,731
Mk 27 Fuze	21,466,850
No. 253 Fuze	20,864,408
AN-M110 Fuze	18,481,849
Tracer Shell (40 mm)	15,399,740
M102 Booster	482,120
M104 Booster	1,079,471
M38 & Mk 22 Primers	47,884,040
M1B1A2 and M1A2 Primer	15,786,753
M23A2 Primer	9,122,494
Detonator (for 56 Fuze)	3,381,610
Burster M13	497,890
Grenade, Fragmentation, Mk 2	28,325,664
Grenade, Rifle	6,620
Pack Parachute	616,376
T-13 Grenade	65,347
Destruction Kit	150
Practice Grenade	120,025
37 mm Cannister	49,358
Rocket Kit, T-23	767,756
Ammonium Nitrate (in pounds)	18,895,640
Agricultural Grade Ammonium Nitrate (in pounds)	34,450,418
TNT Reclamation (in pounds)	3,088,825
Tritonal Pellets (in pounds)	1,474,582

30a. A total of approximately 216,000,000 pounds of TNT, 55,200,000 pounds of smokeless powder, 8,000,000 pounds of black powder, 1,740,000 pounds of tetryl, and 30,440,000 pounds of ammonium nitrate were used in loading said ammunition.

30b. Approximately 31,700 railroad carloads of finished ammunition were shipped out of the Plant by the Government to its armed forces for their use in the prosecution of World War II.

31. Lone Star Defense Corporation did not sell to the Government (or anyone else) the items and material enumerated in paragraph 29b. As provided in the Contract, the title to all such ammunition and material was at all times vested in the Government and the company was reimbursed for its costs and expenditures and was paid a limited fixed fee, not based on cost for its services in operating [fol. 270] the Plant.

32. Throughout the period of time that the Plant was under construction and operating, the Government stationed at the Plant a Contracting Officer's Representative who, under the provisions of the Contract, exercised full power and authority as the Government's representative. The Government's auditing, accounting, inspection, and other administrative work, incident to and connected with the Contract, was under the direction and control of the Contracting Officer's Representative. The Contracting Officer's Representatives, who were assigned to the Plant, were in each instance commissioned officers of the Army of the United States, who usually held a commissioned rank not lower than Lieutenant Colonel. The Contracting Officer's Representative was also the Commanding Officer of the military reservation. To assist him in the discharge of his duties, the Contracting Officer's Representative had a staff of Commissioned officers of the Army of the United States consisting of Lieutenants, Captains, and Majors. The Contracting Officer's Representative also had under his supervision a large group of civilian employees who were employed by the Government, some of whom were employed as auditors and some as "time checkers", whose duties were, among other things, to ascertain and verify the amount of time reported worked by employees of Lone Star Defense Corporation.

33. The Contract provided that the Contracting Officer could, among other things, at any time after consultation with Lone Star Defense Corporation, make changes in or additions to the drawings and specifications of the work to be performed, issue additional instructions, and require additional work to be performed and direct the omission of work covered by the Contract; require the defendant to dismiss any employee the Contracting Officer deemed incompetent, or whose retention was deemed to be not in the public interest, and the Contract required the defendant to keep at the Plant a duly appointed and qualified representative to receive and execute, on the part of the defendant, such notices, directions, and instructions as were issued by the Contracting Officer under the Contract.

34. The Contract also provided that Lone Star Defense Corporation would only be reimbursed for the costs of the work under the Contract when such costs were approved or ratified by the Contracting Officer. It also required that Lone Star Defense Corporation should furnish to the Con- [fol. 271] tracting Officer, or his Representative, statements of administrative procedure followed by Lone Star Defense Corporation for the direction and control of the work. In compliance with this provision of the Contract, Lone Star Defense Corporation furnished to the Contracting Officer's Representative its written administrative procedures covering purchasing, disbursing, accounting, transportation, storage, employment, housing, sanitation, subsistence, recreation, and other essential activities and methods. In accordance with other provisions of the Contract, the books and records of Lone Star Defense Corporation were open and accessible to the Contracting Officer's Representative for his inspection and audit. As above stated, Lone Star Defense Corporation's written administrative procedures, covering timekeeping, computation of time worked, computation of overtime payments, wage and salary rates, etc., were submitted to the Contracting Officer's Representative who approved or ratified such procedures.

35. Lone Star Defense Corporation's wage and salary payrolls, books, and costs records were continuously audited and inspected by Government auditors and employees under the supervision of the Contracting Officer to verify that such costs and payments were made within the terms of the Contract and in accordance with the procedures above re-

ferred to, and that Lone Star Defense Corporation's employees received the full amount of pay due to them and that no unauthorized deduction was made in their pay. Consequently the Government, through its Contracting Officer, had full and detailed knowledge as to Lone Star Defense Corporation's methods and procedure for computing wages, salaries, and overtime payments, and that such methods and computations were correct and in compliance with all applicable laws.

36. Lone Star Defense Corporation did not "ship" finished ammunition from the Plant. All such shipments were made by the Ordnance Department. The finished ammunition was loaded on common carrier cars by the defendant in accordance with Government shipping instructions but the actual shipment thereof was made by the Ordnance Department on United States Government Bills of Lading.

37. To perform the work under the Contract, Lone Star Defense Corporation established at the Plant an organization headed by its general manager who had general supervision of the company's activities. He was assisted by ten [fol. 272] division superintendents, each of whom headed one of the company's ten organizational divisions. Seven division superintendents reported to the general manager and three reported to the Coordinator of Staff Functions. Each division superintendent supervised the performance of the duties and functions assigned to his particular division. The principal functions of each division is as follows:

Consulting Engineer's Division—under the direction of the Consulting Engineer advises on technical matters, engineering and production; performs functions incident to safety, and screening, renovation and salvage of field service (ARFO) ammunition.

Engineering Division—under the direction of the Chief Engineer performs functions of all phases of engineering and maintenance.

Technical Division—under the direction of the Technical Superintendent performs functions incident to methods of manufacture and inspection.

Ammunition and Auxiliary Loading Division—under the direction of the Superintendent of Ammunition and Auxiliary Loading performs all the functions incident to production, renovation and salvage of ammunition and loaded

components, other than field service (ARFO) ammunition.

Staff Division—under the direction of the Staff Superintendent performs functions incident to planning and scheduling production, printing forms, warehousing, intra-plant transportation, traffic, and salvage of material other than ammunition.

Medical Division—under the direction of the Medical Director performs functions incident to the medical and surgical care of plant industrial cases, the operation of the hospital and first aid stations, and the maintenance of health and sanitary standards.

Accounting and Treasury Division—under the direction of the Controller and Assistant Treasurer performs all functions relating to fiscal matters, auditing and accounting, office service, and plant protection; and as Coordinator of Staff Functions coordinates the functions of the Personnel Division, Purchasing Division, and Assistant Secretary's office.

Personnel Division—under the direction of the Superintendent of Personnel performs functions incident to the employment and training of personnel; the planning of employee transportation, housing, feeding, and publication of the Plant newspaper.

Purchasing Division—under the direction of the Purchasing Agent performs functions incident to procuring supplies, materials, and services; the disposition of salvage and excess property; and the negotiation of purchase order termination settlements.

Assistant Secretary's Office—under the direction of the Assistant Secretary performs functions incident to the administration of the Prime Contract, insurance matters, state and federal reports; coordinates compliance with state and federal laws and regulations.

[fol. 273] 38. Attached hereto as a part hereof, marked "Exhibit B", is an organization chart which graphically sets forth the organization of personnel at the Plant by showing the various levels of exempt job classifications by job title in each division. This plat or chart shows the organization as it existed as of March 1, 1945. The figure in parentheses following the job title indicates the number of persons employed in that capacity on said date. (In a few instances a job shown on the chart was temporarily vacant on said date—and some jobs which had been previously

abolished and discontinued are not shown.) Minor and inconsequential changes were made in the Contractor's organization from time to time, due to changes in production schedules, and the necessity and desirability of changing the organizational set-up within particular divisions, but, as stated in this paragraph, such changes were of no material consequence, and the job title, and its consequent exempt classifications, remained the same, regardless of the particular division or department to which such job classification was assigned. The attached organization chart sets forth only exempt job classifications. It does not show the names or job titles of the non-exempt hourly rated and non-exempt salaried job classifications.

39. To supplement the description of the physical layout of the Plant and to give a better understanding of same, there is attached hereto as a part hereof a plat marked "Exhibit C" which shows the various plant areas, and "Exhibit D" which shows the layout of Area E load line which load line is typical of the other major caliber load lines.

40. Without prejudice to, or waiver of the defense of non-coverage and non-applicability of the Fair Labor Standards Act to the operations conducted by Lone Star Defense Corporation, there is listed below a list of plaintiffs and intervenors in this action who were employed as "exempt" employees as said term is defined and delimited by the Official Regulations of the Administrator under the Fair Labor Standards Act. This compilation lists the job classification by job title together with a job description, which, in a general way only, briefly sets forth the principal duties, functions, and responsibilities discharged by the job holder in each listed job classification. The period of time each exempt plaintiff and intervenor was employed in each exempt job classification is also shown under the subdivisions of this paragraph:

[fol. 274]

Job Title and Job Description	Names of Plaintiffs and Intervenors	Period from	to

i. *Area Warehouse Foreman (x)*—Supervises directly, and through warehouse foremen, a group of workmen, checkers, and clerks in all buildings within a storage area. Assigned to one shift, but directs operation of all shifts in

a storage area. Interprets written or verbal orders and passes them on to warehouse foremen on other shifts. Determines procedure of work, assigns duties, and inspects the work to see that it is properly done. This includes proper storage, quantity, safety, and maintenance of harmony among workers. Involves supervision of receiving and disbursement in the area and other critical references. Must possess a detailed knowledge of work involved.

Lige W. Pettigrew	12-11-44	8-6-45

ii. *Building Foreman (x)*—1. Supervises all production of ammunition or components and production personnel in a building. 2. Is responsible for the attainment of production schedules in a building. 3. Promotes and supervises safety, good workmanship, efficiency and cleanliness in a building.

Green E. Williams	6-29-42	2-7-44

iii. *Chief Scheduler (x)*—Supervises a group of schedulers to see that the work done under the scheduler job description is properly performed. Makes special investigations of difficult scheduling problems. Controls scheduling activities for several producing departments.

M. L. Collins	10-9-44	8-23-45

iv. *Foreman, Truck Dispatchers (x)*—Supervises over a period of a shift truck dispatchers, truck drivers, and tractor trailer drivers, and fork lift truck operators. Interprets written or verbal orders, determines procedure of work, and inspects the work to see that it is properly done. Must possess a detailed knowledge of work involved.

B. J. Reed	7-17-44	8-6-45
Ruel L. Jansen	4-9-45	4-28-45

v. *Group Leader-Porter Service (x)*—Direct supervision of employees engaged in the cleaning operations covered under the general foreman job description.

Jeffie G. Thomas	4-10-44	8-31-45

[fol. 275]

Job Title and Job Description	Names of Plaintiffs and Intervenors	Period from	to

vi. *Inspection Supervisor (x)*—Direct supervision of hourly rate inspectors, handling contact with the workers. Sees that data and records covering the inspection are properly compiled, and handles details of proper payroll and time allocation of the individual inspector. The work of the inspection supervisor is usually limited to a single building on a single shift within a load line area.

Green E. Williams	7-24-44	9-25-44

vii. *Safety Inspector (y)*—Determines that employees are complying with safety rules, regulations and practices and that manufacturing procedures being used permit safe operations. This function is extremely important in the shell loading business where employees are constantly handling high explosives and the safety of the entire plant depends upon compliance with safety rules, regulations, and practices. Advises production supervision after determining that safety rules and regulations are being violated. Also determines if practices are unsafe even though not covered by safety rules and regulations. Suspends production activities when extremely unsafe acts or practices are found.

Herbert A. Power	1-25-43	2-20-43

viii. *Shipping Foreman (x)*—Supervises during a shift the shippers, workmen, and clerks engaged in the loading of ammunition and other materials into cars or common carrier trucks. Directs the assembling and shipping of finished ammunition and inert materials to various destinations, keeping detailed records of all such shipments. Supervises the loading and dunnaging of freight cars according to I.C.C. regulations. Assigns duties to employees and inspects their work to see that it is properly performed, as to quality, quantity, and safety. Must possess a detailed knowledge of work involved.

Edgar L. Goodroe	8-14-44	6-9-45
E. W. Sexton	9-20-43	6-25-45

[fol. 276]

Job Title and Job Description	Names of Plaintiffs and Intervenors	Period from	to

ix. *Sub-Foreman (x)*—1. Supervises all production of ammunition or components and production personnel in a part of a building. 2. Is responsible for the attainment of production schedules in a part of a building. 3. Promotes and supervises safety, good workmanship, efficiency and cleanliness in a part of a building.

Edwin R. Gossett	11-6-44	12-4-44
Lovic H. White	11-6-44	1-1-45

x. *Truck Dispatcher (y)*—Directs the movement of motor trucks and tractor trailers and lift fork trucks throughout the plant and determines assignment of employees to equipment and to job. Assigns drivers to special or emergency trips. Schedules and assigns work of the drivers throughout the shift. May check the condition of equipment and may inspect and determine that the work is being done properly from a quality and safety viewpoint. May instruct some of the workers.

B. J. Reed	6-21-43	7-17-44

xi. *Warehouse Foreman (x)*—A. Supervises checkers, workmen, and clerks in all buildings within a storage area over a period of one shift. Interprets written or verbal orders, determines procedure of work, assigns duties, and inspects the work to see that it is properly done. This includes proper storage, quantity, safety. Must possess a detailed knowledge of the work required.

[fol. 277] B. Supervises employees sorting and baling paper and cardboard. Supervises small group of common laborers engaged in receiving, cleaning, inspecting and reconditioning of salvage materials.

Lige W. Pettigrew	10-16-44	12-11-44
	8-6-45	8-29-45

41. The job titles hereinabove referred to in the subdivisions of paragraph 40, which are marked with the letter "(x)", were classified by the defendant as "executive" as the employees were employed in a bona fide "executive capacity" as the term is used in Section 13 (a) (1) of the

Fair Labor Standards Act and as defined and delimited by the Administrator of said Act under Official Regulation 541.1, and each job classification thus marked was held by said employee (or employees) whose primary duty consisted of the management of the establishment in which he was employed or customarily recognized department or subdivision thereof, and who customarily and regularly directed the work of other employees therein, and whose suggestions and recommendations as to the hiring or firing and as to the advancement and promotion or any other change of status of other employees were given particular weight, and who customarily and regularly exercised discretionary powers, and who was compensated for his services on a salary basis at not less than $30.00 per week (exclusive of board, lodging, or other facilities), and whose hours of work of the same nature as that performed by non-exempt employees did not exceed twenty percent of the number of hours worked in the work week by the non-exempt employees.

[fol. 278] 42. The job titles hereinabove referred to in the subdivisions of paragraph 40, which are marked and identified by the letter "(y)", were jobs held by employees employed in a bona fide "administrative capacity" as such term is used in Section 13 (a) (1) of the Fair Labor Standards Act and the definition of said term by the Administrator of said Act as contained in Official Regulation 541.2 and each job classification thus marked was held by said employee (or employees) who was compensated for his services on a salary basis at a rate of not less than $200.00 per month (exclusive of board, lodging, or other facilities); who regularly and directly assisted an employee or employees employed in a bona fide executive or administrative position (as such terms are defined by the Administrator of the Fair Labor Standards Act) where such assistance was nonmanual in nature and required the exercise of discretion and independent judgment, or who performed under only general supervision, responsible nonmanual office or field work, directly related to management policies, or general business operations, along specialized technical lines requiring special training, experience, or knowledge, and which required the exercise of discretion and independent judgment; or whose work involved the execution under only general supervision of special nonmanual assignments and tasks directly related to management policies, or general business

operation involving the exercise of discretion and independent judgment; or who were engaged in transporting goods or passengers for hire and who performed, under only general supervision, responsible outside work of a specialized or technical nature requiring special training, experience, or knowledge, and whose duties required the exercise of discretion and independent judgment.

43. The job titles hereinabove referred to in the subdivisions of paragraph 40 that are marked "(z)" designate employees employed in a bona fide "professional capacity" as that term is used in Section 13 (a) (1) of the Fair Labor Standards Act and as defined and delimited by the Administrator of said Act under Official Regulation 541.3 and designates employees who were engaged in work predominantly intellectual and varied in character as opposed to routine mental, manual, mechanical, or physical work, and required the consistent exercise of discretion and judgment in its performance, and work of such character that the output produced or the result accomplished could not be standardized in relation to a given period of time, and whose hours [fol. 279] of work of the same nature as that performed by non-exempt employees did not exceed twenty percent of the hours worked in the work week by the nonexempt employees; provided that where such nonprofessional work was an essential part of and necessarily incident to work of a professional nature, such essential and incidental work was not counted as non-exempt work; and requiring knowledge of an advanced type in a field or science or learning customarily acquired by a prolonged course of specialized intellectual instruction and study, as distinguished from a general academic education and from an apprenticeship, and from training in the performance of routine mental, manual, or physical processes; or which work was predominantly original and creative in character in a recognized field of artistic endeavor as opposed to work which could be produced by a person endowed by general manual or intellectual ability or training and the result of which depended on the invention, imagination or talent of the employee, and who was compensated for his or her services on a salary basis at a rate of not less than $200.00 per month (exclusive of board, lodging, or other facilities).

The above named plaintiffs and intervenors are referred to as exempt under only one of the executive, administra-

tive, and professional exemptions, but the powers, duties, and responsibilities of, and the nature of the services performed by many of said plaintiffs and intervenors were such that they, or many of them, are exempt under one or more of such three exempt classifications.

44. The loading of ammunition was commenced at the Plant when the construction work and installation of machinery was completed in each particular area. Area G was the first load line to be completed and equipped and it was placed in operation loading ammunition on or about May 26, 1942. The other load line areas that were operated were placed in operation subsequent to said date. With the exception of Area A which was closed down on Oct. 24, 1945, loading operations in all load line areas were terminated on or prior to August 16, 1945.

45. The "work week" of the defendant's employees consisted of the period of time commencing Sunday at 12:00 P. M. (midnight) and ending Sunday at 12:00 P. M. (midnight) of the following week, except as to the employees working in the Fire Department from August 28, 1944, to August 26, 1945, during which last mentioned period of time [fol. 280] the work week of the employees working in the Fire Department consisted of the period of time starting at 8:00 A. M. Monday, and ending at 8:00 A. M. Monday of the following week.

46. To comply with the provisions of the Contract and to provide a uniform system of accounting, timekeeping, and wage computation, the company adopted and inaugurated a "Timekeeping and Wage Payroll Procedure" which procedure was approved or ratified by the Government's Contracting Officers who were stationed at the Plant. Under this procedure, with but few exceptions, all hourly rated employees were required to punch a time clock as hereinabove stated; but the time clock cards were not, under said procedure, the official records or basis for the calculation and computation of time worked by, and wages due, such hourly rated employees. The controlling, official record from which the calculation and computation of time worked and wages due was the employee's "Labor Distribution Card". The Labor Distribution Card was distributed to the employee's immediate salaried supervisor or foreman who daily entered on said card, in the proper space provided

for thereon, the number of hours, or fractions thereof, worked by such wage employee in each day of the work week. At the end of each work shift the Labor Distribution Card and the time clock card of each wage employee was picked up by the area time clerk for the purpose of inspecting same, noting discrepancies between the two, to ascertain that the hours reported worked on the Labor Distribution Card were supported by proper in-rings and out-rings on the time clock card, and to extend on each card the total number of hours worked on said day. At the end of each work week the Labor Distribution Cards and time clock cards were forwarded to the Central Timekeeping Department. The Central Timekeeping Department, after first making a similar audit, then calculated the employee's weekly earnings, at regular and overtime rates, using the hours shown worked on the employee's Labor Distribution Card.

The use of the time clocks and time clock cards was requested and required by the Ordnance Department so that Government auditors and "time checkers" could verify by audit and investigation to the extent considered necessary (which audit and investigation were made daily) that said employees were actually at their work area and working during the time for which wages were paid, and also to guard against the possibility that an employee might be [fol. 281] paid for a greater number of hours than he actually worked. Thus the time clock card served mainly as an attendance report and as a double check on the Labor Distribution Card which was the official time record. An illustration may serve to make the matter more understandable. For example, assume that on the day of January 3, 1944, John Doe was assigned to and working the second shift (from 8:00 A. M. to 4:00 P. M.) and that his clock card showed an in-ring at 8:24 A. M. and an out-ring at 4:00 P. M. and that the foreman's entry on the Labor Distribution Card was for eight full hours as time worked on this particular day. When the Labor Distribution Card and time clock card were examined by the area time clerk, the discrepancy of three-tenths of an hour would be noted. If the discrepancy could not be satisfactorily cleared up at that time by the area time clerk, the area time clerk made out a "Clock Card Discrepancy Report", in duplicate, one copy of which was forwarded to the employee's foreman and one copy forwarded to the Central Timekeeping office. Thus the clock card in this instance served as a device to prevent

payment for three-tenths of one hour which the foreman had mistakenly shown as being worked on the Labor Distribution Card as there was not eight hours elapsed time between the employee's in-ring and out-ring.

The company provided a "Wage Adjustment" form for the use of any employee who felt that he had not received proper compensation for the hours which he claimed he had worked during any work week. All employees were instructed about this form; its purpose and its uses. This form was used in connection with the Clock Card Discrepancy Report and some of the common, typical situations which called for its use arose where the employee did not conform to defendant's regulations with respect to ringing the time clock; such as, forgetting or omitting to in-ring when reporting for work, forgetting or omitting to out-ring at the end of the shift, ringing another employee's card through error or mistake, making improper ring through carelessness in inserting the card in the time clock, alleged failure of the time clock to function, and other similar situations. In such instances, unless the area time clerk had been able to successfully clear up the discrepancy between the time clock card and the Labor Distribution Card, the employee would not be paid for the hours claimed worked for that particular day unless and until he filed his claim for [fol. 282] wage adjustment on the provided form briefly setting forth the basis of his claim and the time actually worked. If the employee's foreman, after investigation of the employee's claim, certified that the employee did work the hours claimed on the particular day, or days, the Central Timekeeping office then allowed the employee's wage claim and issued a supplemental check to the employee for the hours worked on the particular day, or days, including any additional overtime to which he might be entitled during the particular work week.

Each week a Labor Distribution Card was prepared for each and every hourly rated plaintiff and intervenor in this case and a daily entry was entered thereon for the hours worked each day that he worked for the company, in accordance with the latter's official Timekeeping and Payroll Procedure. Each of them was paid at their regular rate for the first forty hours worked during any work week and at not less than time and one-half for all hours worked in excess of forty hours during each and every work week, as shown by such Labor Distribution Card, and in every instance, where

a plaintiff or intervener filed claim for wage adjustment, as shown in the next preceding paragraph, the defendant has given due consideration to such claims, and the proof or evidence in support thereof, and has paid each such claim for wage adjustment which had reasonable support and foundation in fact.

47. Concurrently with the surrender of Japan, the loading of ammunition at the Plant was discontinued on or about August 15, 1945. The Government's instructions to the defendant to stop loading operations was confirmed by Change Order No. 17 to the Contract. By letter dated October 18, 1945, the Government gave notice of its termination of the work under the Contract effective as of midnight October 26, 1945, and at midnight November 4, 1945, the defendant returned the Plant back into the custody and possession of the Government who assumed sole responsibility therefor. Both the hourly rated and non-exempt salaried plaintiffs and interveners herein had full knowledge of the defendant's highly publicized wage adjustment procedure. In fact, many of said plaintiffs and intervenors did file and were granted wage adjustments. Although the alleged claims allegedly arose and accrued several years prior to the [fol. 283] institution of this suit, the plaintiffs and intervenors did not file a wage adjustment claim nor make a claim against the defendant for the claims herein asserted nor did the exempt salaried plaintiffs and intervenors make a claim for the additional overtime compensation herein claimed until after the termination of hostilities with Japan and loading activities at the Plant had been discontinued and practically all of the defendant's employees, including most of the plaintiffs, and administrative personnel had been terminated.

[fol. 284] STATE OF TEXAS,
County of Tarrant:

Before Me, the undersigned, a Notary Public in and for the County and State aforesaid, on this day personally appeared John T. Murchison, who being first duly sworn, states on oath that during the period of time hereinafter referred to he was a commissioned officer of the Army of the United States, holding the rank of Lieutenant Colonel in the Ordnance Department; that on September 4, 1944, he was duly and regularly appointed as the authorized repre-

sentative of the Ordnance Contracting Officer for the administration of the Ordnance Facility project near Texarkana, Texas, designated as the Lone Star Ordnance Plant, and that he continued to act as said representative of the Ordnance Contracting Officer until the 29th day of January, 1946; that he has personal knowledge of the facts stated in Paragraphs 3, 5, 6, 26, 29a, 31, 32, 33, 34, 35, 36, and 47 of the above and foregoing "Affidavit in Support of Motion for Summary Judgment"; that the facts stated in said paragraphs, and the exhibits referred to therein, are true and correct, and that he is able to give competent testimony as to the truth thereof.

John T. Murchison.

Subscribed and Sworn to before me by John T. Murchison this the 3d day of January, 1947, to certify which witness my hand and seal of office. Ottie Lyon, Notary Public in and for Tarrant County, Texas. My Commission Expires June 1, 1947. (Seal.)

[fol. 285] STATE OF TEXAS,
County of Bowie:

Before Me, the undersigned, a Notary Public in and for the County and State aforesaid, on this day personally appeared Wm. M. Bailey, who being first duly sworn, states on oath that he is a Civil Service employee of the Government of the United States, and that he was employed by the Ordnance Department in the capacity of Ordnance Department Field Auditor and was stationed at Lone Star Ordnance Plant; that he has personal knowledge of the facts stated in Paragraphs 19, 20, 24, 35, 45, and 46 of the above and foregoing "Affidavit in Support of Motion for Summary Judgment"; that the facts stated in said paragraphs, and the exhibits referred to therein, are true and correct, and that he is able to give competent testimony as to the truth thereof.

Wm. M. Bailey.

Subscribed and Sworn to before me by Wm. M. Bailey this the 31 day of December, 1946, to certify which witness my hand and seal of office. B. P. Rothermel, Notary Public in and for Bowie County, Texas. My Commission Expires June 1, 1947. (Seal.)

[fol. 286] STATE OF OHIO,
County of Summit:

Before Me, the undersigned, a Notary Public in and for the County and State aforesaid, on this day personally appeared A. Kelly, who being first duly sworn, states on oath that he was employed by Lone Star Defense Corporation in the capacity of General Manager from the 22nd day of July, 1941, to the 5th day of April, 1943, and that on the 5th day of April, 1943, he was elected a Vice-President of said corporation and still holds said office; that he has personal knowledge of the facts stated in Paragraphs 1, 7, 8, 9, 10, 39, and 44 of the above and foregoing "Affidavit in Support of Motion for Summary Judgment"; that the facts stated in said paragraphs, and the exhibits referred to therein, are true and correct, and that he is able to give competent testimony as to the truth thereof.

A. Kelly.

Subscribed and Sworn to before me by A. Kelly this the 27th day of December, 1946, to certify which witness my hand and seal of office. Rosemary Mac Gregor, Notary Public in and for Summit County, Ohio. My commission expires August 1, 1948. (Seal.)

[fol. 287] STATE OF ALABAMA,
County of Tuscaloosa:

Before me, the undersigned, a Notary Public in and for the County and State aforesaid, on this day personally appeared J. C. Herbert, who being first duly sworn, states on oath that from the 22nd day of July, 1941, to the present time he has been variously employed by the Lone Star Defense Corporation in the capacities of Assistant Secretary, Assistant General Manager, and General Manager; that he has personal knowledge of the facts stated in Paragraphs 3, 4, 6, 8, 9, 11, 13b, 13c, 14, 15, 16, 17, 24, 25, 26, 27, 28, 29a, 29b, 30a, 30b, 32, 33, 36, subdivisions i, ii, iii, iv, viii, ix, x, and xi of 40, 41, 42, 43, 44, and 47 of the above and foregoing "Affidavit in Support of Motion for Summary Judgment"; that the facts stated in said paragraphs, and the exhibits

referred to therein, are true and correct, and that he is able to give competent testimony as to the truth thereof.

J. C. Herbert.

Subscribed and Sworn to before me by J. C. Herbert this the 27th day of December, 1946, to certify which witness my hand and seal of office. Dorothy S. McGee, Notary Public in and for Tuscaloosa County, Alabama. (Seal.)

[fol. 288] STATE OF TEXAS,
County of Bowie:

Before me, the undersigned, a Notary Public in and for the County and State aforesaid, on this day personally appeared K. M. Prichard, who being first duly sworn, states on oath that he was employed by Lone Star Defense Corporation in the capacity of Assistant Secretary of the corporation on the 3rd day of June, 1943, and still holds said office; that he has personal knowledge of the facts stated in Paragraphs 2, 5, 11, 18, 31, 33, 34, 36, 37, 38, 40 and its subdivisions, 41, 42, 43, 45, and 47 of the above and foregoing "Affidavit in Support of Motion for Summary Judgment"; that the facts stated in said paragraphs, and the exhibits referred to therein, are true and correct, and that he is able to give competent testimony as to the truth hereof.

K. M. Prichard.

Subscribed and Sworn to before me by K. M. Prichard this the 30 day of December, 1946, to certify which witness my hand and seal of office. B. P. Rothermel, Notary Public in and for Bowie County, Texas. My commission expires June 1, 1947. (Seal.)

[fol. 289] STATE OF OHIO,
County of Summit:

Before me, the undersigned, a Notary Public in and for the County and State aforesaid, on this day personally appeared K. R. Huffman, who being first duly sworn, states on oath that he was employed by Lone Star Defense Corporation in the capacity of Controller and Assistant Treasurer on the 22nd day of July, 1941, and still holds said offices; that he has personal knowledge of the facts stated in Paragraphs 12, 13a, 13c, 14, 15, 17, 18, 19, 20, 21, 22a, 22b, 22c,

22d, 23, 24, 26, 27, 29a, 29b 30a 30b, 31, 34, 35, 36, 40, 41, 42, 43, 45, and 46 of the above and foregoing "Affidavit in Support of Motion for Summary Judgment"; that the facts stated in said paragraphs, and the exhibits referred to therein, are true and correct, and that he is able to give competent testimony as to the truth thereof.

K. R. Huffman.

Subscribed and Sworn to before me by K. R. Huffman this the 27 day of December, 1946, to certify which witness my hands and seal of office. R. MacGregor, Notary Public in and for Summit County, Ohio. My commission expires August 1, 1948. (Seal.)

[fol. 290] STATE OF MISSOURI,
County of Jackson:

Before me, the undersigned, a Notary Public in and for the County and State aforesaid, on this day personally appeared R. W. Ells, who being first duly sworn, states on oath that he was employed by Lone Star Defense Corporation in the capacity of Superintendent of Personnel from the 3rd day of July, 1944, to the 16th day of October, 1945; and that he has personal knowledge of the facts stated in Paragraphs 12, 13a, 13b, 13c, 22a, 22b, and 40 of the above and foregoing "Affidavit in Support of Motion for Summary Judgment"; that the facts stated in said paragraphs, and the exhibits referred to therein, are true and correct, and that he is able to give competent testimony as to the truth thereof.

R. W. Ells.

Subscribed and Sworn to before me by R. W. Ells this the 26" day of Dec., 1946, to certify which witness my hand and seal of office. Vera Lucille Outwater, Notary Public in and for Jackson County, Missouri. My Com. Exps. Jan. 21, 1947. (Seal.)

[fol. 291] STATE OF OHIO,
County of Summit:

Before me, the undersigned, a Notary Public in and for the County and State aforesaid, on this day personally appeared A. C. Sprague, who being first duly sworn, states on oath that he was employed by Lone Star Defense Corpora-

tion in the capacity of Superintendent of Personnel from the 1st day of August, 1941, to the 2nd day of January, 1944; that he has personal knowledge of the facts stated in Paragraphs 13a, 22a, 22b, 22c, and 23 of the above and foregoing "Affidavit in Support of Motion for Summary Judgment"; that the facts stated in said paragraphs, and the exhibits referred to therein, are true and correct, and that he is able to give competent testimony as to the truth thereof.

A. C. Sprague.

Subscribed and Sworn to before me by A. C. Sprague this the 30" day of Dec., 1946, to certify which witness my hand and seal of office. Alberta M. Tewers, Notary Public in and for Summit County, Ohio. My commission expires November 15, 1947. (Seal.)

[fol. 292] STATE OF OHIO,
County of Summit:

Before me, the undersigned, a Notary Public in and for the County and State aforesaid, on this day personally appeared C. E. Jones, who being first duly sworn, states on oath that he was employed by Lone Star Defense Corporation in the capacity of Chief Engineer from the 16th day of August, 1941, to the 11th day of November, 1945; that he has personal knowledge of the facts stated in Paragraphs 10, 16, and subdivision v of 40 of the above and foregoing "Affidavit in Support of Motion for Summary Judgment"; that the facts stated in said paragraphs, and the exhibits referred to therein, are true and correct, and that he is able to give competent testimony as to the truth thereof.

C. E. Jones.

Subscribed and Sworn to before me by C. E. Jones this the 27" day of Dec. 1946, to certify which witness my hand and seal of Office. R. MacGregor, Notary Public in and for Summit County, Ohio. My commission expires August 1, 1948. (Seal.)

[fol. 293] STATE OF OHIO,
County of Summit:

Before me, the undersigned, a Notary Public in and for the County and State aforesaid, on this day personally appeared L. M. Freeman, who being first duly sworn, states

on oath that he was employed by Lone Star Defense Corporation in the capacity of Technical Superintendent from the 16th day of September, 1941, to the 11th day of November, 1945; that he has personal knowledge of the facts stated in Paragraphs 40-vi and 40-vii of the above and foregoing "Affidavit in Support of Motion for Summary Judgment"; that the facts stated in said paragraphs, and the exhibits referred to therein, are true and correct, and that he is able to give competent testimony as to the truth thereof.

L. M. Freeman.

Subscribed and Sworn to before me by L. M. Freeman this the 27th day of December, 1946, to certify which witnes my hand and seal of office. Rosemary MacGregor, Notary Public in and for Summit County, Ohio. My commission expires August 1, 1948. (Seal.)

[fol. 294] EXHIBIT "A" TO AFFIDAVIT

Contract No. W-ORD-516. DA-W-ORD-3

Cost-Plus-a-Fixed-Fee

New Ordnance Facility

Construction and Operation Contract

War Department

Contractor: Lone Star Defense Corporation, Akron, Ohio.

Contract for: Furnishing management service (including subcontracts for architect-engineer services and construction of a new ordnance facility and installation of equipment therein), procuring production equipment, training key personnel for and operating a new ordnance facility for the loading of fixed rounds, shells, bombs, boosters, fuzes, detonators, and artillery primers.

Place: Near Texarkana, Texas.

Estimated Cost of management service (including cost of architect-engineer and construction subcontracts) under Title I: $27,232,536.00.

Fixed-Fee for management service under Title I: $120,781.00.

Estimated Cost of procuring equipment under Title II: $5,987,600.00.

Fixed-Fee for procuring equipment under Title II: $45,470.00.

Estimated Cost of Training Key Personnel under Title III (Optional): $250,000.00.

Fixed-Fee for Training Key Personnel under Title III: $1.00.

Estimated Cost of operation under Title IV (Optional): $44,690,000.00.

Fixed-Fee for operation under Title IV: $480,000.00.

Payments to be made by Finance Officer, U. S. Army at Fort Sam Houston, Texas.

The new ordnance facility, services and supplies to be obtained by this instrument are authorized by, are for the purposes set forth in, and are chargeable to the following procurement authorities, the available balances of which are sufficient to cover the cost of the same:

ORD 27,030 P99 A0141-02.
ORD 27,031 P99 A0141-02.
ORD 50,177 P510-31 A0025-13.
ORD 50,178 P531-32 A0025-13.

This contract is authorized by the following laws: The Act of July 2, 1940 (Public No. 703, 76th Congress), the Act of March 11, 1941 (Public No. 11, 77th Congress), and the Act of June 30, 1941 (Public No. 139, 77th Congress).

(S.) L. H. Campbell, Jr., Brig. Gen., U. S. Army.

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[fol. 297] Cost-Plus-a-Fixed-Fee

New Ordnance Facility

Construction and Operation Contract

This Contract, entered into this 23d day of July, 1941 by The United States of America, hereinafter called the Government, represented by the Contracting Officers executing this contract, and Lone Star Defense Corporation, a corporation organized and existing under the laws of the State of Ohio, with its principal office in the City of Akron, in the State of Ohio, hereinafter called the Contractor, witnesseth that:

Whereas, The Government desires to have the Contractor design, construct and equip a new ordnance facility by furnishing management services for such designing, constructing and equipping, by procuring the production equipment to be installed therein, and by subcontracting with third parties for necessary architect-engineer services and for constructing the new ordnance facility and installing the production equipment therein; and, at the option of the Government, train key personnel and operate the new ordnance facility more particularly described in Title I hereof, for the loading of fixed rounds, shells, bombs, boosters, fuzes, detonators, and artillery primers; and

Whereas, The accomplishment of the above-described work under a cost-plus-a-fixed-fee contract, entered into after negotiations approved by the Secretary of War, and without advertising for proposals, is authorized by law; and

Whereas, As a result of such negotiations, the Secretary of War has directed that the Government enter into a cost-

plus-a-fixed-fee contract with the Contractor for the accomplishment of the above-described work;

Now Therefore, The parties hereto do mutually agree as follows:

[fol. 298] Title I

Management Service

Article I-A—Description of New Ordnance Facility

1. The new ordnance facility, hereinafter referred to as the "Plant", and designated as Lone Star Ordnance Plant, shall comprise a plant at or near Texarkana, Texas, upon a site to be furnished and made available by the Government, for the loading of fixed rounds, shells, bombs, boosters, fuzes, detonators and artillery primers, including manufacture of amatol and of nitrate of ammonia from neutral nitrate of ammonia solution for the foregoing types of ammunition, having an estimated capacity as follows:

96,000 20mm Shell, or equivalent capacity of other similar types, per 24-hour day (2 lines of 48,000 each),
24,000 105mm Howitzer Shell, or equivalent capacity of other similar types, per 24-hour day (1 line),
8,400 15mm Shell, or equivalent capacity of other similar types, per 24-hour day (1 line),
2,880 100-lb. bombs, or equivalent capacity of other similar types, per 24-hour day (1 line),
and corresponding fuzes and boosters for all the foregoing types of Ammunition;

as well as:

400,000 detonators for M20 boosters, or equivalent per 24-hour day (2 lines of 200,00 each),
100,000 artillery primers (M-23A1, or equivalent) per 24-hour day (1 line), and
50,000 artillery primers (M1B1A1, or equivalent) per 24-hour day (1 line).

2. Said Plant shall consist of such nine operating lines and appropriate lines for the corresponding boosters, and fuzes, and shall include loading buildings, Nitrate of Ammonia evaporating and graining buildings, administration buildings, shops, railroads, roads, steam lines, air lines, electric lines, telephone lines, fencing, lighting, power houses,

dormitories, water system, staff dwellings, mess hall, cafe-
[fol. 299] terias, guard quarters, fire fighting system and housing thereof, and other buildings together with all equipment necessary or appropriate for a loading plant of the approximate capacity aforesaid, with storage buildings adequate for about 30 days' supply of incoming materials and about 60 days' production of finished product.

3. Said Plant shall conform, insofar as is practicable, with typical designs, drawings, specifications, details, standards or instructions which are on file in the offices of the Chief of Ordnance and The Quartermaster General and which shall be promptly furnished to the Contractor or which will be furnished hereafter by the Contracting Officer; *Provided, however,* that no portion of said Plant shall consist of a permanent type of construction unless specifically authorized in advance by the Secetary of War; and *Provided further,* that nothing herein shall prevent the use of a type of construction sufficiently substantial for the use intended, in the judgment of the Contracting Officer, as evidenced by his approval of the plans and specifications.

Article I-B—Statement of Work

1. The Contractor shall, in the shortest reasonable time, furnish the labor, materials, tools, machinery, equipment, facilities, utilities, supplies not furnished by the Government, and services, and do all things necessary for the completion of a Plant of the type and capacity described in Article I-A hereof.

2. In the performance of the work described in Section I of this Article I-B:

a. The Contractor shall furnish management service covering supervision, direction and control of the designing (including designing of the production equipment), engineering and construction (including the installation of the production equipment) of the Plant, and subject to the approval of the Contracting Officer, establish, equip and maintain adequate guard and fire fighting forces.

b. The Contractor shall subcontract, on forms prescribed by The Quartermaster General, for Architect-Engineer services covering design (including necessary design of production equipment) and engineering and subcontract for the

construction (including the installation of production equipment) of the Plant, with subcontractors selected by the Quartermaster General and approved by the Contractor.

c. The performance of the work described in Paragraph *a* of this Section 2 of Article I-B shall be subject to the approval of the Contracting Officer appointed by the Chief of Ordnance.

[fol. 300] 3. Approval of performance of the subcontracts provided for in Paragraph *b* of Section 2 of this Article I-B shall be as follows:

a. The preparation of the general layout of the project and the detailed plans and working drawings for the manufacturing buildings and their equipment, including process steam generating plant and explosive storage buildings, shall be subject to approval by the Contracting Officer appointed by the Chief of Ordnance.

b. The preparation of the detailed plans and working drawings for roads, railroads, sewerage systems, water systems, electrical generating plants and transmission lines, heating plants, non-manufacturing buildings, such as offices, general warehouses and garages, and such miscellaneous construction as may be requested by the Chief of Ordnance shall be subject to approval by the Contracting Officer appointed by The Quartermaster General. All designs must have the approval of the Contracting Officer appointed by the Chief of Ordnance.

c. Performance of the construction work of the entire project will be under the direction of the Contracting Officer appointed by The Quartermaster General.

4. The Government shall furnish the Contractor such available schedules of preliminary data, layout sketches, and other available information respecting sites, topography, soil conditions, outside utilities and equipment, and shall make available to the Contractor such Government designs, drawings, specifications, details, standards and safety practices as are on hand in the offices of the Chief of Ordnance and The Quartermaster General and are applicable to the design, construction, and equipping of the said Plant.

5. All of the Contractor's notes and other data concerning the design, construction and equipping of the Plant shall

become the property of the Government and the Government shall have full right to use said notes and other data for any purpose it may desire, without any claim on the part of the Contractor for additional compensation. All such notes and other data shall be delivered to the Government whenever requested by the Contracting Officer and, furthermore, access to such notes and data shall be restricted to trusted and duly authorized representatives of the Government and of the Contractor.

Article I-C—Estimates

1. It is estimated that the total cost of the work under this Title I will be approximately *Twenty-seven Million Two Hundred Thirty-Two Thousand Five Hundred Thirty-Six* Dollars *($27,232,536.00)*, including the cost of all subcontracts but excluding the Contractor's fee and the procurement of production equipment provided for in Title II hereof.

[fol. 301] 2. It is estimated that the completed Plant will be ready for utilization by the Government within ten (10) months after the approval date of this contract.

3. It is expressly understood that neither the Government nor the Contractor guarantees the correctness of any of the estimates set forth in this Article I-C. The estimated total costs set forth in this Article I-C are based upon estimates agreed to by both the Government and the Contractor, copies of which are on file in the offices of the Chief of Ordnance and The Quartermaster General

Article I-D—Consideration

As consideration for its under taking under this Title I the Contractor shall receive the following:

1. Reimbursement for expenditures as provided in Title V.

2. A fixed-fee in the amount of *One Hundred Twenty Thousand Seven Hundred Eighty-One* Dollars *($120,781.00)* which shall constitute complete compensation for the Contractor's services, including profit.

Article I-E—Labor

1. The Contractor or his subcontractor shall pay all mechanics and laborers employed directly upon the site of

the work, unconditionally and not less often than once a week, and without subsequent deduction or rebate on any account, the full amounts accrued at the time of payment, computed at wage rates not less than those determined by the Secretary of Labor for the work herein specified, regardless of any contractual relationship which may be alleged to exist between the Contractor, subcontractor and such mechanics and laborers; and said schedule of minimum wage rates will be posted by the Contractor in a prominent and easily accessible place at the site of the work.

2. The Contractor shall compensate laborers and mechanics for all hours worked by them in excess of eight hours in any one calendar day at a rate not less than one and one-half times the basic rate of pay of such laborers and mechanics and shall include a stipulation in each subcontract that laborers and mechanics will be paid at a rate not less than one and one-half times their basic rate of pay for all hours worked by them in excess of eight hours of any one calendar day.

3. All wage rates, including compensation for overtime under Section 2 of this Article, for laborers and mechinics engaged in work under this contract shall be approved in writing by the Chief of Branch or his duly authorized representative, and any amount paid by the Contractor to any [fol. 302] *laborer or mechanic in excess* of the wage rate so approved shall be at the expense of the Contractor and shall not be reimbursed by the Government. When, in connection with the audit and check by the Contracting Officer or his authorized representative, of the Contractor's payrolls prior to reimbursement as contemplated in Section 1 of Article V-A hereof, it is found that one or more laborers and/or mechanics have been paid wages at rates in excess of the wage rates approved as herein provided, the reimbursement made to the Contractor on account of such payrolls will not include such excess payments.

4. There may be withheld from the Contractor so much of the accrued payments as may be considered necessary by the Contracting Officer to pay to laborers and mechanics employed by the Contractor or any subcontractor on the work the difference between the rates of wages required by this contract to be paid laborers and mechanics on the work

and the rates of wages received by such laborers and mechanics and not refunded to the Contractor, subcontractor, or their agents.

5. In the event it is found by the Contracting Officer that any laborer or mechanic employed by the Contractor or any subcontractor directly on the site of the work covered by this contract has been or is being paid a rate of wages less than the rate of wages required by this contract to be paid as aforesaid, the Government may, by written notice to the Contractor, terminate his right to proceed with the work or such part of the work as to which there has been a failure to pay said required wages and to prosecute the work to completion by contract or otherwise, and the Contractor shall be liable to the Government for any excess costs occasioned the Government thereby.

6. *a.* The Contractor shall furnish to the Contracting Officer, within seven days after the regular payment date of each and every weekly payroll, an affidavit in the form prescribed by regulations issued by the Secretary of Labor and published in the Federal Register of March 1, 1941, 6 F. R. 1211, or any modification thereof pursuant to the Act of June 13, 1934, 48 Stat. 948 (U. S. Code Title 40, section 276 *b* and *c*), sworn to by the Contractor or the subcontractor concerned or by the authorized officer or employee of the Contractor or subcontractor supervising such payment, to the effect that each and every person employed on the work has been paid in full the weekly wages shown on the payroll covered by the affidavit; that no rebates have been or will be made either directly or indirectly to or on behalf of the Contractor or such subcontractor from the full weekly wages earned as set out on such payrolls; and that no deductions, other than permissible deductions as defined in the said regulations pursuant to said Act of June 13, 1934, and as described in said affidavit, have been or will be made, either directly or indirectly, from the full weekly wages earned as set out on such payroll.

[fol. 303] *b.* The Contractor shall comply with all applicable requirements of the said regulations of the Secretary of Labor under the Act of June 13, 1934, and the requirements of this Article of the contract shall be subject to all applicable provisions of such regulations.

c. The Contractor shall cause appropriate provisions to be inserted in all subcontracts relating to this work to insure fulfillment of the requirements of this Article.

[fol. 304] Title II

Procurement of Production Equipment

Article II-A—Statement of Work

1. The Contractor shall, in the shortest reasonable time, determine the production equipment requirements for the Plant and shall, subject to the approval of the Contracting Officer, thereupon proceed to do all things necessary and incident to the procurement of the production equipment required.

2. The Government reserves the right to furnish any production equipment necessary for the equipping of the Plant, provided such production equipment so to be furnished is of a suitable type and in satisfactory operating condition, upon so notifying the Contractor prior to any commitment by the latter therefor. In the equipping of the Plant the Contractor shall be free (but shall not be obligated) to use any production equipment of its own manufacture, upon advising the Government in advance as to the prices at which and the conditions upon which such production equipment will be supplied, which prices and conditions, however, shall not be less favorable than those quoted to third parties for similar quantities and deliveries, and may be quoted without regard to the provisions of Section 5 of Article V-A of Title V. In the event the Government is able to obtain production equipment of equal quality and quantity at a lower price or on more favorable conditions from any responsible competitive source or from its own manufacture, it may undertake to do so upon so informing the Contractor within ten (10) days after being advised of the Contractor's price for such equipment.

Article II-B—Estimates

It is estimated that the total cost under this Title II will be approximately Five Million Nine Hundred Eighty Seven Thousand Six Hundred Dollars ($5,987,600.00), exclusive of the Contractor's fee. It is expressly understood, however, that neither the Government nor the Contractor guar-

antees the correctness of this estimate. The estimated total cost set forth in this Article II-B is based upon an estimate agreed to by both the Government and the Contractor, a copy of which is on file in the office of the Chief of Ordnance.

Article II-C—Consideration

As consideration for its undertaking under this Title II the Contractor shall receive the following:

1. Reimbursement for expenditures as provided in Title V.

[fol. 305] 2. A fixed-fee in the amount of *Forty-Five Thousand Four Hundred Seventy* Dollars *($45,470.00)*, which shall constitute complete compensation for the Contractor's services, including profit other than that included in the prices quoted pursuant to Section 2 of Article II-A of this Title II.

Article II-D—Eight-hour Law—Overtime Compensation

The Contractor shall compensate laborers and mechanics for all hours worked by them in excess of eight hours in any one calendar day at a rate not less than one and one-half times the basic rate of pay of such laborers and mechanics and shall include a stipulation in each subcontract that laborers and mechanics will be paid at a rate not less than one and one-half times their basic rate of pay for all hours worked by them in excess of eight hours of any one calendar day.

[fol. 306]

Title III

Training of Key Personnel (Optional)

Article III-A—Statement of Work

1. The obligation of the Contractor to proceed with the work under this Title III shall be conditioned upon receipt by the Contractor of notice in writing from the Contracting Officer so to do, and the prior appropriation and allocation of funds necessary therefor. Upon receipt by the Contractor of such notice, the Contractor shall hire or select the key personnel necessary for the operation of the Plant, and when such personnel is available shall proceed to train such personnel in the duties and functions of their respective positions, at the Contractor's plants, at Ordnance estab-

lishments, or elsewhere, in order that they will have obtained experience with the processes and operations involved in the Plant at any time when the Government shall exercise its option under Section 1 or Article IV-A of Title IV.

2. After completion of the work under Section 1 of this Article III-A, the Contractor shall, if directed by the Contracting Officer, until a date not in excess of six (6) months after the approval of this contract, use its best efforts to retain the group of key personnel trained hereunder in readiness for operation of the Plant should the Government exercise its option under Section 1 of Article IV-A of Title IV.

3. The extent and character of the work to be done by the Contractor under this Title III shall be subject to the approval of Contracting Officer to whom the Contractor shall report and be responsible. In the event that there should be any dispute with regard to the extent and character of the work to be done the matter shall be determined as provided in Article VII-M of Title VII.

Article III-B—Estimate

It is estimated that the cost of the work under this Title III will be approximately *Two Hundred Fifty Thousand* Dollars *($250,000.00)*, exclusive of the Contractor's fee. It is expressly understood that neither the Government nor the Contractor guarantees the correctness of this estimate. The estimated total cost set forth above is based upon an estimate agreed to by both the Government and the Contractor, a copy of which is on file in the Office of the Chief of Ordnance.

[fol. 307] Article III-C—Consideration

As consideration for its undertaking under this Title III the Contractor shall receive the following:

1. Reimbursement for expenditures as provided in Title V.

2. A fixed fee of *One Dollar ($1.00)* which shall constitute complete compensation for the Contractor's services under this Title III, including profit.

Article III-D—Eight Hour Law—Overtime Compensation

The Contractor shall compensate laborers and mechanics for all hours worked by them in excess of eight hours in any

one calendar day at a rate not less than one and one-half times the basic rate of pay of such laborers and mechanics and shall include a stipulation in each subcontract that laborers and mechanics will be paid at a rate not less than one and one-half times their basic rate of pay for all hours worked by them in excess of eight hours of any one calendar day.

[fol. 308] Title IV

Operation of Plant (Optional)

Article IV-A—Statement of Work

1. The obligation of the Contractor to proceed with the work under this Title IV shall be conditioned upon receipt by the Contractor within *six (6)* months after the date of approval of this contract of the notice provided for in Section 1 of Article III-A of Title III hereof and receipt by the Contractor of notice in writing from the Contracting Officer so to do, and the prior appropriation and allocation of funds necessary therefor. Immediately upon receipt by the Contractor of such notice, and concurrently with the performance of the work required of it under Titles I, II and III hereof, the Contractor shall undertake all preparations necessary for the subsequent operation of the Plant, including the necessary training of personnel for such operation in addition to the key personnel trained pursuant to Title III hereof, and all other services incident to setting up an efficient and going operating force.

2. As each operating unit of the Plant is completed and ready for operation and the necessary preparation for operation and training of personnel has proceeded to a point where operation is practicable the Contractor shall so notify the Contracting Officer in writing and shall proceed to operate it as directed from time to time by the Contracting Officer, irrespective of whether or not the construction and equipping of the Plant as a whole shall have been completed.

3. Notwithstanding the fact that the construction and equipping of the Plant as a whole shall not have been completed, when all operating units thereof are completed and ready for operation without incurring hazards because of the lack of completion of the construction and equipping of

the Plant as a whole beyond those usual in the normal operation of a plant of the type provided for herein, the Contractor shall so notify the Contracting Officer in writing, and from and after the date of said notice the Contractor shall operate said Plant for a period of twelve (12) months; provided, however, that in no event shall the Contractor be obligated to operate said Plant either partially or completely under this section 3 or section 2 immediately preceding for a total period of more than eighteen (18) months after the Contractor has notified the Contracting Officer in writing that the first operating unit of said plant is completed and ready for operation as provided in section 2 above.

[fol. 309] 4. Upon written notice to the Contractor not less than ninety (90) days before the anticipated completion of the operation provided for in Section 3 next above, the Government may, at its option, authorize the continued operation of the Plant for an additional period of twelve (12) months, and the Contractor shall undertake such continued operation under the terms and conditions of this contract applicable to the operation of the Plant (including those relating to the fixed-fee for such additional operation, which fee shall be that provided in Section 3 of Article IV-C, hereof). Further continued operation, if any, of said Plant by the Contractor after said additional operation shall be subject to mutual agreement.

5. The Ammunition shall be loaded in accordance with the current applicable specifications which will be furnished by the Contracting Officer or which are contained in a list of drawings identified by the signatures of the parties hereto, and which is on file in the Office of the Chief of Ordnance.

6. The Government shall furnish all explosives, including neutral nitrate of ammonia solution for the manufacture of nitrate of ammonia and all metal parts (except metal parts for detonators which will be manufactured by the Contractor) for the loading of the Ammunition. The Contractor will furnish all packing and shipping materials (except fiber containers and bundle accessories therefor, which will be furnished by the Government). The foregoing explosives, materials and parts to be furnished by the Government will be delivered f.o.b. said Plant, when and as requisitioned from time to time by the Contractor, in sufficient quantities to

enable the Contractor to carry on the operation of the Plant provided for in this Title IV. The Contractor shall be under no obligation to accept or store or permit to be stored at said Plant any explosives which would render the work to be done by the Contractor hereunder hazardous beyond what is usual in the normal operation of a plant of the type provided for herein.

7. In carrying out the work under this Title IV the Contractor is authorized and shall do all things necessary or convenient in the operating and closing down of the Plant, or any part thereof including (but not limited to) the employment of all persons engaged in the work hereunder (who shall be subject to the control and constitute employees of the Contractor), the providing of all materials and supplies except such as the Government is to furnish or supply as elsewhere specifically provided herein, the storage of materials and supplies and of the finished products to the extent of the storage facilities at said Plant, the preparation of the product for shipment and the loading of same on cars or other carriers in accordance with the Government's shipping instructions.

[fol. 310] 8. In providing materials and supplies as provided in Section 7, next above, the Contractor shall be free (but shall not be obligated) to use any materials or supplies of its own manufacture, upon advising the Contracting Officer appointed by the Chief of Ordnance in advance as to the prices at which and the conditions upon which such materials and supplies will be provided, which prices and conditions, however, shall not be less favorable than those quoted to third parties for similar quantities and deliveries, and may be quoted without regard to the provisions of Section 5 of Article V-A of Title V. In the event the Government is able to obtain materials or supplies of equal quality and quantity at a lower price or on more favorable conditions from any responsible competitive source or from its own manufacture, it may undertake to do so upon so informing the Contractor within ten (10) days after being advised of the Contractor's price for such material and supplies.

9. The Contractor shall maintain a satisfactory system of inspection, gaging and gage checking concurrent with operations, and no ordnance material shall be submitted for

the Government inspector's approval which has not previously been inspected by agents of the Contractor and found to be up to the contract standard.

Article IV-B—Estimates

It is estimated that the cost of the work under this Title IV will be *Forty-Four Million Six Hundred Ninety Thousand Dollars ($44,690,000.00)*, exclusive of the cost of continued operation covered by the option therefor provided in Section 4 of Article IV-A hereof, and exclusive of the Contractor's fee. It is expressly understood that neither the Government nor the Contractor guarantees the correctness of this estimate. The estimated total cost set forth above is based upon an estimate agreed to by both the Government and the Contractor, a copy of which is on file in the Office of the Chief of Ordnance.

Article IV-C—Consideration

As consideration for its undertaking under this Title IV the Contractor shall receive the following:

1. Reimbursement for expenditures as provided in Title V hereof.

2. A fixed-fee for the work under Sections 1, 2, and 3 of Article IV-A hereof in the amount of *Four Hundred Eighty Thousand Dollars ($480,000.00)*, which fee shall constitute complete compensation (except for continued operation) for Contractor's services, including profit other than that included in the prices quoted pursuant to Section 8 of Article IV-A of this Title IV.

[fol. 311] 3. A fixed-fee for continued operation provided in Section 4 of Article IV-A hereof, in the amount of *Four Hundred Eighty Thousand Dollars ($480,000.00)* which fee shall constitute complete compensation for Contractor's services during continued operation, including profit, other than that included in the prices quoted pursuant to Section 8 of Article IV-a of this Title IV.

Article IV-D—Walsh-Healey Act

1. The following representations and stipulations pursuant to the Walsh-Healey Public Contracts Act (Act of June 30, 1936; 49 Stat. 2036; 41 USC 35-45), shall apply

to the operation of the Plant under this Title IV of this contract:

a. The Contractor is the manufacturer of or a regular dealer in the materials, supplies, articles, or equipment to be manufactured or used in the performance of the contract.

b. All persons employed by the Contractor in the manufacture or furnishing of all materials, supplies, articles, or equipment used in the performance of the contract will be paid, without subsequent deduction or rebate on any account, not less than the minimum wages as determined by the Secretary of Labor to be the prevailing minimum wages for persons employed on similar work or in the particular or similar industries or groups of industries currently operating in the locality in which the materials, supplies, articles or equipment are to be manufactured or furnished under the contract; provided, however, that this stipulation with respect to minimum wages shall apply only to purchases or contracts relating to such industries as have been the subject matter of a determination by the Secretary of Labor.

c. No person employed by the Contractor in the manufacture or furnishing of the materials, supplies, articles, or equipment used in the performance of the contract shall be permitted to work in excess of 8 hours in any 1 day or in excess of 40 hours in any 1 week, unless such person is paid such applicable overtime rate as has been set by the Secretary of Labor.

d. No male person under 16 years of age and no female person under 18 years of age and no convict labor will be employed by the Contractor in the manufacture or production or furnishing of any of the materials, supplies, articles, or equipment included in the contract.

e. No part of the contract will be performed nor will any of the materials, supplies, articles, or equipment to be manufactured or furnished under said contract be manufactured [fol. 312] or fabricated in any plants, factories, buildings or surroundings or under working conditions which are unsanitary or hazardous or dangerous to the health and safety of employees engaged in the performance of the contract. Compliance with the safety, sanitary, and factory inspection laws of the state in which the work or part thereof is to be performed shall be prima facie evidence of compliance with this paragraph.

f. Any breach or violation of any of the foregoing representations and stipulations shall render the party responsible therefor liable to the United States of America for liquidated damages, in addition to damages for any other breach of the contract, in the sum of $10 per day for each male person under 16 years of age or each female person under 18 years of age, or each convict laborer knowingly employed in the performance of the contract, and a sum equal to the amount of any deductions, rebates, refunds, or underpayment of wages due to any employee engaged in the performance of the contract; and, in addition, the agency of the United States entering into the contract shall have the right to cancel the same and to make open market purchases or enter into other contracts for the completion of the original contract, charging any additional cost to the original contractor. Any sums of money due to the United States of America by reason of any violation of any of the representations and stipulations of the contract as set forth herein may be withheld from any amounts due on the contract or may be recovered in a suit brought in the name of the United States of America by the Attorney General thereof. All sums withheld or recovered as deductions, rebates, refunds, or underpayments of wages shall be held in a special deposit account and shall be paid, on order of the Secretary of Labor, directly to the employees who have been paid less than minimum rates of pay as set forth in such contracts and on whose account such sums were withheld or recovered: Provided, That no claims by employees for such payments shall be entertained unless made within 1 year from the date of actual notice to the Contractor of the withholding or recovery of such sums by the United States of America.

g. The Contractor shall post a copy of the stipulations in a prominent and readily accessible place at the site of the contract work and shall keep such employment records as are required in the Regulations under the Act available for inspection by authorized representatives of the Secretary of Labor.

h. The foregoing stipulations shall be deemed inoperative if this contract is for a definite amount not in excess of $10,000.00.

2. Paragraph *b* of Section 1 of this Article IV-D with respect to wages is inoperative due to no determination by

the Secretary of Labor of prevailing minimum wage rates for the industry involved.

[fol. 313] Article IV-E—Neutrality Act

Subsection 12 (g) of the Joint Resolution approved by the President, November 4, 1939, provides:

"No purchase of arms, ammunition, or implements of war shall be made on behalf of the United States by any officer, executive department, or independent establishment of the Government from any person who shall have failed to register under the provisions of this joint resolution."

A copy of the Contractor's Certificate of Registration shall be filed in the Office of the Chief of Ordnance.

[fol. 314] Title V

Cost of the Work and Payment Therefor

Article V-A—Reimbursement for Contractor's Expenditures

1. The Contractor shall be reimbursed in the manner hereinafter described for its actual expenditures in the performance of the work under this contract, when approved or ratified by the Contracting Officer, and as are included in but not limited to the following items:

a. All labor, materials, tools, machinery, equipment, facilities, supplies, utilities and services necessary for either temporary or permanent use for the benefit of the work, including the training of operating personnel. Unless otherwise directed in writing by the Contracting Officer, all articles of machinery or equipment valued at $300 or less shall be classed as tools and shall be charged directly to the work.

b. All subcontracts made in accordance with the provisions of this contract.

c. Transportation, loading, unloading and storage charges on materials, supplies, and equipment.

d. Transportation and traveling expenses to and from the site of the Plant of the necessary field forces for the economical and successful prosecution of the work; transportation and traveling expense of such other employees of the Contractor whose full time is devoted to the work under

this contract as is actually incurred in connection with such work; and costs and expenses reimbursed to permanent employees of the Contractor transferred to or from the Plant on account of transportation of themselves, their families and their household goods.

Reimbursement for transportation and traveling expenses will be limited to the cost of transportation including Pullman where necessary and an allowance of *Six Dollars ($6.00)* per day in lieu of all other expenses. Transportation by automobile on such required travel shall be reimbursed at the rate of Five Cents ($.05) per mile as representing the actual cost of such transportation.

All travel shall be either authorized or approved in writing by the Contracting Officer. Should the Contractor or any representative thereof, remain in a travel status in excess of six (6) days at any one time, not including the time consumed in travel, the cost for such excess travel status shall be at the expense of the Contractor, unless otherwise [fol. 315] ordered or approved in writing by the Contracting Officer.

e. Expenses of procuring labor and expediting the production and transportation of material supplies and equipment.

f. Salaries of employees of the Contractor engaged full time directly on the work provided hereunder whether at the Plant or elsewhere. In case the full time of any employee of the Contractor at the Plant or elsewhere (except at the Contractor's home office covered by paragraph *p* of this Section 1) is not applied to the work, his salary shall be included in this item only in proportion to the actual time applied thereto. No person shall be assigned to service by the Contractor as superintendent of operation, chief engineer, chief purchasing agent, chief accountant, or similar position in the Contractor's organization at the Plant, or as principal assistant to any such person until there has been submitted to and approved by the Contracting Officer a statement of the previous salary, proposed salary, qualifications, and experience of the person selected for such assignment. It is recognized that in transferring men from their regular positions to the Plant, it may be necessary to make some increase in their remuneration, which shall be subject to the approval of the Contracting Officer.

g. Necessary temporary buildings and the equipment therefor and the cost of maintenance and operation thereof;

provided, however, that the costs and expenses of equipping and operating cafeterias and commissaries shall be reimbursed only as provided in the procedure relating thereto approved by the Contracting Officer.

h. Premiums on such bonds and insurance policies as the Contracting Officer or the Secretary of War may approve or require as reasonably necessary for the protection of the Government or the Contractor.

i. Losses and expenses, not compensated by insurance or otherwise (including settlements made with the written consent of the Contracting Officer), actually sustained by the Contractor in connection with the work and found and certified by the Contracting Officer to be just and reasonable unless reimbursement therefor is expressly prohibited herein.

j. The cost of reconstructing and replacing any of the work destroyed or damaged, to the extent not covered by insurance, but expenditures under this item must have the written authorization of the Contracting Officer in advance.

k. Payments made by the Contractor under the Social Security Act (employer's contribution) and any disburse-
[fol. 316] ments required by law which the Contractor may be required to pay on account of this contract, on or for any plant, equipment, process, organization, materials, supplies, or personnel or on moneys received as reimbursement therefor; and, if approved in writing by the Contracting Officer in advance, permit and license fees and royalties on patents used including those owned by the Contractor.

l. While the Contractor shall make every reasonable effort to have the finished product conform to the drawings and specifications referred to in Title IV hereof, it is recognized that variances therefrom are unavoidable and the Contractor shall be allowed all costs determined in accordance with this Article for re-working material because of rejection and for material finally rejected.

m. Extra compensation to employes, discontinuance wages and charges under welfare and other employee relations plans maintained by the Contractor; Provided, that the Government shall be chargeable therefor only insofar as the same are consistent with the general employee relations policies existing throughout the Contractor's organization, or are incurred pursuant to agreement made as a result of collective bargaining with the representatives of

employees, and are expressly authorized in writing by the Contracting Officer.

n. Accounting (including salaries and other expenses) in connection with special audits of accounts for the government in connection with work hereunder.

o. Expenses in connection with any temporary or permanent closing down of the plant.

p. 1. The fixed amount of *Eighty-Four Thousand* Dollars (*$84,000.00*), payable in ten (10) equal monthly installments of *Eighty-Four Hundred* Dollars (*$8,400.00*) each, the first such installment to be paid at the close of the calendar month in which this contract is approved, as complete compensation, including all general overhead, for all services performed by the Contractor at its home office in connection with the work under Titles I and II hereof except for the wages, salaries and transportation and traveling expenses of employees of the Contractor who devote full time to the work under such Titles I and II.

2. The fixed amount of *Twenty-Five Hundred* Dollars (*$2,500.00*) per month for each calendar month of operation payable at the close thereof, subsequent to the commencement of the complete operation provided in Section 3 of Article IV-A of Title IV but not later than six (6) months after the date of the written notice to the Contracting Officer provided in Section 2 of Article IV-A hereof (including continued operation under Section 4 of such Article IV-A), [fol. 317] as complete compensation, including all general overhead, for all services performed by the Contractor at its home office in connection with the work under Titles III and IV hereof, except for the wages, salaries and transportation and traveling expenses of employees of the Contractor who devote full time to the work under such Titles III and IV. The initial amount shall be payable at the close of the calendar month during which such operation commences.

3. For the purposes of paragraphs *d*, *f*, and *p*, of this Section 1 of Article V-A, the term "full time" shall be deemed to refer to the time of employment of those employees engaged solely upon the work under this contract and who are carried on payrolls separate from the Contractor's payrolls relating to its other business and not to employees of the Contractor engaged part time on the work under this contract and part time on the Contractor's other business.

q. Disbursements incident to payment of payrolls, including but not limited to, the cost of disbursing cash, necessary guards, cashiers and pay masters. If payments to employees are made by check, facilities for cashing checks must be provided without expense to employees, and the Contractor shall be reimbursed therefor.

r. Such other items as should, in the opinion of the Contracting Officer, be included in the cost of the work. When such an item is allowed by the Contracting Officer, it shall be specifically certified as being allowed under this paragraph.

General

2. The Government reserves the right to furnish any materials, supplies, equipment, machinery, tools, or services, including communication services necessary for the performance of the work provided for under this contract, upon so notifying the Contractor prior to any commitment by the latter therefor.

3. The Government reserves the right to pay directly to common carriers any and all transportation charges on materials, machinery, equipment and supplies.

4. The Government reserves the right to pay directly to the persons concerned, including the subcontractors referred to in Paragraph *b* of Section 2 of Article I-B of Title I, all sums due from the Contractor for labor, materials, or other charges.

5. No salaries of the Contractor's executive officers or partners, no part of the expense incurred in conducting the Contractor's main office or regularly established branch [fol. 318] offices, and no overhead expenses of any kind, except as specifically authorized in Section 1 of this Article, shall be included in the cost of the work under this contract; nor shall any interest on capital employed or on borrowed money be included in the cost of the work.

6. The Contractor shall, to the extent of its ability, take all cash and trade discounts, rebates, allowances, credits, salvage, commissions and benifications, and when unable to take advantage of such benefits, it shall promptly notify the Contracting Officer to that effect and the reason therefor. In determining the actual net cost of articles and materials of every kind required for the purposes of this contract,

there shall be deducted from the gross cost thereof all cash and trade discounts; rebates, allowances, credits, salvage, commissions and benifications which have been accrued to the benefit of the Contractor or would have so accrued except for the fault or neglect of the Contractor. Such benefits lost through no fault or neglect on the part of the Contractor, or lost through fault of the Government, or lost through compliance with the provisions of Section 5 of Article V-C, shall not be deducted from gross costs.

7. All revenue from the operations of the hospital or other facilities, except commissaries and cafeterias, or from rebates, discounts, refunds, etc., shall be accounted for by the Contractor and applied in reduction of the cost of the work. Revenue from the operations of the commissaries and cafeterias shall be accounted for as provided in the procedure approved by the Contracting Officer under paragraph *g*, Section 1, of this Article V-A.

Article V-B—Payments

Reimbursement for Cost

1. *a.* The Government will currently reimburse the Contractor for expenditures made in accordance with Article V-A of this Title V, upon certification and delivery to and verification by the Contracting Officer of the original signed pay rolls for labor, receipted invoices for materials, equipment, etc., or other evidence satisfactory to the Contracting Officer. Reimbursement will be made as promptly as possible, generally weekly, but may be made at more frequent intervals if the conditions so warrant. All payments made under this paragraph *a* of Section 1 shall be subject to the provisions of Article V-C.

b. Payment of the sums provided in subparagraphs 1 and 2 of paragraph *p*, of Section 1 of Article V-A shall be made as provided therein.

Payment of the Fixed-Fees

2. *a.* The fixed-fee provided for in Article I-D of Title I [fol. 319] shall be paid in partial payments, less ten percent (10%) of each such partial payment, on the last working day of each calendar month from and after the approval date of this contract, as it accrues, based upon estimates

made by the Contractor and approved by the Contracting Officer of the percentage of completion of the work and services provided for in Title I.

b. The fixed-fee provided for in Article II-C of Title II shall be paid in partial payments, less ten percent (10%) of each such partial payment, on the last working day of each calendar month from and after the approval date of this contract, as it accrues, based upon estimates made by the Contractor and approved by the Contracting Officer of the percentage of completion of the work and services provided for in Title II.

c. The fixed-fee of One Dollar ($1.00) provided for in Article III-C shall be paid upon the completion of the work provided therein.

d. The fixed-fee provided for in Section 2 of Article IV-C of Title IV shall be paid as follows:

(1) *Sixty Thousand* Dollars (*$60,000.00*), payable in six (6) equal monthly installments of *Ten Thousand* Dollars (*$10,000.00*) each, less ten percent (10%) of each installment, the first such installment to be payable thirty (30) days after the receipt by the Contractor of the notice provided for in Section 1 of Article IV-A, and the remaining installments to be payable on the same day of each of the next succeeding five (5) months.

(2) *One Hundred Twenty Thousand* Dollars (*$120,000.00*), payable in six (6) equal monthly installments of *Twenty Thousand* Dollars (*$20,000.00*) each, less ten percent (10%) of each installment, the first such installment to be payable thirty (30) days after the date of the written notice to the Contracting Officer, provided for in Section 2 of Article IV-A hereof, that the first operating line of the Plant is completed and ready for operation, and the remaining installments to be payable on the same day of each of the next succeeding five (5) months.

(3) *Three-Hundred Thousand* Dollars (*$300,000.00*), payable in twelve (12) equal monthly installments of *Twenty-five Thousand* Dollars (*$25,000.00*) each, less ten percent (10%) of each installment, the first such installment to be payable either thirty (30) days after the final payment under paragraph (2) next preceding becomes payable, or thirty (30) days after the date of the written notice

to the Contracting Officer provided for in Section 3 of Article IV-A hereof, whichever is earlier, and the remaining installments to be payable on the same day of each of the [fol. 320] next succeeding eleven (11) months.

c. The fixed-fee provided for in Section 3 of Article IV-C of Title IV shall be paid as follows:

(1) *Four Hundred Eighty Thousand* Dollars (*$480,000.00*) for the operation of the plant during the additional period of twelve (12) months provided for in Section 4 of Article IV-A hereof, payable in twelve (12) monthly installments of *Forty Thousand* Dollars (*$40,000.00*) each, less ten percent of each installment, the first such installment to be paid 30 days after the beginning of said additional twelve-months period and the remaining installments to be paid on the same day of each of the next succeeding eleven months.

Payments by Contractor

3. *a.* If bills for purchase of materials, machinery, or equipment, or pay rolls covering employment of laborers or mechanics incurred by the Contractor or by any subcontractor under this contract are not promptly paid by the Contractor or subcontractor, as the case may be, the Contracting Officer may, in his discretion, withhold from payments otherwise due the Contractor an amount equivalent to the amount of any such bill or pay roll until such bill or pay roll is paid. Should the Contractor neglect or refuse to pay such bills or pay rolls or to direct any subcontractor to pay such bills or pay rolls within five (5) days after notice from the Contracting Officer so to do, the Government shall have the right to pay such bills or pay rolls directly provided such bills or pay rolls are not disputed in good faith by the Contractor or subcontractor, and in such event a deduction equal to five per cent (5%) of the amount so paid directly shall be made from the Contractor's fee.

b. Anything herein to the contrary notwithstanding, the Contractor shall have no obligation regarding and no responsibility in connection with the audit and payment of bills, accounts or other charges of the subcontractors referred to in Paragraph *b* of Section 2 or Article I-B of Title I.

Final Payment

4. Upon completion of the work under Titles I and II and its final acceptance in writing by the Contracting Officer, and again upon the completion of the work under Title IV, the Government shall pay to the Contractor the unpaid balance of the cost of the work determined under Title V hereof, and of the fees, less any sum that may be necessary to settle any unsettled claims for labor or materials, or any claim the Government may have against the Con- [fol. 321] tractor. The Contracting Officer shall accept or reject the completed work with reasonable promptness. The Contractor shall, if required, furnish the Government with a release of all claims against the Government arising under and by virtue of this contract other than such claims, if any, as may be specifically excepted by the Contractor from the operation of the release in stated amounts to be set forth therein.

Failure of the Government to Make Payments

5. In the event of failure of the Government to make any payments or advances as provided in this Title V (other than by reason of normal delay in the payment of current expenditures incident to the checking by the disbursing officer of statements of such expenditures), the Contractor may suspend its performance hereunder until the full amount of any deficiency shall have been paid. The exercise of this right shall be without prejudice to any other rights or remedies of the Contractor on account of such failure by the Government; and failure of the Contractor to exercise such right shall not constitute a waiver thereof with respect to any continuing or subsequent failure on the part of the Government.

Article V-C—Advances

1. At any time, and from time to time, after the execution of this contract, the Government, at the request of the Contractor, and subject to the approval of the Chief of Ordnance as to the necessity therefor, shall advance to the Contractor without payment of interest thereon by the Contractor, a sum or sums not in excess of thirty percent (30%) of the estimated cost of the work under this contract (as increased or decreased pursuant to the provisions of Article VII-B of Title VII or as increaseed pursuant to the provi-

sions of Article IV-A of Title IV). When approximately sixty percent (60%) of said estimated cost (as increased or decreased pursuant to the provisions of Article VII-B of Title VII or as increased pursuant to the provisions of Article IV-A of Title IV) shall have been paid under Section I of article V-B, a revised estimate of such costs shall be made by the Contractor; and if it appears that the then estimated cost exceeds the amount of the original estimate (increased or decreased as provided above), and the revised estimate is approved by the Chief of Ordnance, the Government shall under the conditions stated above advance to the Contractor without interest, not to exceed thirty percent (30%) of such excess. Such advance or advances shall be made in each case upon the furnishing of such surety bonds in such penal sums not exceeding the total aggregate advance as the Secretary of War may prescribe; Provided, that the Secretary of War shall have prescribed the furnishing of a surety bond in connection with such ad- [fol. 322] vances, as security additional to that provided for in this contract; and Provided, Further, that if at any time the Secretary of War deems the security for any advance or advances theretofore made inadequate, the Contractor shall furnish on demand such other security, in the form of a surety bond or surety bonds, as will be satisfactory to the Secretary of War but at no time shall the Contractor be required to maintain in force a surety bond or surety bonds, the total aggregate penal sums of which exceed the aggregate amount of the advances authorized by the Secretary of War under this contract. It is understood that the Government will advance to the Contractor, pursuant to this Article V-C, the sums currently necessary to the Contractor for working capital to carry on the work contemplated under this contract, not in excess of thirty percent (30%) of the estimated cost of such work.

2. Whenever there shall be paid to the Contractor, pursuant to Section 1 of Article V-B reimbursement which, when added to the advance payment or payments made pursuant to Section 1 of this Article V-C, shall equal the full amount of the estimated cost of said work under this contract (as increased or decreased pursuant to the provisions of Section 1 of this Article V-C), no additional payment on account of said work shall be made to the Contractor by the Government until said advance payments are expended; Provided, however, that if the total cost of the

work shall be in excess of the amount so paid to the Contractor including said advance payments, the Government, upon presentation of satisfactory evidence, shall currently and promptly reimburse the Contractor to the extent of such excess cost (subject to any delay in the availability of appropriated funds); Provided, further, that if upon termination of the contract for other than the default of the Contractor there shall remain due the Government from the Contractor any sum theretofore advanced by the Government under this contract and not fully liquidated as above provided, the same shall be applied against any payments due the Contractor and any remaining balance of such sums shall be returned to the Government forthwith after final audit by the Government of all accounts hereunder.

3. In the event of cancellation or termination of this contract because of the default of the Contractor, the Contractor agrees to return to the Government, upon demand, without set-off of any sum alleged to be due the Contractor, the outstanding balance of any advance payment; Provided, however, that the Contractor may retain in the account an amount sufficient to meet the outstanding obligations incurred by it in good faith under this contract pursuant to authorization by the Contracting Officer until assumption and discharge of such obligations by the Government or final disallowance thereof. Furthermore, if, in the opinion of the Chief of Ordnance, the unliquidated [fol. 323] balance of the advance or advances made by the Government under this contract exceeds the amount necessary for the current needs of the Contractor, as determined by the Chief of Ordnance, the amount of such excess shall, upon demand made by the Chief of Ordnance, be promptly returned to the Government and will be credited against the balance due the Government for advances previously made. If the demand made in either event set forth above is not met within fifteen (15) days after the receipt of such demand by the Contractor, the amound demanded will bear interest at the rate of six percent (6%) per annum from the date of the demand until payment is made.

4. All funds received as advance payments under this contract, together with all funds received as reimbursements for the cost of the work under paragraph *a* of section 1 of Article V-B of this contract, shall be deposited in a special bank account or accounts separate from the Con-

tractor's general or other funds in a bank which is a member of the Federal Reserve System. Such a special bank account or accounts shall be so designated as to indicate clearly to the bank their special character and purpose and shall be used by the Contractor exclusively as a revolving fund for carrying out the purposes of this contract and not for the general business of the Contractor. Balances in such special account or accounts shall at all times secure the repayment of such advances in connection with which the special account or accounts are opened, and the Government shall have a lien upon such balances to secure the repayment of such advances, which lien shall be superior to any lien of the bank upon such account or accounts by virtue of assignment or otherwise; Provided, however, that any bank in which such funds are deposited shall have no obligation whatever with respect to the use or disposition by the Contractor of funds withdrawn from such account or accounts or be liable for misuse by the Contractor of funds withdrawn prior to the receipt by such bank of notice from the Chief of Ordnance or the order of a court of competent jurisdiction directing it to refrain from permitting withdrawals by the Contractor. The Contracting Officer shall at all times be afforded proper facilities for inspection and audit of such special bank account or accounts.

5. The Contractor may pay to any third party for services in advance or pay for materials or supplies in advance of delivery at the site of the work or at an approved storage site, any of the sums previously advanced to it by the Government under the provisions of this contract, with the prior written approval of the Contracting Officer.

[fol. 324]

Title VI

Termination

Article VI-A—Termination by Government

1. The Government may terminate this contract at any time by a notice in writing from the Contracting Officer to the Contractor. Such termination shall be effective in the manner and upon the date specified in said notice and shall be without prejudice to any claims which the Government may have against the Contractor or which the Contractor may have against the Government. Upon receipt of such

notice, the Contractor shall, unless the notice directs otherwise, immediately discontinue all work and the placing of all orders for materials, facilities, and supplies in connection with performance of this contract and shall proceed to cancel promptly, insofar as it is possible to do so, all existing orders and terminate all subcontracts insofar as such orders and subcontracts are chargeable to this contract.

2. If this contract is terminated for the fault of the Contractor, the Contracting Officer may enter upon the premises for the purpose of completing the work contemplated by this contract, take possession of any or all materials, tools, machinery, equipment and appliances, and exercise all options, privileges, and rights, and may complete or employ any other person or persons to complete said work.

3. Upon the termination of this contract, full and complete settlement of all claims of the Contractor arising out of this contract shall be made as follows:

a. The Government shall assume and become liable for all obligations, commitments, and claims that the Contractor may have theretofore in good faith undertaken or incurred in connection with said work and the cost of which would be reimbursable in accordance with the provisions of this contract; and the Contractor shall, as a condition of receiving the payments mentioned in this Title, execute and deliver all such papers and take all such steps as the Contracting Officer may require for the purpose of fully vesting in the Government the rights and benefits of the Contractor under such obligations or commitments.

b. The Government shall reimburse the Contractor for all expenditures made in accordance with Title V and not previously reimbursed.

c. The Government shall reimburse the Contractor for [fol. 325] such further expenditures, made after the date of termination, for the protection of Government property and for accounting services in connection with the settlement of this contract as are required or approved by the Contracting Officer.

d. If the contract is terminated for the convenience of the Government, the Contractor will be paid all fees which have accrued at the date of termination, less fee payments previously made. If the contract is terminated due to fault of

the Contractor, no additional payment on account of the fixed-fees will be made.

c. The obligation of the Government to make any of the payments required by this Title, or by Title V of this contract, shall be subject to any unsettled claims which the Government may have against the Contractor.

4. Prior to final settlement the Contractor shall, if required, furnish a release as required in Section 4 of Article V-B of Title V hereof.

[fol. 326]

Title VII

General

Article VII-A—Responsibility of Contractor—Contingencies

While it is the purpose and intent of the Contractor to exercise the same degree of care (unless otherwise directed by the Government) in carrying out and performing the work provided for in this contract as it would if the plant to be constructed, equipped and operated belonged to the Contractor, nevertheless, because of the abnormal conditions existing, it is agreed by and between the parties hereto as follows, to-wit:

1. All work under this contract is to be performed at the expense of the Government, and the Government shall indemnify and hold the Contractor harmless against any loss, expense (including expense of litigation) or damage (including personal injuries and deaths of persons and damage to property of any kind whatsoever arising out of or connected with the performance of the work, unless such loss, expense or damage should be shown by the Government to have been caused directly by bad faith or willful misconduct on the part of some officer or officers of the Contractor acting within the scope of his or their authority and employment.

2. The Government recognizes that the work herein provided for is of a highly dangerous nature and that its accomplishment under existing conditions will be attendant with even greater risk of damage to property, injuries to persons and failures or delays in performance due to uncertain and unexpected causes than would normally exist.

The Contractor is unwilling to assume said risks for the consideration herein provided. It is therefore agreed that the Contractor shall not be liable to the Government in any amount whatever for failure or delay in performance by it hereunder, or for any damage to or destruction of property, or for any injury to or death of persons arising out of or in connection with the work hereunder, no matter what the cause thereof may be or may seem to be, unless same shall be shown by the Government to have been caused directly by bad faith or willful misconduct on the part of some officer of officers of the Contractor acting within the scope of his or their authority and employment.

Article VII-B—Changes

The Contracting Officer may at any time after consultation with the Contractor, by a written order and without notice to the sureties, make changes in or additions to the drawings and specifications, issue additional instructions, require additional work but not to exceed, without the consent of the Contractor, 25% of the original work, or direct [fol. 327] the omission of work covered by the contract. If such changes cause a material increase or decrease in the amount of the work to be done under this contract, or in the time required for its performance, an equitable adjustment of the amount of the fixed-fees to be paid to the Contractor shall be made and the contract shall be modified in writing accordingly; Provided, however, that there shall be no adjustment in the amount of the fixed-fees as provided herein nor shall there be any claim for increased compensation because of any errors and/or omissions made in computing the original estimates of cost hereunder or where the estimated costs vary from the actual costs. Any claim for adjustment under this Article must be asserted within ten (10) days from the date the change is ordered: Provided, however, that the Contracting Officer, if he determines that the facts justify such action, may receive and consider, and with the approval of the Chief of Branch, adjust any such claim asserted at any time prior to the date of final settlement of the contract. If the parties fail to agree upon the adjustment to be made the dispute shall be determined as provided in Article VII-M hereof, but nothing provided in this Article shall excuse the Contractor from proceeding with the prosecution of the work so changed.

Article VII-C—Title

The title to all work, completed or in the course of construction, preparation or manufacture shall be in the Government. Likewise, upon delivery at the site of the work, at an approved storage site or other place approved by the Contracting Officer and upon inspection and acceptance in writing by the Contracting Officer, title to all materials, tools, machinery, equipment and supplies, for which the Contractor shall be entitled to be reimbursed under Title V hereof shall vest in the Govenment. These provisions as to title being vested in the Government shall not operate to relieve the Contractor from any duties imposed under the terms of this contract.

Article VII-D—Materials and Workmanship

1. The work shall be executed in the best and most workmanlike manner by qualified, careful, and efficient workers, insofar as they are available, in strict conformity with the best standard practices.

2. Except it be otherwise authorized by the Contracting Officer, all materials shall be of the best quality of their respective kinds. If the Contracting Officer requires that the Contractor submit for prior approval samples of materials proposed for use in the work covered by this contract, the Contractor shall make no commitments for such materials until the submitted samples have been approved by the contracting Officer.

[fol. 328] Article VII-E—Records and Accounts—Inspection and Audit

1. The Contractor agrees to keep records and books of account, on a recognized cost-accounting basis, showing the actual cost to it of all items of labor, materials, equipment, supplies, services, and other expenditures of whatever nature for which reimbursement is authorized under the provisions of this contract. The system of accounting to be employed by the Contractor shall be such as is satisfactory to the Contracting Officer.

2. The Contracting Officer shall at all times be afforded proper facilities for inspection of the work and of the special bank account or accounts provided for in Article V-C

hereof, and shall at all times have access to the premises, work and materials, to all books, records, correspondence, instructions, plans, drawings, receipts, vouchers, and memoranda of every description of the Contractor pertaining to said work; and the Contractor shall, except such original documents as are submitted in support of reimbursement vouchers, preserve for a period of 3 years after completion or termination of this contract, all the books, records, and other papers herein mentioned.

3. Any duly authorized representative of the Contractor shall be accorded the privilege of examining the books, records, and papers of the Contracting Officer relating to the cost of the work for the purpose of verifying such cost.

4. The Contracting Officer shall have the right to decide which functions of checking and auditing are to be performed exclusively by the Government and to prescribe procedures to be followed by the Contractor in such accounting, checking and auditing functions as he may continue to perform. The employment and number of personnel to be engaged by the Contractor for checking, auditing, and accounting work shall be subject to the approval of the Contracting Officer and if, in the opinion of the Contracting Officer, the number of employees engaged in checking, auditing and accounting work is excessive, the Contractor shall make such reductions in force as the Contracting Officer deems necessary.

Article VII-F—Special Requirements

The Contractor hereby agrees that it will:

1. Procure and thereafter maintain such bonds and insurance in such forms and in such amounts and for such periods of time as the Contracting Officer may approve or require in writing.

2. Procure all necessary permits and licenses; obey and [fol. 329] abide by all applicable laws, regulations and ordinances and other rules of the United States of America, of the state, territory, or subdivision thereof wherein the work is done, or of any other duly constituted public authority.

3. Unless this provision is waived in writing by the Contracting Officer, reduce to writing every contract in excess of *Two Thousand Dollars ($2,000.00)* made by it for the pur-

pose of the work hereunder for services (except contracts of employment), materials, supplies, machinery, or equipment, or for the use thereof, insert therein a provision that such contract is assignable to the Government; make all such contracts in its own name, and not bind or purport to bind the Government or the Contracting Officer thereunder. No purchases in excess of *Five Hundred Dollars ($500.00)* shall be made or placed without the approval of the Contracting Officer.

4. Enter into no subcontract for any portion of the work without the written approval of the Contracting Officer. Subcontracts are defined as contracts entered into by the Contractor with others which involve the performance, wholly or in part, at the site of the work, of some part of the work described in Title I and II hereof.

5. At all times during the progress of the work keep at the site thereof a duly appointed and qualified representative who shall receive and execute on the part of the Contractor such notices, directions, and instructions as the Contracting Officer may give under the terms of this contract.

6. The Contracting Officer may require the Contractor to dismiss from the work any employee the Contracting Officer deems incompetent or whose retention is deemed to be not in the public interest, subject however to appeal under the provisions of Article VII-M for reinstatement of such employee.

7. At all times use its best efforts in all acts hereunder to protect and subserve the interest of the Government.

Article VII-G—Preference for Domestic Articles

In the performance of the work covered by this contract the Contractor, subcontractors, materialmen or suppliers, shall use only such unmanufactured articles, materials and supplies as have been mined or produced in the United States, and only such manufactured articles, materials and supplies as have been manufactured in the United States substantially all from articles, materials or supplies mined, produced or manufactured, as the case may be, in the United States. The foregoing provision shall not apply to [fol. 330] such articles, materials or supplies of the class or

kind to be used or such articles, materials or supplies from which they are manufactured, as are not mined, produced or manufactured, as the case may be, in the United States in sufficient and reasonably available commercial quantities and of a satisfactory quality, or to such articles, materials or supplies, as may be excepted by the Secretary of War under the provise of Title III, Section 3, of the Act of March 3, 1933: 47 Stat. 1520 (41 U.S.C. 10b).

Article VII-H—Convict Labor

The Contractor shall not employ any person undergoing sentence of imprisonment at hard labor.

Article VII-I—Workmen's Compensation Laws

During the life of this contract the Contractor will provide and maintain, for all employees of the Contractor engaged in work under this contract, Workmen's Compensation Insurance or such other protection for employees as may be required by federal or state statutes in the jurisdiction in which such work is performed, under direction of the Contracting Officer.

Article VII-J—Accident Prevention

The Contractor shall at all times exercise reasonable precaution for the safety of employees on the work and shall comply with all applicable provisions of federal, state, municipal and local safety laws and building and construction codes.

Article VII-K—Officials Not to Benefit

No Member of or Delegate to Congress, or Resident Commissioner shall be admitted to any share or part of this contract or to any benefit that may arise therefrom, but this provision shall not be construed to extend to this contract if made with a corporation for its general benefit.

Article VII-L—Covenant Against Contingent Fees

The Contractor warrants that it has not employed any person to solicit or secure this contract upon any agreement for a commission, percentage, brokerage or contingent fee. Breach of this warranty shall give the Government the right to terminate the contract, or in its discretion, to deduct

from payments due the Contractor the amount of such commission, percentage, brokerage or contingent fee. This warranty shall not apply to commissions payable by Contractors upon contracts or sales secured or made through bona fide established commercial or selling agencies maintained by the Contractor for the purpose of securing business.

[fol. 331] Article VII-M—Disputes

Except as otherwise specifically provided herein, all disputes concerning questions of fact arising under this contract shall be decided by the Contracting Officer, subject to written appeal by the Contractor within 30 days to the Chief of Branch concerned or his duly authorized representative, whose decision shall be final and conclusive upon the parties hereto, when the amount involved is $50,000.00 or less. When the amount involved is more than $50,000.00, or when the dispute arises under Section 6 of Article VII-F, or where no specific amount is involved, the decision of the Chief of Branch shall be subject to written appeal within 30 days by the Contractor to the Secretary of War or his duly authorized representative, whose decision shall be final and conclusive upon the parties hereto. In the meantime the Contractor shall diligently proceed with the work as directed. Nothing in this Article VII-M, shall be construed to deprive the Contractor of any legal remedies it may have; *Provided*, however, that this reservation shall not be construed to impair the finality of the decisions of the Chief of Branch and of the Secretary of War, respectively, as above set forth.

Article VII-N—Contractor's Organization and Methods

Within a reasonable time after the execution of this contract the Contractor shall submit to the Contracting Officer a chart showing the executive and administrative personnel to be regularly assigned for full or part time service in connection with the work under this contract, together with a written statement of their duties and the administrative procedure to be followed by the Contractor for the control and direction of the work; and the data so furnished shall be supplemented as additional pertinent data become available. There shall also be submitted to the Contracting Officer by the Contractor charts of the various field organiza-

tions showing all personnel, other than artisans, mechanics, helpers, and laborers to be assigned for full or part time service outside of the central office organization, together with a written statement of their duties and rates of pay and the procedure proposed to be followed by the Contractor for the accomplishment of all field work, including temporary requirements; and the data so furnished shall be supplemented as additional pertinent data become available. Statements of procedure shall include purchasing, disbursing, accounting, transportation, storage, employment, housing, sanitation, subsistence, recreation and similar essential activities and methods.

Article VII-O—Assignment of Claims

Neither this contract, nor any interest therein, shall be assigned or transferred by the Contractor to any other party of parties.

[fol. 332] Article VII-P—Approval Required

This contract shall be subject to the written approval of the Secretary of War and shall not be binding until so approved.

Article VII-Q—Statutory Provisions

It is understood that the respective undertakings to conform to the requirements of the several statutes hereinbefore referred to shall be operative only so long as and to the extent that such statutory requirements are applicable hereunder.

Article VII-R—Racial Discrimination

The Contractor, in performing the work required by this contract, shall not discriminate against any worker because of race, creed, color or national origin.

Article VII-S—Definitions

1. The term "Chief of Branch" refers to the Chief of Ordnance or The Quartermaster General.

2. The terms "Secretary of War" or "Chief or Branch" shall include their duly authorized representatives as the case may be other than the Contracting Officer.

3. For the original signing of this contract, the terms "Contracting Officer" as used herein shall be deemed to include the Contracting Officer appointed by The Quartermaster General and the Contracting Officer appointed by the Chief of Ordnance.

4. The term "Contracting Officer" when used in connection with the approval of performance of construction work of the entire project, and in connection with the approval of preparation of detailed plans and working drawings for roads, railroads, sewage systems, water systems, electrical generating plants and transmission lines, heating plants, non-manufacturing buildings, such as offices, general warehouses and garages, and such miscellaneous construction as may be requested by the Chief of Ordnance, refers to the Contracting Officer appointed by The Quartermaster General, or to his successor or duly authorized representative; and when used in connection with any other phase of the work to be performed under this contract it refers to the Contracting Officer appointed by the Chief of Ordnance, or to his successor or duly authorized representative.

[fol. 333] Article VII-T—Alterations

The following alterations were made in this contract before it was signed by the parties hereto:

None.

[fol. 334] In Witness Whereof, the parties hereto have executed this contract in triplicate as of the day and year first above written.

The United States of America, by (S.) L. H. Campbell, Jr., Brig. Gen., U. S. Army (Contracting Officer Appointed by Chief of Ordnance), by (S.) Homer W. Jones, Lieut. Col., J. A. G. D. (Contracting Officer Appointed by The Quartermaster General.)

Approval Recommended: July 25, 1941.
(S.) C. M. Wesson, Major General, Chief of Ordnance.

Lone Star Defense Corporation (Contractor), by (S.) T. G. Graham, Vice Pres., Akron, Ohio (Business Address.)

Approval Recommended: July 25, 1941. (S.) E. B. Gregory, Major General, The Quartermaster General.

Approved Jul. 28, 1941, by direction of the Secretary of War.

(S.) Robert P. Patterson, Under Secretary of War.

Two Witnesses as to Execution by the Contractor: (S.) William E. Hill, Washington, D. C. (Address); (S.) Hubert E. Evans, Washington, D. C. (Address).

[fol. 335] I, S. M. Jett, certify that I am the Secretary of the corporation named as Contractor herein; that T. G. Graham who signed this contract on behalf of the Contractor was then Vice President of said corporation; that said contract was duly signed for and in behalf of said corporation by authority of its governing body, and is within the scope of its corporate powers.

(S.) S. M. Jett. (Corporate Seal.)

I hereby certify that, to the best of my knowledge and belief, based upon observation and inquiry, T. G. Graham who signed this contract for the Lone Star Defense Corporation had authority to execute the same, and is the individual who signs similar contracts on behalf of this corporation with the public generally.

(S.) L. H. Campbell, Jr., Brig. Gen., U. S. Army.

[fol. 336] Performance Bond

Know all men by these presents, that we, Lone Star Defense Corporation, Akron, Ohio, a corporation organized and existing under the laws of the State of Ohio, as Principal, and The B. F. Goodrich Company, Akron, Ohio, a corporation organized and existing under the laws of the State of New York as Surety, are held and firmly bound unto the United States of America, hereinafter called the Government, in a penal sum unlimited in amount for the payment of which sum, well and truly to be made, we bind ourselves, our heirs, executors, administrators, and successors, jointly and severally, firmly by these presents.

The condition of this obligation is such, that whereas the principal entered into a certain contract No. W-ORD-516 DA-W-ORD-3 hereto attached, with the Government, dated July 23, 1941, for

"Furnishing management service (including subcontracts for architect-engineer services and construction of a new

ordnance facility and installation of equipment therein), procuring production equipment, training key personnel for and operating a new ordnance facility for the loading of fixed rounds, shells, bombs, boosters, fuzes, detonators and artillery primers."

Now therefore, if the Principal shall well and truly perform and fulfill all the undertakings, covenants, terms, conditions, and agreements of said contract during the original terms of said contract and any extensions thereof that may be granted by the Government, with or without notice to the surety, and during the life of any guaranty required under the contract, and shall also well and truly perform and fulfill all the undertakings, covenants, terms, conditions and agreements of any and all duly authorized modifications of said contract that may hereafter be made, notice of which modifications to the surety being hereby waived, then, this obligation to be void; otherwise to remain in full force and virtue.

In witness whereof, the above-bounden parties have executed this instrument under their several seals this 23d day of July, 1941, the name and corporate seal of each corporate party being hereto affixed and these presents duly signed by its undersigned representative, pursuant to authority of its governing body.

War Department, Office of The Judge Advocate General

Washington, D. C., Aug 12, 1941.

The within bond is in due form of law, properly executed; and the evidence submitted shows that the officers, agents, or attorneys, who signed the bond have authority to execute and deliver it on behalf of the surety.

(S.) David S. McLean, Major, J. A. G. D., Assistant to the Chief, Contracts Section.

[fol. 337] Lone Star Defense Corporation (Corporate Principal), Akron, Ohio (Business Address), by (S.) T. G. Graham, Vice Pres. (Affix Corporate Seal).

Attest: (S.) S. M. Jett, Sec.

The B. F. Goodrich Company (Corporate Surety), Akron, Ohio, By (S.) T. G. Graham, Vice Pres. (Affix Corporate Seal).

Attest: (S.) S. M. Jett, Sec.

Certificate As to Corporate Principal

I, S. M. Jett, certify that I am the Secretary of the corporation named as principal in the within bond; that T. G. Graham, who signed the said bond on behalf of the principal, was then Vice President of said corporation; that I know his signature, and his signature thereto is genuine; and that said bond was duly signed, sealed, and attested for and in behalf of said corporation by authority of its governing body.

(S.) S. M. Jett. (Corporate Seal.)

Certificate As to Corporate Surety

I, S. M. Jett, certify that I am the Secretary of the corporation named as surety in the within bond; that T. G. Graham, who signed the said bond on behalf of the surety, was then Vice President of said corporation; that I know his signature, and his signature thereto is genuine; and that said bond was duly signed, sealed, and attested for in behalf of said corporation by authority of its governing body.

(S.) S. M. Jett. (Corporate Seal.)

[fol. 338] Approved: Oct. 9, 1942. L. H. Campbell, Jr., Major General, Chief of Ordnance. VCR, By (S.) T. J. Hayes, Major General.

Contract No. W-ORD-516

Supp. 1 DA-W-ORD-3

Supplemental Contract

to

Cost-Plus-a-Fixed-Fee

New Ordnanee Facility

Construction and Operation Contract

War Department

Contractor: Lone Star Defense Corporation, Akron, Ohio.

Contract for: Supplemental Contract to modify terms of the original contract regarding storage of materials, Walsh-Healey Act, telegraph charges, title to materials, accounting,

insurance and definitions, and to include stipulations regarding race discrimination and renegotiation.

Place: Near Texarkana, Texas.

Payments to be made by Finance Officer, U. S. Army at: Fort Sam Houston, Texas.

The new ordnance facility, services and supplies to be obtained by this instrument are authorized by, are for the purposes set forth in, and are chargeable to the following procurement authorities, the available balances of which are sufficient to cover the cost of the same:

ORD 27,030 P99 A0141-02
ORD 27,031 P99 A0141-02
ORD 50,177 P510-31 A0025-13
ORD 50,178 P531-32 A0025-13

(S.) Rosswell E. Hardy, Brig. Gen., Ord. Dept.
JJMcI.

This contract is authorized by the following law: The act approved July 2, 1940 (Public No. 703, 76th Cong.) as extended, the act approved December 18, 1941 (Public Law 354-77th Cong.) and Executive Order No. 9001 dated December 27, 1941.

[fol. 339] Supplemental Contract

This Supplemental Contract, entered into this 16th day of September, 1942, by THE UNITED STATES OF AMERICA, hereinafter called the Government, represented by the Contracting Officers executing this contract, and LONE STAR DEFENSE CORPORATION, a corporation organized and existing under the laws of the State of Ohio, of the city of Akron, in the State of Ohio, hereinafter called the Contractor, witnesseth that:

Whereas, there is now in force between the parties hereto a certain contract identified by the Government as Contract No. W-ORD-516 DA-W-ORD-3 and being hereinafter sometimes referred to as the "Original Contract"; and

Whereas, the Under Secretary of War has from time to time issued directives for the modification of existing contracts to include certain matters; and

Whereas, the Government now desires to modify the terms of said Original Contract regarding the storage of materials, Walsh-Healey Act, telegraph charges, title to mate-

rials, accounting, insurance and definitions, and to include stipulations relative to race discrimination and renegotiation; and

Whereas, the accomplishment of such changes under a contract entered into after negotiations approved by the Secretary of War, and without advertising for proposals, is authorized by law; and

Whereas, the Contractor has agreed to such modifications upon the terms, conditions, and provisions hereinafter set out; and

Whereas, as a result of negotiations, the Secretary of War has directed that the Government enter into a supplemental contract with the Contractor for the accomplishment of the above described changes;

Now, therefore, the parties hereto do mutally agree that the said Original Contract shall be and it is hereby modified in the following particulars:

[fol. 340] A. Change Section 6 of Article IV-A of Title IV to read:

6. The Government shall furnish all explosives, including neutral nitrate of ammonia solution for the manufacture of nitrate of ammonia and all metal parts for the loading of the Ammunition. The Contractor will furnish all packing and shipping materials (except fiber containers and bundle accessories therefor, which will be furnished by the Government). The foregoing explosives, materials and parts to be furnished by the Government will be delivered f.o.b. said Plant, when and as requisitioned from time to time by the Contractor, in sufficient quantities to enable the Contractor to carry on the operation of the Plant provided for in this Title IV.

(a) The Contractor shall accept, handle and store, within the storage capacity of the Plant not immediately necessary for use in connection with the operation of the Plant, such materials and explosives as it may be directed from time to time by the Contracting Officer; provided, that the Government shall remove or cause to be removed any materials or explosives so stored whenever the storage capacity so utilized becomes necessary to the operation of the Plant, and provided, further, that the Contractor shall be under no obligation to accept or store or permit to be stored at said Plant, any explosives which would render the work to be done by the Contractor hereunder hazardous beyond what

is usual in the normal operation of a Plant of the type provided for herein.

B. Change the initial paragraph of Section 1 and change Subsections *c.* and *d.* of said Section 1 of Article IV-D, Title IV (WALSH-HEALEY ACT) to read as follows:

1. The following representations and stipulations pursuant to the Walsh-Healey Public Contracts Act, as amended, (Act of June 30, 1936; Public Law 846-74th Cong.; Act of May 13, 1942; Public Law 552-77th Cong.) and pursuant to the regulations promulgated thereunder by the Secretary of Labor, shall apply to the performance of this contract:

c. No person employed by the contractor in the manufacture or furnishing of the materials, supplies, articles, or equipment used in the performance of the contract shall be permitted to work in excess of 8 hours in any 1 day or in excess of 40 hours in any 1 week unless such person is paid such applicable overtime rate as has been set by the Secretary of Labor: *Provided, however,* that the provisions of this stipulation shall not apply to any employer who shall have entered into an agreement with his employees pursuant to the provisions of paragraphs 1 or 2 of subsection (b) of section 7 of an act entitled "The Fair Labor Standards Act of 1938"; provided further, that in the case of such an employer, during the life of the agreement referred to, the applicable overtime rate set by the Secretary of Labor shall be paid for hours in excess of 12 in any 1 day or in excess of 56 in any 1 week and if such overtime is not paid, the employer shall be required to compensate his employees during that week at the applicable overtime rate set by the Secretary of Labor for hours in excess of 8 in any 1 day or in excess of 40 in any 1 week.

[fol. 341] *d.* (1) No person under sixteen years of age and no convict labor will be employed by the Contractor in the manufacture or production or furnishing of any of the materials, supplies, articles, or equipment included in the contract.

(2) No girl under eighteen years of age shall be employed for more than eight hours in any one day, or, between the hours of 10 p. m. and 6 a. m., or in any way contrary to state laws governing hours of work.

(3) No girl under eighteen years of age shall be employed in any operation or occupation which, under the Fair Labor Standards Act or under any state law or administrative ruling, is determined to be hazardous in nature or dangerous to health.

(4) For every girl under eighteen years of age employed by him the Contractor shall obtain and keep on file a certificate of age showing that such girl is at least sixteen years of age.

(5) A specific and definite luncheon period of at least 30 minutes shall be regularly granted any women workers under eighteen years of age.

(6) No girl under eighteen years of age shall be employed at less than the minimum hourly rate set by or under the Fair Labor Standards Act or the Walsh-Healey Public Contracts Act for the industry in which the exemption is granted.

C. Change Paragraph *c.* of Section 1 and change Section 4 of Article V-A of Title V to read:

c. Transportation, loading, unloading and storage charges on materials, supplies and equipment, including expenses of removing rejected property under Article VII-C, Title VII hereof.

4. The Government reserves the right to pay directly to the persons concerned including the subcontractors referred to in paragraph *b* of Section 2 of Article I-V of Title I: all sums due from the Contractor for labor, materials, or other charges. The Government will pay directly for all telegraphic communications (including teletype and facsimile when authorized by the Contracting Officer to be installed), cablegrams, radiograms, and similar messages that may be sent by the Contractor pertaining directly to the contract for work to be done or materials to be furnished thereunder, and the Contractor is hereby designated as an agent of the Government only for the purpose of causing the transmittal of any such messages.

D. Change Article VII-C of Title VII to read:

Title to all materials, tools, machinery, equipment and supplies for which the Contractor shall be entitled to re-

imbursement under this contract shall vest in the Government at such point or points as the Contracting Officer may designate in writing, provided that the right of final inspection and acceptance or rejection of such materials, tools, machinery, equipment and supplies at such place or places as he may designate in writing is reserved to the Contracting Officer; provided further, that upon such final inspec- [fol. 342] tion, the Contractor shall be given written notice of acceptance or rejection as the case may be. In the event of rejection, the Contractor shall be responsible for the removal of the rejected property within a reasonable time.

E. Change Section 4 of Article VII-E of Title VII and add Section 5 to said Article VII to read:

4. In order to avoid so far as possible duplication in accounting and auditing functions performed by the Contractor and the Government it is agreed that the following accounting and auditing functions shall be performed by the Government exclusively:

a. Time checking (not timekeeping) in the field or in the plant.

b. Audit of original pay rolls of the Contractor (or such portions thereof as are applicable) where such pay rolls are prepared by the Contractor.

c. Checking of equipment rentals and the preparation and delivery of properly approved rental rolls to the Contractor for payment.

d. Such other accounting and auditing functions as may be effectively performed by Government employees and to which the Contracting Officer and the Contractor may mutually agree in writing.

5. It is further agreed that if any of the accounting and auditing functions performed exclusively by the Government do not adequately discharge such accounting and auditing functions to the satisfaction of the Contractor, the Contractor, with the approval in writing of the Contracting Officer, may perform such additional checking and auditing as may be so approved. The Contractor shall be reimbursed for the cost of such additional accounting and auditing functions as are so approved.

F. Change Section 1 of Article VII-F of Title VII and add Section 8 to said Article VII-F to read:

1. Procure and thereafter maintain such bonds and insurance in such forms and in such amounts and for such periods of time as the Contracting Officer may approve or require in writing. Such bond or insurance policy shall contain an indorsement or other recital excluding by appropriate language any claim on the part of the insurer or obligor to be subrogated, on payment of a loss or otherwise, to any claim against the United States.

8. *Renegotiation Pursuant to Section 403 of the Sixth Supplemental National Defense Appropriation Act, 1942.*

a. The Contractor will include in each fixed-price or lump-sum subcontract made under this contract for an amount in excess of $100,000, the following provisions:

"Article —. *Renegotiation Pursuant to Section 403 of* [fol. 343] *the Sixth Supplemental National Defense Appropriation Act, 1942.*

"(1) Upon the written demand of the Secretary, at such period or periods when, in the judgment of the Secretary, the profits accruing to —— —— (subcontractor) under this contract can be determined with reasonable certainty, the Secretary and —— —— (subcontractor) will renegotiate the contract price to eliminate therefrom any amount found as a result of such renegotiation to represent excessive profits. The demand of the Secretary shall fix a place for renegotiation and a time for the commencement thereof not later than one year after the date of completion or termination of this contract as found by the Secretary.

"(2) —— —— (subcontractor) will furnish to the Secretary such statements of actual costs of production and such other financial statements, at such times and in such form and detail, as the Secretary may prescribe, and will permit such audits and inspections of its books and records as the Secretary may request.

"(3) Any amount of the contract price found as a result of such renegotiation to represent excessive profits shall as directed by the Secretary—

(*a*) Be deducted by —— —— (Contractor) from payments otherwise due to —— —— (subcontractor) under this contract; or

(*b*) Be paid by —— —— (subcontractor) directly to the Government.

"(4) —— —— (subcontractor) agrees that —— —— (Contractor) shall not be liable to —— —— (subcontractor) for or on account of any amount paid to the Government by —— —— (subcontractor) or deducted by —— —— (Contractor) from payments otherwise due under this contract, pursuant to directions from the Secretary in accordance with the provisions of this Article. Under its contract with the Government, —— —— (Contractor) is obligated to pay or credit to the Government all amounts withheld by it from —— —— (subcontractor) hereunder.

"(5) As used in this Article—

(*a*) The term 'Secretary' means the Secretary of War or any duly authorized representative of the Secretary, including the Contracting Officer.

(*b*) The terms 'renegotiate' and 'renegotiation' have the same meaning as in Section 403 (b) of the Sixth Supplemental National Defense Appropriation Act, 1942.

(*c*) The term 'this contract' means this contract as modified from time to time."

b. In any such subcontract by which the subcontractor undertakes to supply to the Contractor the same article or articles which the Contractor is required to deliver to the Government under this contract, the Contractor will also include, in addition to sections (1) to (5) required by section *a*, the following provisions:

[fol. 344] "(6) —— —— (subcontractor) agrees (*a*) to include in each fixed-price or lump-sum subcontract hereunder for an amount in excess of $100,000 the foregoing sections (1) to (5) inclusive, and (*b*) to make no subdivisions of any of any contract or subcontract for the purpose of evading the provisions of this section, and (*c*) to repay to the Government the amount of any reduction in the contract price of any such contract which results from renegotiation thereof by the Secretary and which the Secretary directs —— —— (subcontractor) to withhold from payments otherwise due under such contract and actually unpaid at the time —— —— (subcontractor) receives such direction."

c. (1) The Contractor agrees to make no subdivision of any contract or subcontract for the purpose of evading the provisions of this Article.

(2) If any renegotiation between the Secretary and any subcontractor pursuant to the provisions required by section *a.* hereof results in a reduction of the contract price of the subcontract; the Government shall retain from payments otherwise due to the Contractor under this contract, or the Contractor shall repay to the Government, as the Secretary may direct, the amount of such reduction which the Secretary directs the Contractor to withhold from payments otherwise due to the subcontractor under the subcontract and actually unpaid at the time the Contractor received such direction.

d. As used in this Article—

(1) The term "Secretary" means the Secretary of War or any duly authorized representative of the Secretary, including the Contracting Officer.

(2) The term "subcontract" includes any purchase order form, or any agreement with, the Contractor (*a*) to perform all or any part of the work to be done under this contract, or to make or furnish all or any part of any articles or structures covered by this contract, (*b*) to supply any services required directly for the production of any articles or structures covered by this contract, or any component part thereof, not including services for the general operation of the Contractor's plant or business, (*c*) to make or furnish any articles destined to become a component part of any article covered by this contract, or (*d*) to make or furnish any articles acquired by the Contractor primarily for the performance of this contract, or this contract and any other contract with the United States. The term "articles" includes any supplies, materials, machinery, equipment or other personal property.

(3) The terms "renegotiate" and "renegotiation" have the same meaning as in Section 403 of the Sixth Supplemental National Defense Appropriation Act, 1942.

(4) The term "this contract" means this contract as modified from time to time.

G. Change Article VII-R of Title VII to read:

1. The Contractor, in performing the work required by this contract shall not discriminate against any worker because of race, creed, color or national origin.

[fol. 345] 2. The Contractor agrees that subparagraph 1 above will be inserted in all its subcontracts. For the purpose of this article, a subcontract is defined as any contract entered into by the Contractor with any individual, partnership, association, corporation, estate, or trust, or other business enterprise or other legal entity, for a specific part of the work to be performed in connection with the supplies or services furnished under this contract; provided, however, that a contract for the furnishing of standard or commercial articles or raw material shall not be considered as a subcontract.

H. Change Article VII-S of Title VII to read:

1. The term "Chief of Branch" refers to the Chief of Ordnance, or The Chief of Engineers.

2. The terms "Secretary of War" or "Chief of Branch" shall include their duly authorized representatives as the case may be other than the Contracting Officer.

3. For the original signing of this Contract, the term "Contracting Officer" as used herein shall be deemed to include the Contracting Officer appointed by the Quartermaster General and the Contracting Officer appointed by the Chief of Ordnance. For any modification of this Contract, the term "Contracting Officer" as used herein shall be deemed to include the Contracting Officer in the Office of the Chief of Engineers appointed for that purpose by the Chief of Engineers and the Contracting Officer appointed by the Chief of Ordnance. For all other purposes the term "Contracting Officer" shall mean the District Engineer of the United States Engineer District in which the Contract work is being performed, his successor or duly authorized representative; or the Contracting Officer appointed by the Chief of Ordnance, his successor or duly authorized representative.

4. The term "Contracting Officer" when used in connection with the approval of performance of construction work of the entire project, and in connection with the approval of

preparation of detailed plans and working drawings for roads, railroads, sewage systems, water systems, electrical generating plants and transmission lines, heating plant, non-manufacturing buildings, such as offices, general warehouses and garages, and such miscellaneous construction as may be requested by the Chief of Ordnance, refers to the District Engineer of the United States Engineer District in which the Contract work is being performed, his successor or duly authorized representative; and when used in connection with any other phase of the work to be performed under this contract the term "Contracting Officer" refers to the Contracting Officer appointed by the Chief of Ordnance, or to his successor or duly authorized representative.

I. The provisions of this first Supplemental Contract shall be operative from and after its date of final approval.

J. Except as herein provided, the terms and conditions of the Original Contract shall continue in full force and effect and shall apply with equal force to this supplemental agreement.

K. This supplemental contract shall be subject to the written approval of the Chief of Ordnance and shall not be binding until so approved.

L. The following alterations were made in this supplemental contract before it was signed by the parties hereto: The words "as heretofore modified" were deleted from Paragraph J on Page 8.

[fol. 346] In Witness Whereof, the parties hereto have executed this contract in triplicate as of the day and year first above written.

The United States of America, by (S.) Rosswell E. Hardy, JJMcI, Brig. Gen., Ord. Dept. (Contracting Officer Appointed by the Chief of Ordnance), by (S.) O. P. Eastwood, Jr., Capt., C. of E. (Contracting Office Appointed by the Chief of Engineers); Lone Star Defense Corporation (Contractor), by (S.) T. G. Graham, Vice President, 500 S. Main St., Akron, Ohio (Business Address).

Two Witnesses as to Execution by the Contractor: (S.) G. T. Kimon, 180 N. Portage Path., Akron, Ohio (Address); (S.) Jerome Taylor, 574 Morley Avenue, Akron, Ohio (Address).

I, S. M. Jett, certify that I am the Secretary of the Corporation named as Contractor herein; that T. G. Graham who signed this contract on behalf of the Contractor was then Vice President of said corporation; that said contract was duly signed for and in behalf of said corporation by authority of its governing body and is within the scope of its corporate powers.

(S.) S. M. Jett. (Corporate Seal.)

[fol. 347] Consent of Surety

To Supplemental Contract No. 1 dated September 16, 1942 in connection with Contract W-ORD-516 DA-W-ORD-3 between the United States of America and the Lone Star Defense Corporation.

Consent of Surety is hereby given to the foregoing Supplemental Agreement, and the Surety agrees that its performance bond executed in connection with said Contract W-ORD-516 DA-W-ORD-3 shall apply to and cover the due performance of the Contract as so modified.

In Witness Whereof, the undersigned Surety has executed this instrument under its seal this 16th day of September, 1942.

The B. F. Goodrich Company, Surety, by (S.) T. G. Graham. (Corporate Seal.)

Attest: (S.) S. M. Jett.

Certificate as to Corporate Surety

I, S. M. Jett, certify that I am the Secretary of the corporation named as surety in the above Consent of Surety; that T. G. Graham, who signed the said Consent of Surety on behalf of the surety, was then Vice President of said corporation; that I know his signature; that his signature thereto is genuine; and that said bond was duly signed, sealed, and attested for and in behalf of said corporation by authority of its governing body.

(S.) S. M. Jett. (Corporate Seal.)

[fol. 348] Due to change in identification system of modifications to contracts this Change Order is numbered 2, there being in existence Supplement 1.

Date: April 21, 1943

Change Order No. 2

Contract No. W-ORD-516

DA-W-ORD-3, as Amended

War Department—Ordnance Department

Change Order to Cost-Plus-a-Fixed-Fee

New Ordnance Facility

Construction and Operation Contract

Contractor: Lone Star Defense Corporation, Akron, Ohio

Name and Location of Plant: Lone Star Ordnance Plant, Near Texarkana, Texas

Pursuant to the provisions of Article VII-B of Title VII of Contract No. W-ORD-516 DA-W-ORD-3, dated July 23, 1941, as amended, the following additional instructions are hereby issued:

The Contractor shall, as directed by the Contracting Officer, permit the Federal Works Agency to install, operate and maintain a water connection with the water system of the Plant, at such point or points and under such terms and conditions as may be designated by the Contracting Officer, for the purpose of serving the housing development of the Federal Public Housing Authority located near the Plant site and identified as "N. H. A. Texas —41142". It is expressly understood and agreed by and between the parties hereto that the foregoing is deemed to be part of the work under said Contract W-ORD-516 DA-W-ORD-3, as amended.

There is no change in the estimated cost of Contractor's services under said Contract and no change is made in the fixed-fees. No change in the time required for performance is involved.

Except as hereby changed, the terms and conditions of the contract as heretofore amended shall remain in full force and effect and shall apply with equal force and effect in carrying out the provisions of this Change Order No. 2.

The United States of America, (S.) Otto M. Jank, Colonel, Ordnance Department, Contracting Officer, J.J.McI.

Receipt is hereby acknowledged of the above Change Order No. 2 to Contract No. W-ORD-516 DA-W-ORD-3, as amended, dated July 23, 1941, and the Contractor hereby accepts the terms and conditions thereof.

Date May 14, 1943.

Lone Star Defense Corporation (Contractor), by (S.) T. G. Graham, Vice President, J.C.H., L.N.V. (Seal.)

[fol. 349] Due to change in identification system of modifications to contracts this Change Order is numbered 3, there being in existence Supplement 1 and Change Order 2.

Date: June 29, 1943. Change Order No. 3. Contract No. W-ORD-516. DA-W-ORD-3, as Amended.

War Department—Ordnance Department

Change Order to Cost-Plus-a-Fixed-Fee

New Ordnance Facility

Construction and Operation Contract

Contractor: Lone Star Defense Corporation, Akron, Ohio.

Name and Location of Plant: Lone Star Ordnance Plant, Texarkana, Texas.

1. Pursuant to the provisions of Article VII-B of Title VII of Contract No. W-ORD-516 DA-W-ORD-3 dated July 23, 1941, as amended, the following additional instructions are hereby issued.

a. The Contractor shall, as directed by the Contracting Officer's Representative, transport or cause to be transported, by subcontract or otherwise, any of the products of said Plant to such points within the continental United States as may be designated. The Contractor shall be reimbursed for its expenditures in performance of the work

required under this paragraph in accordance with the provisions of Article V-A of Title V of Contract No. W-ORD-516 DA-W-ORD-3, as amended.

2. It is expressly understood and agreed that the foregoing is deemed to be a part of the work under said Contract No. W-ORD-516 DA-W-ORD-3, as amended.

3. There is no appreciable change in the estimated cost of the Contractor's services under said Contract and no change is made in the fixed-fee. No change in the time required for performance is involved.

4. Except as hereby changed, the terms and conditions of the Contract as heretofore amended, shall remain in full force and effect and shall apply with equal force and effect in carrying out the provisions of this Change Order No. 3.

The United States of America, by (S.) Raymond Rebsamen, Lt. Col., Ord. Dept., Executive Officer, Field Director of Ammunition Plants (Contracting Officer Appointed by the Chief of Ordnance), JJMcI.

Receipt is hereby acknowledged of the above Change Order No. 3 to Contract No. W-ORD-516 DA-W-ORD-3, dated July 23, 1941, as amended, and the Contractor hereby accepts the terms and conditions thereof.

Date: July 22, 1943.

Lone Star Defense Corporation (Contractor), by (S.) G. W. Vaught, Vice President, GTK. (Seal.)

[fol. 350] Due to change in identification system of modifications to contracts this Change Order is numbered 4, there being in existence Supplement 1, and Change Orders 2 and 3.

Date: July 9, 1943. Change Order No. 4. Contract No. W-ORD-516. DA-W-ORD-3, as Amended.

War Department—Ordnance Department

Change Order to Cost-Plus-a-Fixed-Fee

New Ordnance Facility

Construction and Operation Contract

Contractor: Lone Star Defense Corporation, Akron, Ohio.

Name and Location of Plant: Lone Star Ordnance Plant, Texarkana, Texas.

1. Pursuant to the provisions of Article VII-B of Title VII of Contract No. W-ORD-516 DA-W-ORD-3, dated July 23, 1941, as amended, the following additional instructions are hereby issued:

a. It is recognized that property (including without limitation machine tool and processing equipment, manufacturing aids, raw, manufactured, scrap and waste materials), title to which is or may hereafter become vested in the Government, will be used by or will be in the care, custody or possession of the Contractor in connection with his performance of this contract. *Therefore*, at the direction of the Contracting Officer, the Contractor shall transfer or otherwise dispose of such Government-owned property to such parties and upon such terms and conditions as the Contracting Officer may approve or ratify. The proceeds of such transfers and dispositions shall be applied in reduction of the cost of the work under this contract.

b. Section 4 of Article V-A of Title V is changed to read:

4. The Government reserves the right to pay directly to the persons concerned including the subcontractors referred to in paragraph *b.* of Section 2 of Article I-B of Title I: all sums due from the Contractor for labor, materials, or other charges.

2. It is expressly understood and agreed that the foregoing is deemed to be a part of the work under said Contract No. W-ORD-516 DA-W-ORD-3, as amended.

3. There is no appreciable change in the estimated cost of the Contractor's services under said Contract and no change is made in the fixed-fee. No change in the time required for performance is involved.

4. Except as hereby changed, the terms and conditions of the Contract as heretofore amended, shall remain in full force and effect and shall apply with equal force and effect in carrying out the provisions of this Change Order No. 4.

The United States of America, by (S.) Raymond Rebsamen, Lt. Col., Ord. Dept., Executive Officer, Field Director of Ammunition Plants (Contracting Officer Appointed by the Chief of Ordnance), JJMcI.

[fol. 351] Receipt is hereby acknowledged of the above Change Order No. 4 to Contract No. W-ORD-516 DA-W-ORD-3, dated July 23, 1941, as amended, and the Contractor hereby accepts the terms and conditions thereof.

Date: July 22, 1943.

Lone Star Defense Corporation (Contractor), by (S.) G. W. Vaught, Vice President, GTK. (Seal.)

[fol. 352] Due to change in identification system of modifications to contracts this Change Order is numbered 5, there being in existence Supplement 1, and Change Orders 2, 3 and 4.

Date: January 6, 1944. Change Order No. 5. Contract No. W-ORD-516. DA-W-ORD-3, as Amended.

War Department—Ordnance Department

Change Order to Cost-Plus-a-Fixed-Fee

New Ordnance Facility

Construction and Operation Contract

Contractor: Lone Star Defense Corporation, Akron, Ohio.

Name and Location of Plant: Lone Star Ordnance Plant, Texarkana, Texas.

1. Pursuant to the provisions of Article VII-B of Title VII of Contract No. W-ORD-516 DA-W-ORD-3, dated July 23, 1941, as amended, the following additional instructions are hereby issued:

a. With the approval of the Contracting Officer, the Contractor may modify a subcontract or purchase order under Contract No. W-ORD-516 DA-W-ORD-3, as amended, to

increase the price or extend more favorable terms to the Subcontractor.

2. It is expressly understood and agreed that the foregoing is deemed to be a part of the work under said Contract W-ORD-516 DA-W-ORD-3, as amended, and the Contractor shall be reimbursed for any payments made pursuant thereto.

3. There is no appreciable change in the estimated cost of the Contractor's services under said Contract and no change is made in the fixed fee. No change in the time required for performance is involved.

4. Except as hereby changed, the terms and conditions of the Contract as heretofore amended, shall remain in full force and effect and shall apply with equal force and effect in carrying out the provisions of this Change Order No. 5.

The United States of America, by (S.) Raymond Rebsamen, Lt. Col., Ord. Dept., Executive Officer, Field Director Ammunition Plants (Contracting Officer Appointed by the Chief of Ordnance), JJMcI.

Receipt is hereby acknowledged of the above Change Order No. 5 to Contract No. W-ORD-516 DA-W-ORD-3, dated July 23, 1941, as amended, and the Contractor hereby accepts the terms and conditions thereof.

Date: January 12, 1944.

Lone Star Defense Corporation (Contractor), by (S.) A. Kelly, Vice President, GTK. (Seal.)

[fol. 353] Due to change in identification system of modifications to contracts this Change Order is numbered 6, there being in existence Supplement 1, and Change Orders 2, 3, 4 and 5.

Parsons/dp. Date: January 19, 1944. Change Order No. 6. Contract No. W-ORD-516. DA-W-ORD-3, As Amended.

War Department—Ordnance Department

Change Order to Cost-Plus-a-Fixed-Fee

New Ordnance Facility

Construction and Operation Contract

Contractor: Lone Star Defense Corporation, Akron, Ohio.
Name and Location of Plant: Lone Star Ordnance Plant, Texarkana, Texas.

1. Pursuant to the provisions of Article VII-B of Title VII of Contract No. W-ORD-516 DA-W-ORD-3, dated July 23, 1941, as amended, the following additional instructions are hereby issued.

a. You are hereby authorized and directed, with the approval of the Contracting Officer, to do all things necessary or incident to operating the Ammonia Nitrate Crystallizing facilities of the Plant to crystallize Ammonium Nitrate solution, and to coat same in accordance with the process hereby referred to as the Tennessee Valley Authority process, including, without limiting the generality of the foregoing, the reworking and coating of Ammonium Nitrate now in storage, the training of personnel incident thereto at Tennessee Valley Authority's plant or elsewhere, and the loading of same on cars in bags ready for shipment.

2. It is expressly understood and agreed that the foregoing is deemed to be a part of the work under said Contract W-ORD-516 DA-W-ORD-3, as amended.

3. There is an appreciable change in the estimated cost of the Contractor's services under said Contract but no change is made in the fixed-fee. No change in the time required for performance is involved.

4. Except as hereby changed, the terms and conditions of the Contract as heretofore amended, shall remain in full force and effect and shall apply with equal force and effect in carrying out the provisions of this Change Order No. 5.

The United States of America, by (S.) Raymond Rebsamen, Lt. Col., Ord. Dept., Executive Officer, Field Director Ammunition Plants (Contracting Officer appointed by the Chief of Ordnance), P.G.P.

Receipt is hereby acknowledged of the above Change Order No. 6 to Contract W-ORD-516 DA-W-ORD-3, dated

July 23, 1941, as amended, and the Contractor hereby accepts the terms and conditions thereof.

Date: January 29, 1944.

Lone Star Defense Corporation (Contractor), by (S.) A. Kelly, Vice President, GTK. (Seal.)

[fol. 354] Due to change in identification system of modifications to contracts this Change Order is numbered 7, there being in existence Supplements 1 and 6 and Change Order 2, 3, 4 and 5.

Parsons/nl. Date: October 12, 1943. Change Order No. 7. Contract No. W-ORD-516. DA-W-ORD-3, As Amended.

War Department—Ordnance Department

Change Order to Cost-Plus-a-Fixed-Fee

New Ordnance Facility

Construction and Operation Contract

Contractor: Lone Star Defense Corporation, Akron, Ohio.

Name and Location of Plant: Lone Star Ordnance Plant, Texarkana, Texas.

1. Pursuant to the provisions of Article VII-B of Title VII of Contract No. W-ORD-516 DA-W-ORD-3, dated July 23, 1941, as amended, the following additional work is hereby ordered and directed:

a. The Contractor is hereby authorized and shall, as directed by the Contracting Officer, perform at the Navajo Ordnance Depot, Bellemont, Arizona, all work necessary or incident to the reworking or renovating of approximately 33,000 clusters (AN—M4, of 3 23 lb. fragmentation bombs AN—M40) located at the Novajo Ordnance Depot. The Contractor is authorized to use the existing facilities at the said Navajo Ordnance Depot in connection with the reworking or renovating of said clusters. It is understood and agreed that the Contractor is authorized to use the personnel at the Plant in connection with the work hereby ordered and that it will be necessary to transport said personnel to and from the Plant and said Navajo Ordnance Depot and to maintain said personnel at the Navajo Ordnance Depot during the period of said work.

2. It is expressly understood that the foregoing is deemed to be a part of the work under said Contract W-ORD-516 DA-W-ORD-3, as amended.

3. There is no appreciable change in the estimated cost of the Contractor's services under said Contract and no change is made in the fixed-fee. It is estimated that the period of time required for the performance of this additional work will be approximately two (2) months. It is expressly understood, however, that neither the Contractor nor the Government guarantees the correctness of this estimate.

4. Except as hereby changed, the terms and conditions of the Contract as heretofore amended, shall remain in full force and effect and shall apply with equal force and effect in carrying out the provisions of this Change Order No. 7.

The United States of America, by (S.) Raymond Rebsamen, Lt. Col., Ord. Dept., Exec. Off., Field Director Ammunition Plts. (Contracting Officer appointed by the Chief of Ordnance), JJMcI.

Receipt is hereby acknowledged of the above Change Order No. 7 to Contract W-ORD-516 DA-W-ORD-3, dated July 23, 1941, as amended, and the Contractor hereby accepts the terms and conditions thereof.

Date: October 30, 1943.

Lone Star Defense Corporation, by (S.) A. Kelly, Vice President, AK. (Seal.)

[fol. 355] Due to change in identification system of modifications this Supplement is numbered 8, there being in existence Supplement 1 and Change Orders 2, 3, 4, 5, 6 and 7.

Contract No. W-ORD-516. DA-W-ORD-3. Supplement 8.

Supplemental Contract to Cost-Plus-a-Fixed-Fee
New Ordnance Facility
Construction and Operation Contract
War Department

Contractor: Lone Star Defense Corporation, Akron, Ohio.
Place: Near Texarkana, Texas.
Approved: May 5, 1944. L. H. Campbell, Jr., Major General, Chief of Ordnance, VCR.
By (S.) E. P. Russell, Lt. Col., Ord. Dept.

Supplemental Contract for: Authorizing renovation of ammunition and modification of subcontracts and purchase orders; modification of clauses pertaining to the furnishing of explosives and material by the Government, Walsh-Healey Act, travel, overhead payments, office expense, insurance, renegotiation, convict labor, disputes, anti-discrimination, and definitions.

No change is made in the Estimated Cost or Fixed-Fees by this Supplement.

Payments to be made by Finance Officer, U. S. Army at Fort Sam Houston, Texas.

The new Ordnance facility, services and supplies to be obtained by this instrument are authorized by, are for the purposes set forth in, and are chargeable to the following procurement authorities, the available balances of which are sufficient to cover the cost of the same:

5-27030 P210 A 210/40141. 5-27031 P210 A 210/40141. 5-50177 P510 A 21-111/40025. 5-50178 P531 A 21-111/40025. 5-22569 P120 A 212/41005.

This Supplemental Contract is authorized by and negotiated pursuant to the following laws: The Act approved July 2, 1940 (Public No. 703, 76th Cong.), as extended, the Act of March 11, 1941 (Public Law 11, 77th Cong.), as extended, the Act approved December 18, 1941 (Public Law 354, 77th Cong.) and Executive Order No. 9001 dated December 27, 1941.

(S.) Raymond Rebsamen, Lt. Col., Ord. Dept., Executive Officer, Field Director of Ammunition Plants, Contracting Officer.

[fol. 356] Supplemental Contract

This Supplemental Contract, entered into this 24th day of March, 1944 by the United States of America, hereinafter called the Government, represented by the Contracting Officers executing this contract, and Lone Star Defense Corporation, a corporation organized and existing under the laws of the State of Ohio, of the City of Akron, in the State of Ohio, hereinafter called the Contractor, Witnesseth That:

Whereas, there is now in force between the parties hereto a certain contract identified by the Government as Contract No. W-ORD-516 DA-W-ORD-3 and being hereinafter sometimes referred to as the "Original Contract"; and

Whereas, said Original Contract has been amended by Supplemental Contract dated September 16, 1942, identified by the Government as Contract No. W-ORD-516 DA-W-ORD-3, Supplement No. 1, and by Change Orders No. 2, 3, 4, 5, 6 and 7, dated April 21, 1943, June 29, 1943, July 9, 1943, January 6, 1944, January 19, 1944 and October 12, 1943, respectively; and

Whereas, the Government now desires to further modify the Original Contract, as amended, to authorize the renovation of ammunition; to modify subcontracts and purchase orders; and to change the clauses pertaining to the furnishing of explosives and materials by the Government, Walsh-Healey Act, travel, overhead payments, office expense, insurance, renegotiation, convict labor, disputes, anti-discrimination, and definitions; and

Whereas, the Contractor has agreed to such modifications upon the terms, conditions and provisions hereinafter set out; and

Whereas, the accomplishment of the above described work under a cost-plus-a-fixed-fee contract, entered into after negotiations approved by the Secretary of War, and without advertising for proposals, is authorized by law; and

Whereas, as a result of such negotiations the Secretary of War has directed that the Government enter into a Supplemental Contract with the Contractor for the accomplishment of the above described work; and

Whereas, it has been administratively determined that the above described modifications will facilitate the prosecution of the war;

Now, Therefore, the parties hereto do mutually agree that the Original Contract, as amended, shall be and is hereby modified in the following particulars:

[fol. 357] A. Section 6 of Article IV-A of Title IV is changed to read:

6. a. The Government shall furnish all explosives, including Neutral Nitrate of Ammonia solution for the manufacture of Nitrate of Ammonia, and shall furnish all metal parts for the loading of the ammunition, except such metal parts as may be readily procurable and as the Contracting Officer may direct the Contractor to furnish. The Contractor will furnish all packing and shipping materials except returned shipping containers and such other materials as the Government may elect to furnish. The foregoing explosives, materials and parts to be furnished by the Government will be delivered f.o.b. said Plant in sufficient quantities, except as otherwise provided herein, to enable the Contractor to carry on the operation of the Plant provided for in this Title IV. The Contractor is authorized, however, with the approval of the Contracting Officer, to recondition, renovate or modify, by subcontract or otherwise, any metal parts or components so furnished hereunder.

b. The Contractor shall accept, handle and store, within the storage capacity of the Plant not immediately necessary for use in connection with the operation of the Plant, such materials and explosives as it may be directed from time to time by the Contracting Officer; provided, that the Government shall remove or cause to be removed any materials or explosives so stored whenever the storage capacity so utilized becomes necessary to the operation of the Plant, and provided, further, that the Contractor shall be under no obligation to accept or store or permit to be stored at said Plant, any explosives which would render the work to be done by the Contractor hereunder hazardous beyond what is usual in the normal operation of a Plant of the type provided for herein.

B. Section 7 of Article IV-A of Title IV is changed to read:

7. a. In carrying out the work under this Title IV the Contractor is authorized to and shall do all things necessary or convenient in the operating and closing down of the Plant, or any part thereof including (but not limited to) the employment of all persons engaged in the work hereunder (who

shall be subject to the control and constitute employees of the Contractor), the providing of all materials and supplies except such as the Government is to furnish or supply as elsewhere specifically provided herein, the storage of materials and supplies and of the finished products to the extent of the storage facilities at said Plant, the preparation of the product for shipment and the loading of same on cars or other carriers in accordance with the Government's shipping instructions.'

b. The Contractor shall, as directed by the Contracting Officer, transport or cause to be transported, by subcontract or otherwise, any of the products of said Plant to such points within the continental United States as may be designated.

c. It is recognized that property (including without limitation machine tool and processing equipment, manufacturing aids, raw, manufactured, scrap and waste materials), title to which is or may hereafter become vested in the Government, will be used by or will be in the care, custody or possession of the Contractor in connection with the performance of this contract. With the approval in writing of the Contracting Officer (whether such approval is given prior to or after the giving of a notice of the termination of this contract for the convenience of the Government), the Contractor may transfer or otherwise dispose of such Government-owned property to such parties and upon such terms and conditions as the Contracting Officer may approve or ratify, or, with like approval by the Contracting Officer, the Contractor may itself acquire title to [fol. 358] such property or any of it at a price mutually agreeable. The proceeds of any such transfer or disposition or the agreed price of any property, title to which is so acquired by the Contractor, shall be applied in reduction of any payments to be made by the Government to the Contractor under this contract, or shall otherwise be paid in such manner as the contracting Officer may direct.

d. With the approval of the Contracting Officer, the Contractor may modify a subcontract or purchase order under this contract to increase the price or extend more favorable terms to the subcontractor.

e. The Contractor shall, from time to time with the approval of the Contracting Officer, do all things necessary or incident to operating the Ammonia Nitrate Crystallizing

facilities of the Plant to crystallize Ammonium Nitrate solution, and to coat same in accordance with the process hereby referred to as the Tennessee Valley Authority process; including, without limiting the generality of the foregoing, the reworking and coating of Ammonium Nitrate now in storage, the training of personnel incident thereto at Tennessee Valley Authority's plant or elsewhere, and the loading of same on cars in bags ready for shipment. Nothing in this paragraph e. shall be construed as requiring the Contractor to operate said Ammonium Nitrate facilities beyond the period the Contractor is operating the Plant.

f. The Contractor shall, as directed by the Contracting Officer, permit the Federal Works Agency to install, operate and maintain a water connection with and to the water system of the War Department at the Plant at such point or points and under such terms and conditions as may be designated by the Contracting Officer, for the sole and only purpose of serving the War Housing Development of the Federal Public Housing Authority located near the site of the Plant, consisting of approximately 800 dwelling units and all community and project buildings connected therewith and located near said Plant in Bowie County, Texas (NHA identification No. Texas 41142) and the community of Hooks, Texas.

g. The Contractor is hereby authorized and shall, as directed by the Contracting Officer, perform at the Navajo Ordnance Depot, Bellemont, Arizona, all work necessary or incident to the reworking or renovating of approximately 33,000 clusters (AN—M4, of 3 23 lb. fragmentation bombs AN—M40) located at the Navajo Ordnance Depot. The Contractor is authorized to use the existing facilities at the said Navajo Ordnance Depot in connection with the reworking or renovating said clusters. It is understood and agreed that the Contractor is authorized to use the personnel at the Plant in connection with the work hereby ordered and that it will be necessary to transport said personnel to and from the plant and said Navajo Ordnance Depot and to maintain said personnel at the Navajo Ordnance Depot during the period of said work.

h. The Contractor is authorized and shall, in accordance with the instructions of the Contracting Officer, load, renovate or rehabilitate at the Plant any ammunition or its com-

ponents not specifically mentioned herein, in such quantities as may be directed by the Contracting Officer; provided, however, that the Contractor shall not be obligated to load, renovate or rehabilitate any types or quantities of ammunition or its components which the facilities of said Plant may not be capable of loading, renovating or rehabilitating.

[fol. 359] C. Article IV-B of Title IV is changed to read:

Article IV-B—Estimates

It is estimated as of the date of the Original Contract that the cost of the work under Sections 1, 2 and 3 of Article IV-A of this Title IV will be Forty-four Million Six Hundred Ninety Thousand Dollars ($44,690,000.00), exclusive of the Contractor's fees. It is estimated as of April 21, 1943 that the cost of the work under Section 4 of Article IV-A of this Title IV will be Thirty-seven Million Five Hundred Sixteen Thousand Five Hundred Thirty Dollars ($37,516,530.00), exclusive of the Contractor's fees. It is expressly understood, however, that neither the Government nor the Contractor guarantees the correctness of these estimates. The estimated total costs set forth above are based upon estimates agreed to by both the Government and the Contractor, copies of which are on file in the Office of the Chief of Ordnance.

D. Article IV-D of Title IV is changed to read:

Article IV-D—Walsh-Healey Act

The representations and stipulations required by Section 1 of the Act of June 30, 1936 (Walsh-Healey Act, Public 846, 74th Congress) to be included in all contracts therein specified shall apply to the operation of the Plant under this Contract and are hereby incorporated and made a part of this Contract for that purpose with the same force and effect as if fully set forth in this Contract, subject to all applicable regulations, determinations, and exemptions of the Secretary of Labor now or hereafter in effect.

E. Paragraph d of Section 1 of Article V-A of Title V is changed to read:

d. Transportation and traveling expenses to and from the site of the Plant of the necessary field forces for the economical and successful prosecution of the work; transporta-

tion and traveling expenses of such other employees (including executive officers after July 22, 1943) of the Contractor, or of the Contractor's parent company, actually incurred in connection with the work under this Contract; and all cost and expenses reimbursed to permanent employees of the Contractor, or of the Contractor's parent company, on account of the transportation of themselves, their families and household goods in connection with their transfer to the Plant and in connection with their transfer from the Plant, regardless of the place from which the particular employee was originally transferred; Provided, however, that the total of the mileage of all employees so transferred hereunder from the Plant for which the Contractor will be reimbursed shall not exceed the total of the mileage of all employees so transferred hereunder to the Plant.

Reimbursement for transportation and traveling expenses will be limited to the cost of transportation including Pullman where necessary and an allowance of Six Dollars ($6.00) per day in lieu of all other expenses. Transportation by automobile on such required travel shall be reimbursed at the rate of five cents ($.05) per mile as representing the actual cost of such transportation.

All travel shall be either authorized or approved in writing by the Contracting Officer. Should the Contractor, or any [fol. 360] representative thereof, remain in a travel status in excess of six (6) days at any one time, not including the time consumed in travel, the cost for such excess travel status shall be at the expense of the Contractor, unless otherwise ordered or approved in writing by the Contracting Officer.

F. Paragraphs f and m of Section 1 of Article V-A of Title V are changed to read:

f. Salaries of employees of the Contractor engaged full time directly on the work provided hereunder whether at the Plant or elsewhere. In case the full time of any employee of the Contractor at the Plant or elsewhere (except at the Contractor's home office during the period lump sum payments are being made under either paragraph 1 or 2 of paragraph p of this Section 1) is not applied to the work, his salary shall be included in this item only in proportion to the actual time applied thereto. No person shall be assigned to service by the Contractor as superintendent of operation, chief en-

gineer, chief purchasing agent, chief accountant, or similar position in the Contractor's organization at the Plant, or as principal assistant to any such person, until there has been submitted to and approved by the Contracting Officer a statement of the previous salary, proposed salary, qualifications, and experience of the person selected for such assignment. It is recognized that in transferring men from their regular positions to the Plant, it may be necessary to make some increase in their remuneration, which shall be subject to the approval of the Contracting Officer.

m. Extra compensation to employees, discontinuance wages and charges under welfare and other employee relations plans maintained by the Contractor; Provided, that the Government shall be chargeable therefor only insofar as the same are consistent with the general employee relations policies existing throughout the Contractor's organization, or are incurred pursuant to agreement made as a result of collective bargaining with the representatives of employees, or are expressly authorized in writing by the Contracting Officer.

G. Paragraphs 2 and 3 of paragraph p of Section 1 of Article V-A of Title V are changed to read:

2. The fixed amount of Twenty-five Hundred Dollars ($2,500.00) per month for each calendar month of operation, payable at the close thereof, subsequent to the commencement of the complete operation provided in Section 3 of Article IV-A of Title IV but not later than six (6) months after the date of the written notice to the Contracting Officer provided in Section 2 of Article IV-A hereof (including continued operation under Section 4 of such Article IV-A), as complete compensation, including all general overhead, for all services performed by the Contractor at its home office in connection with the work under Title III and IV hereof during the period this paragraph 2 is operative, except for the wages, salaries and transportation and traveling expenses of employees of the Contractor who devote full time to the work under such Title III and IV. The initial amount shall be payable at the close of the calendar month during which such operation commences. Provided, however, that this paragraph 2 shall become inoperative on July 22, 1943 and no payments shall accrue hereunder thereafter.

3. Prior to July 22, 1943, the term "full time," for the purposes of paragraphs f and p of this Section 1 of Article V-A, shall be deemed to refer to the time of employment of those employees engaged for at least one full day solely [fol. 361] upon the work under this Contract and who for that time are carried on payrolls separated from the Contractor's payrolls relating to its other business and not to employees of the Contractor engaged part of the day on the work under this Contract and part of a day on the Contractor's other business.

H. Paragraph s is added to Section 1 of Article V-A of Title V to read:

s. Payments made pursuant to paragraph d of Section 7 of Article IV-A of Title IV.

I. Sections 4 and 5 of Article V-A of Title V are changed to read:

4. The Government reserves the right to pay directly to the persons concerned, including the subcontractors referred to in paragraph b of Section 2 of Article I-B of Title I, all sums due from the Contractor for labor, materials, or other charges.

5. No salaries of the Contractor's executive officers or partners, no part of the expense incurred in conducting the Contractor's main office or regularly established branch offices, and no overhead expenses of any kind of the Contractor's main office or regularly established branch offices, except as specifically authorized in Section 1 of this Article, shall be included in the cost of the work under this contract; nor shall any interest on capital employed or on borrowed money be included in the cost of the work.

J. Section 4 of Article V-B of Title V is changed to read:

4. Upon completion of the work under Titles I and II and its final acceptance in writing by the Contracting Officer, and again upon the completion of the work under Title IV, the Government shall pay to the Contractor the unpaid balance of the cost of the work determined under Title V hereof, and of the fees, less any sum that may be necessary to settle any unsettled claims for labor or materials, or any claim the Government may have against the Contractor. The

Contracting Officer shall accept or reject the completed work with reasonable promptness. The Contractor shall, if required, furnish the Government with a release of all claims against the Government arising under and by virtue of this contract other than such claims if any, as may be specifically excepted by the Contractor from the operation of the release in stated amounts to be set forth therein and other than any claims based on or arising out of liability of the Contractor to third parties subsequently determined to have been incurred in the performance of this contract and not known to the Contractor at the time of furnishing the foregoing release.

K. Section 4 of Article VII-E of Title VII is changed to read:

4. The accounting, auditing and checking functions required in connection with this Contract shall be performed by the Contractor, except that by mutual agreement the functions of accounting, auditing and checking which are required to be performed by the Government auditors as a pre-requisite to reimbursement of the Contractor shall be coordinated as far as possible in order to avoid unnecessary duplication of such functions.

L. Sections 1 and 8 of Article VII-F of Title VII are changed to read:

1. a. Procure and thereafter maintain such bonds and insurance in such forms and in such amounts and for such [fol. 362] periods of time as the Contracting Officer may require, provided same are obtainable. Such bond or insurance policy shall contain an indorsement or other recital excluding by appropriate language any claim on the part of the insurer or obliger to be subrogated, on payment of a loss or otherwise, to any claim against the United States.

b. The Contractor shall give the Contracting Officer or his representative prompt notice in writing of any suit or action filed against the Contractor arising out of the performance of this Contract and of any claim against the Contractor the cost and expense of which are reimbursable under the provisions of this contract, and the risk of which is then uninsured or in which the amount claimed exceeds the amount of insurance coverage. The Contractor shall furnish promptly

to the Contracting Officer copies of all pertinent papers received by the Contractor. Insofar as the following shall not conflict with any policy or contract of insurance, and upon request of the Contracting Officer, the Contractor shall do any and all things to effect an assignment and subrogation in favor of the Government of all Contractor's rights and claims, except against the Government, arising from or growing out of such asserted claims. If required by the Contracting Officer in such case, the Contractor shall authorize representatives of the Government to settle and or defend any such claim and to represent or take charge of any such litigation affecting the Contractor, and thereafter the Government shall be solely responsible for the handling of such litigation and for any settlement made or judgment rendered therein.

c. The Contractor agrees that it will incorporate by reference in each cost-plus-a-fixed-fee subcontract made hereunder subsequent to the approval date of the Eighth Supplement to this Contract, the terms and conditions of this prime contract regarding insurance and liability.

8. Renegotiation pursuant to Section 403 of the Sixth Supplemental National Defense Appropriation Act, 1942, as amended.

a. Upon the written demand of the Secretary, at such period or periods when, in the judgment of the Secretary, the profits accruing to the Contractor under this contract can be determined with reasonable certainty, the fixed-fees specified in Article IV-C of Title IV hereof will be renegotiated to eliminate therefrom any amount found as a result of such renegotiation to represent excessive profits. The demand of the Secretary shall fix a place for renegotiation and a time for commencement thereof not later than one year after the close of the fiscal year of the Contractor within which completion or termination of the contract, as determined by the Secretary, occurs.

b. The Contractor will furnish to the Secretary such statement of actual costs of production and such other financial statements as are available from the Contractors books and records, at such times and in such form and detail, as the Secretary may prescribe, and will permit such audits and inspections of its books and records as the Secretary may request.

e. The Government shall retain from amounts otherwise due the Contractor, or the Contractor shall repay the Government if paid to him, any amount of the fixed-fees specified in Article IV-C found as a result of such renegotiation to represent excessive profits and not eliminated through reductions in fixed-fees specified in Article IV-C or otherwise, as the Secretary may direct.

[fol. 363] d. The Contractor will include in each subcontract described in paragraph f. (2) (ii) of this Article and in each subcontract for an amount in excess of $100,000 described in paragraph f. (2)(i) of this Article, made by the Contractor under this contract, subsequent to the approval date of the Eighth Supplement to this Contract, the following provision:

"Article —— Renegotiation Pursuant to Section 403 of the Sixth Supplemental National Defense Appropriation Act, 1942, as amended.

"(1) Upon the written demand of the Secretary, at such period or periods when, in the judgment of the Secretary, the profits accruing to —— —— (subcontractor), under this contract can be determined with reasonable certainty, the Secretary and —— —— (subcontractor), will renegotiate the contract price to eliminate therefrom any amount found as a result of such renegotiation to represent excessive profits. The demand of the Secretary shall fix a place for renegotiation and a time for the commencement thereof not later than one year after the close of the fiscal year of the subcontractor within which completion or termination of the contract, as determined by the Secretary, occurs.

"(2) —— —— (subcontractor), will furnish the Secretary such statements of actual costs of production and such other financial statements, at such times and in such form and detail, as the Secretary may prescribe, and will permit such audits and inspections of its books and records as the Secretary may request.

"(3) Any amount of the contract price found as a result of such renegotiation to represent excessive profits shall, as directed by the Secretary,—

(a) Be deducted by —— —— (contractor), from payments otherwise due to —— —— (subcontractor), under this contract; or

(b) Be paid by —— —— (subcontractor), directly to the Government, if paid to him; or

(c) Be eliminated through reductions in the contract price or otherwise.

"(4) —— —— (subcontractor), agrees that —— —— (contractor), shall not be liable to —— —— (subcontractor), for or on account of any amount paid to the Government by —— —— (subcontractor), or deducted by —— —— (Contractor), from payments otherwise due under this contract, pursuant to directions from the Secretary in [fol. 364] accordance with the provisions of this Article. Under its contract with the Government, —— —— (contractor), is obligated to pay or credit to the Government all amounts withheld by it from —— —— (subcontractor), hereunder.

"(5) —— —— (subcontractor), agrees (a) upon direction of the Secretary, to include in any subcontract hereunder sections (1) to (6) inclusive of this Article, and (b) to make no subdivisions of any contract or subcontracts for the purpose of evading the provisions of this section, and (c) to repay to the Government the amount of any reduction in the contract price of any such subcontract which results from renegotiation thereof by the Secretary, and which the Secretary directs —— —— (subcontractor), to withhold from payments otherwise due under such subcontract and actually unpaid at the time —— —— (subcontractor), receives such direction.

"(6) As used in this Article,—

(a) The term 'Secretary' means the Secretary of War or any duly authorized representative of the Secretary including the Contracting officer.

(b) The term 'subcontract' means any purchase order, agreement or arrangement within the definition set forth in Section 403 (a) (5) of the Sixth Supplemental National Defense Appropriation Act, 1942, as amended, and not exempt under or exempted pursuant to that Act.

(c) The terms 'renegotiate' or 'renegotiation' have the same meaning as in section 403(b) of the Sixth Supplemental National Defense Appropriation Act, 1942, as amended.

(d) The term 'this contract' means this contract as modified from time to time."

e. (1) The Contractor agrees to make no subdivisions of any contract or subcontract for the purpose of evading the provisions of this Article.

(2) If any renegotiation between the Secretary and any subcontractor pursuant to the provisions required by Section d hereof results in a reduction of the contract price or fixed-fee of the subcontract, the Government shall retain from payments otherwise due to the Contractor, or the Contractor shall repay to the Government, as the Secretary may direct, the amount of such reduction which the Secretary directs the Contractor to withhold from payments otherwise due to the subcontractor under the subcontract and actually unpaid at the time the Contractor receives such direction.

[fol. 365] f. As used in this Article—

(1) The term "Secretary" means the Secretary of War or any duly authorized representative of the Secretary, including the Contracting Officer.

(2) The term "subcontract" means (i) any purchase order or agreement to perform all or any part of the work, or to make or furnish any materials, part, assembly, machinery, equipment or other personal property, required for the performance of this contract, or (ii) any contract or arrangement (other than a contract or arrangement between two contracting parties one of which parties is found by the Secretary to be a bona fide executive officer, partner, or full-time employee of the other contracting party), (A) any amount payable under which is contingent upon the procurement of a contract or contracts with a Department or of a subcontract or subcontracts thereunder, or determined with reference to the amount of such a contract or subcontract or such contracts or subcontracts, or (B) under which any part of the services performed or to be performed consists of the soliciting, attempting to procure, or procuring a contract or contracts with a Department or a subcontract or subcontracts thereunder, unless exempt under or exempted pursuant to Section 403(i) of the Sixth Supplemental National Defense Appropriation Act of 1942, as amended.

(3) The terms "renegotiate" and "renegotiation" have the same meaning as in Section 403(b) of the Sixth Supplemental National Defense Appropriation Act, 1942, as amended.

(4) The term "this contract" means this contract as modified from time to time.

M. Article VII-H of Title VII is changed to read:

Article VII-H—Convict Labor

The Contractor shall not employ any person undergoing sentence of imprisonment at hard labor. This provision shall not be construed to prevent the Contractor or any subcontractor hereunder from obtaining any of the supplies, or any component parts or ingredients thereof, to be furnished under this contract or any of the materials or supplies to be used in connection with the performance of this contract, directly or indirectly, from any Federal, State or territorial prison or prison industry; Provided, that such articles, materials or supplies are not produced pursuant to any contract or other arrangement under which prison labor is hired or employed or used by any private person, firm or corporation.

N. Article VII-M of Title VII is changed to read:

Article VII-M—Disputes

Except as otherwise specifically provided in this contract, all disputes concerning questions of fact which may arise under this contract, and which are not disposed of by mutual agreement, shall be decided by the Contracting Officer, who shall reduce his decision to writing and mail a copy thereof to the Contractor at his address shown herein. Within 30 days from said mailing the Contractor may appeal in writing to the Secretary of War, whose written de- [fol. 366] cision or that of his designated representative or representatives thereon shall be final and conclusive upon the parties hereto. The Secretary of War may, in his discretion, designate an individual, or individuals, other than the Contracting Officer, or a board as his authorized representative to determine appeals under this Article. The Contractor shall be afforded an opportunity to be heard and offer evidence in the support of his appeal. The

president of the board, from time to time, may divide the board into divisions of one or more members and assign members thereto. A majority of the members of the board or of a division thereof shall constitute a quorum for the transaction of the business of the board or of a division, respectively, and the decision of a majority of the members of the board or of a division shall be deemed to be the decision of the board or of a division, as the case may be. If a majority of the members of a division are unable to agree on a decision or if within 30 days after a decision by a division, the board or the president thereof directs that the decision of the divison be reviewed by the board, the decision will be so reviewed, otherwise the decision of a majority of the members of a division shall become the decision of the board. If a majority of the members of the board is unable to agree upon a decision, the president will promptly submit the appeal to the Under Secretary of War for his decision upon the record. A vacancy in the board or in any division thereof shall not impair the powers, nor affect the duties of the board or division nor of the remaining members of the board or division, respectively. Any member of the board, or any examiner designated by the president of the board for that purpose, may hold hearings, examine witnesses, receive evidence and report the evidence to the board or to the appropriate division, if the case is pending before a division. Pending decision of a dispute hereunder the Contractor shall diligently proceed with the performance of this contract. Any sum or sums allowed to the Contractor under the provisions of this Article shall be paid by the United States as part of the cost of the articles or work herein contracted for and shall be deemed to be within the contemplation of this contract.

O. Article VII-R of Title VII is changed to read:

Article VII-R—Anti-Discrimination

1. The Contractor, in performing the work required by this contract, shall not discriminate against any employee or applicant for employment because of race, creed, color, or national origin.

2. The Contractor agrees that the provision of Section 1 above will also be inserted in all of its subcontracts executed subsequent to the approval date of the Eighth Supplement

to this Contract. For the purpose of the article a subcontract is defined as any contract entered into by the Contractor with any individual, partnership, association, corporation, estate, or trust, or with any business enterprise or other legal entity, for a specific part of the work to be performed in connection with the supplies or services furnished under this contract; provided, however, that a contract for the furnishing of standard or commercial articles or raw material shall not be considered as a subcontract.

P. Article VII-S of Title VII is changed to read:

Article VII-S—Definitions

1. The term "Chief of Branch" refers to either the Chief of Ordnance or to the Chief of Engineers, dependent upon the particular function involved, as described in Sec- [fol. 367] tion 4 below; and includes any person or board, other than the Contracting Officer, duly authorized to represent them respectively.

2. The term "Secretary of War" includes the Under Secretary of War and any person or board, other than the Contracting Officer, duly authorized to represent the Secretary of War or the Under Secretary of War.

3. For the signing of this contract, the term "Contracting Officer" means both the Contracting Officer in the Office of the Chief of Engineers appointed for that purpose by the Chief of Engineers, and the Contracting Officer appointed by the Chief of Ordnance. For the signing of any modification of this contract, the term "Contracting Officer" means the Contracting Officer appointed by the Chief of Ordnance (or a Contracting Officer designated as the duly authorized representative of the Ordnance Contracting Officer so appointed by the Chief of Ordnance), and, where the modification relates to the functions of the Corps of Engineers as described in Section 4 below, means, in addition, the Contracting Officer in the Office of the Chief of Engineers appointed for that purpose by the Chief of Engineers. For all other purposes, the term "Contracting Officer" refers either to the District Engineer of the United States Engineers District in which the contract work is being performed, or the Contracting Officer appointed by the Chief of Ordnance, dependent upon the particular func-

tion involved as described in Section 4 below; and includes their respective successor or duly authorized representatives.

4. The Corps of Engineers' functions are: Prior to acceptance of the project or any part thereof by the Ordnance Department as the using service, the approval of the performance of all construction work and the acceptance thereof; the approval of the preparation of detailed plans and working drawings for roads, railroads, sewage systems, water systems, electrical generating plants and transmission lines, heating plants, non-manufacturing buildings (such as offices, general warehouses and garages); and the approval of such miscellaneous construction as may be requested by the Chief of Ordnance. The above described Contracting Officers representing the Corps of Engineers, shall have no further authority under the Contract with respect to any part of the project which has been accepted by the using service. The Ordnance Department's functions are: All functions other than the Corps of Engineers' functions set forth in the two preceding sentences.

Q. The provisions of Change Order No. 2 dated April 21, 1943 have been inserted as paragraph *f* of Section 7 of Article IV-A of Title IV; the provisions of Change Order No. 3 dated June 29, 1943 have been inserted as paragraph *b* of Section 7 of Article IV-A of Title IV; paragraph 1.*a*. of Change Order No. 4 dated July 9, 1943 has been inserted as paragraph *c* of Section 7 of Article IV-A of Title IV and Paragraph 1.*b*. of Change Order No. 4 has been inserted as Section 4 of Article V-A of Title V; the provisions of Change Order No. 5 have been inserted as paragraph *d* of Section 7 of Article IV-A of Title IV; the provisions of Change Order No. 6 have been inserted as paragraph *e* of Section 7 of Article IV-A of Title IV; the provisions of paragraph 1.*a*. of Change Order No. 7 dated October 12, 1943 have been inserted as paragraph *g* of Section 7 of Article IV-A of Title IV. Therefore, Change Orders No. 2, 3, 4, 5, 6 and 7 are hereby superseded.

[fol. 368] R. Except as herein provided the terms and conditions of the Original Contract, as amended, shall continue in full force and effect and shall apply with equal force to this Supplemental Contract.

S. This Supplemental Contract shall be subject to the written approval of the Chief of Ordnance or his duly

authorized representative and shall not be binding until so approved.

T. The following alterations were made in this Supplemental Contract before it was signed by the parties hereto: None.

[fol. 369] In witness whereof, the parties hereto have executed this contract in triplicate as of the day and year first above written.

The United States of America, by (S.) Raymond Rebsamen, Lt. Col., Ord. Dept., Executive Officer, Field Director of Ammunition Plants (Contracting Officer Appointed by the Chief of Ordnance), JJMcI, by (S.) O. P. Easterwood, Jr., Major, Corps of Engineers (Contracting Officer Appointed by the Chief of Engineers); Lone Star Defense Corporation (Contractor), by (S.) A. Kelly, Vice President, 500 S. Main Street, Akron, O. (Business Address).

Two witnesses as to Execution by the Contractor: (S.) E. A. Cole, 500 S. Main Street, Akron, O. (Address); (S.) Jerome Taylor, 500 S. Main Street, Akron, O. (Address).

I, S. M. Jett, certify that I am the Secretary of the Corporation named as Contractor herein, that A. Kelly who signed this contract on behalf of the Contractor was then Vice President of said corporation; that said contract was duly signed for an- in behalf of said corporation by authority of its governing body and is within the scope of its corporate powers.

(S.) S. M. Jett. (Corporate Seal.)

[fol. 370] Consent of Surety

To Supplemental Contract No. 8 dated March 24, 1944 in connection with Contract No. W-ORD-516 DA-W-ORD-3 between the United States of America and the Lone Star Defense Corporation.

Consent of Surety, is hereby given to the foregoing Supplemental Agreement, and the Surety agrees that its bond or bonds shall apply to and cover the due performance of the Contract as modified and extended thereby.

In witness whereof, the undersigned Surety has executed this instrument under its seal this 13th day of April, 1944.

The B. F. Goodrich Company, by (S.) Jas. J. Newman, Vice President. (Corporate Seal.)

Attest: (S.) G. T. Kilmon, Assistant Secretary.

Certificate as to Corporate Surety

I, S. M. Jett, certify that I am the Secretary of the corporation named as surety in the above Consent of Surety: that Jas. J. Newman, who signed the said Consent of Surety on behalf of the surety, was then Vice President of said corporation; that I know his signature, and his signature thereto is genuine; and that said bond was duly signed, sealed, and attested for and in behalf of said corporation by authority of its governing body.

S. M. Jett, Secretary. (Corporate Seal.)

[fol. 371] Due to change in identification system of modifications to contracts this Change Order is numbered 9, there being in existence Supplements 1 and 8, and Change Orders 2, 3, 4, 5, 6 and 7.

Parsons/ap. Date: 3 April, 1944. Change Order No. 9. Contract No. W-ORD-516. DA-W-ORD-3, as amended.

War Department—Ordnance Department

Change Order to Cost-Plus-a-Fixed-Fee

New Ordnance Facility

Construction and Operation Contract

Contractor: Lone Star Defense Corporation, Akron, Ohio.
Name and Location of Plant: Lone Star Ordnance Plant, Texarkana, Texas.

1. Pursuant to the provisions of Article VII-B of Title VII of Contract No. W-ORD-516 DA-W-ORD-3, as amended, the following additional work is hereby ordered:

a. The Contractor shall, as directed from time to time by the Contracting Officer, inspect (including x-raying) at the Lone Star Ordnance Plant shells or other ammunition for the Plant or for other Ordnance Facilities. No charge shall be made to any other Ordnance Facility for any such inspection services.

2. It is expressly understood and agreed that the foregoing is deemed to be a part of the work under said Contract No. W-ORD-516 DA-W-ORD-3, as amended.

3. There is no appreciable change in the estimated cost of the Contractor's services under said Contract and no change is made in the fixed-fee. No change in the time required for performance is involved.

4. Except as hereby changed, the terms and conditions of the Original Contract, as heretofore amended, shall remain in full force and effect and shall apply with equal force and effect in carrying out the provisions of this Change Order 9.

The United States of America, by (S.) Raymond Rebsamen, Lt. Col., Ord. Dept., Executive Officer, Field Director of Ammunition Plants, Contracting Officer, JJMcI.

Receipt is hereby acknowledged of the above Change Order No. 9 to Contract No. W-ORD-516 DA-W-ORD-3, dated July 23, 1941, as amended, and the Contractor hereby accepts the terms and conditions thereof.

Date: April 13, 1944.

Lone Star Defense Corporation (Contractor), by (S.) A. Kelly, Vice President.

[fol. 372] Due to change in identification system of modifications to contracts this Change Order is number 10, there being in existence Supplements 1 and 8, and Change orders 2, 3, 4, 5, 6, 7 and 9.

Parsons/ap.

Date: April 7, 1944. Change Order No. 10. Contract No. W-ORD-516. DA-W-ORD-3, as amended.

War Department—Ordnance Department

Change Order to Cost-Plus-a-Fixed-Fee

New Ordnance Facility

Construction and Operation Contract

Contractor: Lone Star Defense Corporation, Akron, Ohio.
Name and Location of Plant: Lone Star Ordnance Plant, Texarkana, Texas.

1. Pursuant to the provisions of Article VII-B of Title VII of Contract No. W-ORD-516 DA-W-ORD-3, as amended, the following additional work is hereby ordered:

a. The Contractor is authorized to and shall, as directed from time to time by the Contracting Officer, receive, inspect, assort, screen, segregate, load, renovate, recondition, rehabilitate, destroy, store, load on cars, ship or otherwise handle any ammunition (including components and containers) even though it is not specifically mentioned in this Contract, regardless of its origin, in such quantities as may be directed by the Contracting Officer; provided, however, that the Contractor shall not be obligated to perform any of the services provided for in this paragraph which the facilities of said Plant may not be capable of performing.

2. It is expressly understood and agreed that the foregoing is deemed to be a part of the work under this Contract, as amended, and that the carrying out of said work will be done under and in accordance with the applicable provisions of this Contract, as amended. The Contractor shall not be obligated to perform the work herein provided for beyond the expiration date of this Contract No. W-ORD-516 DA-W-ORD-3, as amended.

3. There is no appreciable change in the estimated cost of the Contractor's services under said Contract and no Change is made in the fixed-fee. No change in the time required for performance is involved.

4. Except as hereby changed, the terms and conditions of this Contract, as heretofore amended, shall remain in full force and effect and shall apply with equal force and effect in carrying out the provisions of this Change Order.

The United States of America, by (S.) Raymond Rebsamen, Lt. Col., Ord. Dept., Executive Officer,

Field Director of Ammunition Plants, Contracting Officer, J.J.McI.

Receipt is hereby acknowledged of the above Change Order No. 10 to Contract No. W-ORD-516 DA-W-ORD-3, dated July 23, 1941, as amended, and the Contractor hereby accepts the terms and conditions thereof.

Date: June 3, 1944.

Lone Star Defense Corporation (Contractor), by (S.) A. Kelly, Vice President.

[fol. 373] Due to change in identification system of modifications to contracts this Supplement is numbered 11, there having been executed Supplements 1 and 8, and Change Orders 2, 3, 4, 5, 6, 7, 9 and 10.

Contract No. W-ORD-516. DA-W-ORD-3. Supplement 11.

Supplemental Contract to Cost-Plus-a-Fixed-Fee

New Ordnance Facility

Construction and Operation Contract

War Department

Contractor: Lone Star Defense Corporation.

Place: At or near Texarkana, Texas.

Supplemental Contract for: Additional operation (3rd year) and modification of provisions pertaining to fixed-fee, renovation, final payment, transportation and renegotiation.

No change is made in the Estimated Cost or Fixed-fees by this Supplement except:

Estimated Cost under Title IV: (3rd year) $40,078,500.00.

Fixed-fee under Title IV: (3rd year) 450,000.00.

Payments to be made by Finance Officer, U. S. Army at Fort Sam Houston, Texas.

The New Ordnance Facility, services and supplies to be obtained by this instrument are authorized by, are for the purposes set forth in, and are chargeable to the following procurement authorities, the available balances of which are sufficient to cover the cost of the same:

5-27030 P210 A 210/40141.

5-27031 P210 A 210/40141.

5-50177 P510 A 21-111/40025.
5-50178 P531 A 21-111/40025.
5-22569 P120 A 212/41005.

This Supplemental Contract is authorized by and negotiated pursuant to the following laws: The Act approved July 2, 1940 (Public No. 703, 76th Cong.), as extended, the Act of March 11, 1941 (Public Law 11, 77th Cong.), as extended, the Act approved December 18, 1941 (Public Law 354, 77th Cong.) and Executive Order No. 9001 dated December 27, 1941.

Approved: —— —, 1944. L. H. Campbell, Jr. By E. P. Russell, Lt. Col., Ord. Dept.

[fol. 374] Supplemental Contract

This Supplemental Contract, entered into this 30th day of June, 1944 by the United States of America, hereinafter called the Government, represented by the Contracting Officers executing this contract, and Lone Star Defense Corporation, a corporation organized and existing under the laws of the State of Ohio, of the City of Akron, in the State of Ohio, hereinafter called the Contractor, Witnesseth That:

Whereas, there is now in force between the parties hereto a certain contract identified by the Government as Contract No. W-ORD-516 DA-W-ORD-3 and being hereinafter sometimes referred to as the "Original Contract"; and

Whereas, said Original Contract has been amended by Supplemental Contracts dated September 16, 1942, and March 24, 1944, identified by the Government as Contract No. W-ORD-516 DA-W-ORD-3, Supplements 1 and 8, respectively, and by Change Orders No. 2, 3, 4, 5, 6, 7, 9 and 10, dated April 21, 1943, June 29, 1943, July 9, 1943, January 6, 1944, January 19, 1944, October 12, 1943, April 3, 1944 and April 7, 1944, respectively; and

Whereas, the Government now desires to further modify the Original Contract, as amended, to provide for additional operation (3rd year) and to change the clauses pertaining to fixed-fee, renovation, final payment, transportation and renegotiation.

Whereas, the Contractor has agreed to such modifications upon the terms, conditions and provisions hereinafter set out; and

Whereas, the accomplishment of the above described work under a cost-plus-a-fixed-fee contract, entered into after negotiations approved by the Secretary of War, and without advertising for proposals, is authorized by law; and

Whereas, as a result of such negotiations the Secretary of War has directed that the Government enter into a Supplemental Contract with the Contractor for the accomplishment of the above described work; and

Whereas, it has been administratively determined that the above described modifications will facilitate the prosecution of the war;

Now Therefore, the parties hereto do mutually agree that the Original Contract, as amended, shall be and is hereby modified in the following particulars:

[fol. 375] A. Section 4 of Article IV-A of Title IV is changed to read:

4. *a.* Upon written notice to the Contractor not less than ninety (90) days before the anticipated completion of the operation provided for in Section 3 next above, the Government may, at its option, authorize the continued operation of the Plant for an additional period of twelve (12) months, and the Contractor shall undertake such continued operation under the terms and conditions of this contract applicable to the operation of the Plant (including those relating to the fixed-fee for such additional operation, which fee shall be that provided in Section 3 of Article IV-C hereof).

b. Beginning July 22, 1944, the Contractor shall, as directed from time to time by the Contracting Officer, operate the Plant for an additional period of twelve (12) months (July 22, 1944 to July 22, 1945). Any operation after July 21, 1945, shall be subject to mutual agreement after negotiation.

B. Paragraph *h* of Section 7 of Article IV-A of Title IV is changed to read:

h. The Contractor is authorized to and shall, as directed from time to time by the Contracting Officer, receive, in-

spect (including x-raying), assort, screen, segregate, load, renovate, recondition, rehabilitate, destroy, store, load on cars, ship or otherwise handle any ammunition (including components and containers) even though it is not specifically mentioned in this Contract, regardless of its origin, in such quantities as may be directed by the Contracting Officer; provided, however, that the Contractor shall not be obligated to perform any of the services provided for in this paragraph which the facilities of said Plant may not be capable of performing.

C. Article IV-B of Title IV is changed to read:

Article IV-B—Estimates

It is estimated as of the date of the Original Contract that the cost of the work under Sections 1, 2 and 3 of Article IV-A of this Title IV will be Forty-four Million Six Hundred Ninety Thousand Dollars ($44,690,000.00), exclusive of the Contractor's fee. It is estimated as of April 21, 1943, that the cost of the work under paragraph *a* of Section 4 of Article IV-A of this Title IV will be Thirty-seven Million Five Hundred Sixteen Thousand Five Hundred Thirty Dollars ($37,516,530.00), exclusive of the Contractor's fee. It is estimated as of the date of Supplement No. 11 to this Contract that the cost of the work under paragraph *b* of Section 4 of Article IV-A of this Title IV will be Forty Million Seventy-eight Thousand Five Hundred Dollars ($40,078,500.00), exclusive of Contractor's fee. It is expressly understood, however, that neither the Government nor the Contractor guarantees the correctness of these estimates. The estimated total costs set forth above are based upon estimates agreed to by both the Government and the Contractor, copies of which are on file in the Office of the Chief of Ordnance.

D. Section 3 of Article IV-C of Title IV is changed to read:

3. A fixed-fee for continued operation provided in paragraph *a* of Section 4 of Article IV-A hereof in the amount of Four Hundred Eighty Thousand Dollars ($480,000.00), which fee shall constitute complete compensation for Contractor's services during such continued operation, includ-

ing profit other than that included in the prices quoted pursuant to Section 8 of Article IV-A of this Title IV.

[fol. 376] E. Section 4 is added to Article IV-C of Title IV to read:

4. A fixed-fee for the additional operation provided in paragraph *b* of Section 4 of Article IV-A hereof in the amount of Four Hundred Fifty Thousand Dollars ($450,000.00), which fee shall constitute complete compensation for Contractor's services from July 22, 1944 to July 22, 1945, including profit other than that included in the prices quoted pursuant to Section 8 of Article IV-A of this Title IV.

F. Paragraph *c* of Section 1 of Article V-A of Title V is changed to read:

c. Transportation, loading, unloading, demurrage, and storage charges on materials, supplies, and equipment, including expenses of removing rejected property under Article VII-C of Title VII hereof.

G. Paragraph *e* of Section 2 of Article V-B of Title V is changed to read:

e. The fixed-fee provided for in Section 3 of Article IV-C of Title IV shall be paid as follows:

(1) Four Hundred Eighty Thousand Dollars ($480,000.00) for the operation of the Plant during the additional period of twelve (12) months provided for in paragraph *a* of Section 4 of Article IV-A hereof, payable in twelve (12) monthly installments of Forty Thousand Dollars ($40,000.00) each, less ten percent (10%) of each installment, the first such installment to be paid thirty (30) days after the beginning of said additional twelve months' period and a like installment to be paid on the same day of each of the next succeeding eleven (11) months.

H. Paragraph *f* is added to Section 2 of Article V-B of Title V to read:

f. The fixed-fee provided for in Section 4 of Article IV-C of Title IV shall be paid as follows:

(1) Four Hundred Fifty Thousand Dollars ($450,000.00) for the operation of the Plant during the period provided for in paragraph *b* of Section 4 of Article IV-A hereof, payable in twelve (12) equal monthly installments of Thirty-seven Thousand Five Hundred Dollars ($37,500.00) each, the first such installment to be paid August 22, 1944 and a like installment to be paid on the same day of each of the next succeeding eleven (11) months.

I. Section 4 of Article V-B of Title V is changed to read:

4. Upon completion of the work under Titles I and II, and under Sections 1, 2 and 3 and paragraph *a* of Section 4 of Article IV-A of Title IV, and again upon the completion of the work under paragraph *b* of Section 4 of Article IV-A of Title IV, the Government shall pay the Contractor the unpaid balance of the cost of the work determined under Title V hereof, and of the fees, less any sum that may be necessary to settle any unsettled claims for labor or materials, or any claim the Government may have against the Contractor. The Contracting Officer shall accept or reject the completed work with reasonable promptness. The Contractor shall, if required, furnish the Government with a release of all claims against the Government arising under and by virtue of this contract other than such claims, if any, [fol. 377] as may be specifically excepted by the Contractor from the operation of the release in stated amounts to be set forth therein, or in estimated amounts where the amounts involved are not susceptible of exact statement, and other than any claims based on or arising out of the liability of the Contractor to third parties subsequently determined to have been incurred in the performance of this contract and not known to the Contractor at the time of furnishing the foregoing release.

J. Section 8 of Article VII-F of Title VII is changed to read:

8. Renegotiation Pursuant to Section 403 of the Sixth Supplemental National Defense Appropriation Act, 1942, as amended.

a. This contract shall be deemed to contain all the provisions required by subsection (b) of the Renegotiation Act

as amended by Section 701 of the Revenue Act of 1943 (Public Law No. 235, 78th Congress, enacted February 25, 1944).

b. In compliance with said subsection (b) of the Renegotiation Act, the Contractor shall insert in the subcontracts specified in said subsection (b) which are executed subsequent to the date of this Supplement No. 11 either the provisions of this Section or the provisions required by said subsection (b).

K. The provisions of Change Order No. 9 dated April 3, 1944 and the provisions of Change Order No. 10 dated April 7, 1944, have been inserted in paragraph B herein amending paragraph *h* of Section 7 of Article IV-A of Title IV. Therefore, Change Orders No. 9 and 10 are hereby superseded.

L. Except as herein provided, the terms and conditions of the Original Contract, as amended, shall continue in full force and effect and shall apply with equal force to this Supplemental Contract.

M. This Supplemental Contract shall be subject to the written approval of the Chief of Ordnance or his duly authorized representative and shall not be binding until so approved.

N. The following alterations were made in this Supplemental Contract before it was signed by the parties hereto:

None.

[fol. 378] In Witness Whereof, the parties hereto have executed this contract in triplicate as of the day and year first above written.

The United States of America, by (S.) James H. Ellett, Major, Ord. Dept., Executive Officer, Field Director of Ammunition Plants, Contracting Officer, JJMeI; by (S.) Herbert H. Rice, Major, Corps of Engineers (Contracting Officer appointed by the Chief of Engineers), W.M.M., H.H.K.

Two Witnesses as to Execution by the Contractor: (S.) C. R. Couts, Address: 500 S. Main St., Akron, Ohio; (S.) E. A. Cole, Address: 500 S. Main St., Akron, Ohio.

Lone Star Defense Corporation (Contractor), by (S.) A. Kelly, Vice President, GTK, Business Address: 500 S. Main St., Akron, Ohio.

I, S. M. Jett, certify that I am the Secretary of the Corporation named as Contractor herein, that A. Kelly who signed this contract on behalf of the Contractor was then Vice President of said corporation; that said Contract was duly signed for and in behalf of said corporation by authority of its governing body and is within the scope of its corporate powers.

(S.) S. M. Jett, Secretary. (Corporate Seal.)

[fol. 379] Consent of Surety

To Supplemental Contract No. 11 dated June 30, 1944 in connection with Contract No. W-ORD-516 DA-W-ORD-3 between the United States of America and the Lone Star Defense Corporation.

Consent of Surety is hereby given to the foregoing Supplemental Agreement, and the Surety agrees that its bond or bonds shall apply to and cover the due performance of the Contract as modified and extended thereby.

In Witness Whereof, the undersigned Surety has executed this instrument under its seal this 30th day of June, 1944.

The B. F. Goodrich Company, by (S.) T. G. Graham, Vice President, GTK. (Corporate Seal.)

Attest: (S.) S. M. Jett, Secretary.

Certificate as to Corporate Surety

I, S. M. Jett, certify that I am the Secretary of the corporation named as surety in the above Consent of Surety: That T. G. Graham, who signed the said Consent of Surety on behalf of the surety, was then Vice President of said corporation; that I know his signature, and his signature thereto is genuine; and that said bond was duly signed, sealed, and attested for and in behalf of said corporation by authority of its governing body.

(S.) S. M. Jett, Secretary. (Corporate Seal).

[fol. 380] Due to change in identification system of modifications to contracts, this Change Order is numbered 12, there having been executed Supplements 1 and 8 (Supplement 11 pending), and Change Orders 2, 3, 4, 5, 6, 7, 9 and 10.
Parsons/ap. Date: 19 June 1944. Change Order No. 12. Contract No. W-ORD-516. DA-W-ORD-3, as amended.

War Department—Ordnance Department

Change Order to
Cost-Plus-a-Fixed-Fee

New Ordnance Facility

Construction and Operation Contract

Contractor: Lone Star Defense Corporation, Akron, Ohio.
Name and Location of Plant: Lone Star Ordnance Plant, Texarkana, Texas.

1. Pursuant to the provisions of Article VII-B of Title VII of Contract No. W-ORD-516 DA-W-ORD-3, as amended, the following additional work is hereby ordered:

a. The Contractor is authorized to prepare such engineering studies as may be requested or approved by the Contracting Officer.

2. It is expressly understood and agreed that the foregoing is deemed to be a part of the work under said Contract No. W-ORD-516 DA-W-ORD-3, as amended.

3. There is no appreciable change in the estimated cost of the Contractor's services under said Contract and no change is made in the fixed-fee. No change in the time required for performance is involved.

4. Except as hereby changed, the terms and conditions of the Original Contract, as heretofore amended, shall remain in full force and effect and shall apply with equal force and effect in carrying out the provisions of this Change Order No. 12.

The United States of America, by (S.) T. C. Gerber, Colonel, Ord. Dept., Field Director of Ammunition Plants, Contracting Officer, HEE.

Receipt is hereby acknowledged of the above Change Order No. 12 to Contract No. W-ORD-516 DA-W-ORD-3,

dated July 23, 1941, as amended, and the Contractor hereby accepts the terms and conditions thereof.
Date: June 20, 1944.

Lone Star Defense Corporation (Contractor), by (S.) A. Kelly, Vice President. GTK.

[fol. 381] Due to change in identification system of modifications to contracts, this Change Order is numbered 13, there having been executed Supplements 1 and 8 (Supplement 11 pending), and Change Orders 2, 3, 4, 5, 6, 7, 9, 10 and 12.

Parsons/ap. Date: 9 August 1944. Change Order No. 13. Contract No. W-ORD-516. DA-W-ORD-3, as amended.

War Department—Ordnance Department

Change Order to
Cost-Plus-a-Fixed-Fee

New Ordnance Facility

Construction and Operation Contract

Contractor: Lone Star Defense Corporation, Akron, Ohio.
Name and Location of Plant: Lone Star Ordnance Plant, Texarkana, Texas.

1. Pursuant to the provisions of Article VII-B of Title VII of Contract No. W-ORD-516 DA-W-ORD-3, as amended, the following additional work is hereby ordered:

a. Pending the preparation and execution of a formal supplement, the Contractor shall furnish such management service, and procure such production equipment as is not furnished by the Government, as may be approved or ratified by the Contracting Officer, as will be required by the modification of a load line (VI) at the Plant to increase capacity for loading 20# cluster fragmentation bombs by 50,000 per month and by the installation of facilities for the reclamation and renovation of 100,000 155mm shell, or equivalent, per month. The Contractor is advised that the construction will be done under the supervision of the Corps of Engineers by collateral contracts.

2. Site letters have been approved covering said work and funds are available therefor. It is expressly understood and agreed that the foregoing is deemed to be a part of the work under said Contract No. W-ORD-516 DA-W-ORD-3.

3. This Change Order will involve an appreciable increase in the cost of the work. Therefore, as soon as a detailed estimate is available it will be furnished to the Ordnance Department by the Contractor. It is estimated that the period of time required to perform such work will be approximately three months. Any fixed fee for the foregoing work will be negotiated as a part of said formal supplement.

4. Except as hereby changed, the terms and conditions of the Original Contract, as heretofore amended, shall remain in full force and effect and shall apply with equal force and effect in carrying out the provisions of this Change Order No. 13.

The United States of America, by (S.) Herbert H. Rice, W.M.M., Major, Corps of Engineers, O.F.S. (Contracting Officer appointed by the Chief of Engineers); by (S). James H. Ellett, Major, Ord. Dept., Executive Officer, Field Director of Ammunition Plants (Contracting Officer appointed by the Chief of Ordnance). JJMcI.

Receipt is hereby acknowledged of the above Change Order No. 13 to Contract No. W-ORD-516 DA-W-ORD-3, dated July 23, 1941, as amended, and the Contractor hereby accepts the terms and conditions thereof.

Date: September 21, 1944.

Lone Star Defense Corporation (Contractor), by (S.) A. Kelly, Vice President. GTK.

[fol. 382] Parsons/ap. Change Order No. 14. Contract No. W-ORD-516. DA-W-ORD-3, as amended.

Army Service Forces

Office of the Chief or Ordnance

Field Director of Ammunition Plants

St. Louis 8, Missouri

12 January 1945

In Reply Refer To: SPOLY-G, Legal Section.

Lone Star Defense Corporation,
500 S. Main Street,
Akron, Ohio.

Re: Modification of Line F at Lone Star Ordnance Plant to Provide Increased Capacity to Meet 1945 Schedule Requirements.

GENTLEMEN:

A site letter has been approved authorizing such modification of a load line (F) at the Plant as is necessary to increase the capacity for loading Fragmentation Mk11 Hand Grenades by 2,700,000 per month.

Therefore, pending the negotiation and execution of a formal supplement to Contract No. W-ORD-516 DA-W-ORD-3, as amended, covering such modification, you are hereby authorized and directed, pursuant to the provisions of Article VII-B of Title VII thereof, to furnish such management service, procure such production equipment as is not furnished by the Government, install said equipment and operate said facilities, as may be approved or ratified by the Contracting Officer, as will be necessary to provide for such facility expansion and for the operation thereof. Any Architect-engineering or construction will be done under the supervision of the Corps of Engineers by Collateral Contracts.

It is expressly understood and agreed that the work described herein is deemed to be a part of the work under said Contract No. W-ORD-516 DA-W-ORD-3, as amended, and that it shall be governed by all the applicable provisions of said contract, including, without limiting the generality of the foregoing, those pertaining to reimbursement.

The work authorized by this Change Order may involve an appreciable increase in the cost of the work. Therefore, it is understood and agreed that as soon as a detailed estimate of the amount of the work involved is available it will be furnished to the Ordnance Department by the Contractor. Any fixed fee for the foregoing work will be negotiated as a part of said supplement.

Except as hereby changed, the terms and conditions of the Original Contract, as heretofore amended, shall remain in full force and effect and shall apply with equal force and effect in carrying out the provisions of this Change Order No. 14.

[fol. 383] If this Change Order is satisfactory, please so indicate by signing the three inclosed copies and returning one of the carbon copies and the original of same to this office for conforming and distributing.

For the Chief of Ordnance:

Yours very truly, (S.) S. M. Strohecker, Jr., Colonel, Ord. Dept., Executive Officer, Field Director of Ammunition Plants, Contracting Officer. PGP.

Receipt is hereby acknowledged of the above Change Order No. 14 to Contract No. W-ORD-516 DA-W-ORD-3, dated July 23, 1941, as amended, and the Contractor hereby accepts the terms and conditions thereof.

Date: January 30, 1945.

Lone Star Defense Corporation (Contractor), by (S.) A. Kelly, Vice President. GTK.

[fol. 384] Parsons ap. Change Order No. 15. Contract No. W-ORD-516. DA-W-ORD-3, as amended.

Army Service Forces

Office of the Chief of Ordnance

Field Director of Ammunition Plants

St. Louis 8, Missouri

21 March 1945

In Reply Refer To: SPOLY-G, Legal Section.

Lone Star Defense Corporation
500 S. Main Street
Akron, Ohio.

Re: Continued Operation

GENTLEMEN:

Pending the execution and approval of a formal supplement to Contract No. W-ORD-516 DA-W-ORD-3, as amended, providing for continued operation of the Lone Star Ordnance Plant, you are hereby authorized and directed, pursuant to the provisions of Article VII-B of Title VII of said Contract, until notified to the contrary, to make such purchases of raw and manufactured materials, supplies, etc., necessary for such continued operation as though you had a formal supplement to said contract providing therefor, and, unless sooner notified to the contrary, upon completion of the work provided for in paragraph b. of Section 4 of Article IV-A of Title IV of said contract, continue with the operation of said Plant as directed from time to time by the Contracting Officer, in accordance with the production schedules.

All purchases and operation hereby authorized shall be carried on in accordance with all applicable terms and conditions of Contract No. W-ORD-516 DA-W-ORD 3, as amended, including, without limiting the generality of the foregoing, those relating to reimbursement for the work. A fixed-fee for any operation of said Plant beyond July 21, 1945, will be negotiated. Funds are presently available for the foregoing work under Procurement Authority

505-2760 P120 A212/51005.

Please indicate your acceptance by signing the three inclosed copies and returning the original and one of the carbon copies of same to this office.

Yours very truly, (S.) S. M. Strohecker, Jr., Colonel, Ord. Dept., Executive Officer, Field Director of Ammunition Plants, Contracting Officer.

For the Chief of Ordnance:

Receipt is hereby acknowledged of the above Change Order No. 15 to Contract No. W-ORD-516 DA-W-ORD-3, dated July 23, 1941, as amended, and the Contractor hereby accepts the terms and conditions thereof.

Date: April 3, 1945.

Lone Star Defense Corporation (Contractor), by (S.) A. Kelly, Vice President. GTK.

[fol. 385] Due to change in identification system of modifications to contracts this Supplement is numbered 16, there having been executed Supplements 1, 8 and 11 and Change Orders 2, 3, 4, 5, 6, 7, 9, 10, 12, 13, 14 and 15.

Contract No. W-ORD-516. DA-W-ORD-3. Supplement No. 16.

Supplemental Contract to Cost-Plus-a-Fixed-Fee

New Ordnance Facility

Construction and Operation Contract

War Department

Contractor: Lone Star Defense Corporation, Akron, Ohio.

Place: At or near Texarkana, Texas.

Supplemental Contract for: Continued operation (4th year): addition of provisions pertaining to notice of labor disputes; modification of provisions pertaining to fixed fees, final payment and title.

No change is made in the estimated cost or fixed-fees by this Supplement except:

Estimated Cost under Title IV: (4th year), $21,676,000.00.

Fixed-Fee under Title IV: (4th year), $330,000.00.

Payments to be made by Finance Officer, U. S. Army at Red River Ordnance Depot, Texarkana, Texas.

The equipment, services and supplies to be obtained by this instrument are authorized by, are for the purposes set forth in, and are chargeable to the following procurement authorities, the available balances of which are sufficient to cover the cost of the same:

605-6034 P120 A212/61005.
505-2366 P120 A212/51005.

(S.) John K. Willard, Lt. Col., Ord. Dept., Executive Officer, Field Director Ammunition Plants, Contracting Officer.

This Supplemental Contract is authorized by and negotiated pursuant to the following laws: The Act approved July 2, 1940 (Public No. 703, 76th Cong.), as extended; the Act of March 11, 1941 (Public Law 11, 77th Cong.), as extended; the Act approved December 18, 1941 (Public Law 354, 77th Cong.); and Executive Order No. 9001 dated December 27, 1941.

[fol. 386] Supplemental Contract

This Supplemental Contract, entered into this 20th day of July, 1945, by The United States of America, hereinafter called "the Government", represented by the Contracting Officers executing this contract, and Lone Star Defense Corporation, a corporation organized and existing under the laws of the State of Ohio (with offices in Akron, Ohio) hereinafter called "the Contractor", Witnesseth That:

Whereas, there is now in force between the parties hereto a certain contract dated July 23, 1941, identified by the Government as Contract No. W-ORD-516 DA-W-ORD-3 and being hereinafter sometimes referred to as the "Original Contract"; and

Whereas, said Original Contract has been amended by Supplemental Contracts identified by the Government as Contract No. W-ORD-516 DA-W-ORD-3, Supplements 1, 8 and 11, and by Change Orders 2, 3, 4, 5, 6, 7, 9, 10, 12, 13, 14 and 15; and

Whereas, the Government now desires to further modify the Original Contract, as amended, to provide for continued operation (4th year); to add provisions pertaining to notice of labor disputes; and to change the provisions pertaining to fixed-fees, final payment and title; and

Whereas, the Contractor has agreed to such modifications upon the terms, conditions and provisions hereinafter set out; and

Whereas, the accomplishment of the above described work and modifications under a cost-plus-a-fixed-fee contract, entered into after negotiations approved by the Secretary of War, and without advertising for proposals, is authorized by law; and

Whereas, as a result of such negotiations the Secretary of War has directed that the Government enter into a Supplemental Contract with the Contractor for the accomplishment of the above described work; and

Whereas, it has been administratively determined that the foregoing will facilitate the prosecution of the war;

Now, Therefore, the parties hereto do mutually agree that the Original Contract, as amended, shall be and is hereby modified in the following particulars:

[fol. 387] A. Section 4 of Article IV-A of Title IV is changed to read:

4. a. Upon written notice to the Contractor in less than ninety (90) days before the anticipated completion of the operation provided for in Section 3, next above, the Government may, at its option, authorize the continued operation of the Plant for an additional period of twelve (12) months, and the Contractor shall undertake such continued operation under the terms and conditions of this Contract applicable to the operation of the Plant (including those relating to the fixed fee for such additional operation, which fee shall be that provided for in Section 3 of Article IV-C, Title IV hereof).

b. Beginning July 22, 1944, the Contractor shall, as directed from time to time by the Contracting Officer, operate the Plant for an additional period of twelve (12) months (July 22, 1944 to July 22, 1945).

c. Beginning July 22, 1945, the Contractor shall, as directed from time to time by the Contracting Officer, operate the Plant for an additional period of twelve (12) months (July 22, 1945 to July 22, 1946). Any operation after July 21, 1946, shall be subject to mutual agreement after negotiation.

B. Article IV-B of Title IV is changed to read:

Article IV-B-Estimates

1. a. It is estimated as of the date of the Original Contract that the cost of the work under Sections 1, 2 and 3 of Article IV-A of this Title IV will be Forty-four Million Six Hundred Ninety Thousand Dollars ($44,690,000.00), exclusive of the Contractor's fee.

b. It is estimated as of April 21, 1943, that the cost of the work under paragraph a. of Section 4 of Article IV-A, Title IV will be Thirty-seven Million Five Hundred Sixteen Thousand Five Hundred Thirty Dollars ($37,516,530.00), exclusive of the Contractor's fee.

c. It is estimated as of June 30, 1944, that the cost of the work under paragraph b of Section 4 of Article IV-A of this Title IV will be Forty Million Seventhy-eight Thousand Five Hundred Dollars ($40,078,500.00), exclusive of the Contractor's fee.

d. It is estimated as of the date of Supplement Sixteen that the cost of the work under paragraph c of Section 4 of Article IV-A of this Title IV will be Twenty-one Million Six Hundred Seventy-six Thousand Dollars ($21,676,000.00), exclusive of the Contractor's fee.

2. It is expressly understood, however, that neither the Government nor the Contractor guarantees the correctness of these estimates. The estimated total costs set forth above are based upon estimates agreed to by both the Government and the Contractor, copies of which are on file in the Office of the Chief of Ordnance.

C. The following is added as Section 5 of Article IV-C of Title IV:

5. A fixed-fee for the additional operation provided for [fol. 388] in paragraph c of Section 4 of Article IV-A hereof in the amount of Three Hundred Thirty Thousand Dollars ($330,000.00) which fee shall constitute complete compensation for Contractor's services from July 22, 1945 to July 22, 1946, including profit other than that included in the prices quoted pursuant to Section 8 of Article IV-A of this Title IV.

D. The following is added as Section 8 of Article V-A of Title V:

8. It is agreed that the Contractor shall receive no fee for the work and services performed under Change Orders No. 13 and 14 to this Contract.

E. The following is added as paragraph g to Section 2 of Article V-B of Title V:

g. The fixed-fee provided for in Section 5 of Article IV-C of Title IV shall be paid as follows:

Three Hundred Thirty Thousand Dollars ($330,000.00), for the operation of the Plant during the period provided for in paragraph c of Section 4 of Article IV-A hereof, payable in twelve (12) equal monthly installments of Twenty-seven Thousand Five Hundred Dollars ($27,500.00) each. The first such installment to be paid August 22, 1945, and a like installment to be paid on the same day of each of the next succeeding eleven (11) months.

F. Section 4 of Article V-B of Title V is changed to read:

4. a. Upon completion of the work under Titles I and II and/or under Sections 1, 2 and 3 and paragraphs a and b of Section 4 of Article IV-A of Title IV, and again upon the completion of the work under paragraph c of Section 4 of Article IV-A of Title IV, the Government shall pay to the Contractor the unpaid balance of the cost of the work determined under Title V hereof, and of the fees, less any sums that may be necessary to settle any unsettled claims for labor or materials, or any claims in connection with this contract which the Government may have against the Contractor. The Contracting Officer shall accept or reject the completed work with reasonable promptness.

b. Prior to final payment and as a condition thereof the Contractor shall furnish the Government with a release of all claims against the Government arising under and by virtue of this contract, other than (a) such claims, if any, as may be specifically excepted by the Contractor from the operation of the release in stated amounts to be set forth therein, or in estimated amounts where the amounts are not susceptible of exact statement, and (b) any claim based upon liability of the Contractor to third parties arising out of the performance of this contract not known to the Contractor at the time of furnishing the release.

c. Even though the existence or amount thereof shall not be determined until after the furnishing of such release as

is described next above, reimbursement to be made for payments made by the Contractor shall include, along with wages and salaries otherwise reimbursable, all additional amounts determined (either by approval of the Contracting Officer or by litigation as hereinafter provided) to be due and payable for overtime compensation and allowances under local, state or Federal laws in connection with such wages and salaries.

d. The Contractor shall promptly notify the Contracting [fol. 389] Officer of any claims of the type described in (b) of paragraph b above which are asserted subsequent to the execution of the release.

e. In the event the Contracting Officer shall determine that the best interests of the Government require that the Contractor initiate or defend litigation in connection with claims of third parties arising out of the performance of this contract, the Contractor will proceed with such litigation in good faith, and the costs and expenses of such litigation, including judgments and court costs, allowances rendered or awarded in connection with suits for wages, overtime or salaries, and reasonable attorney's fees for private counsel when the Government does not furnish Government counsel, shall be reimbursable under the contract. The term "litigation" shall include suits at law or in equity and proceedings before any Governmental agency having jurisdiction over the claim.

G. Article VII-C of Title VII is changed to read:

Article VII-C—Title

Title to all materials, tools, machinery, equipment and supplies for which the Contractor shall be entitled to reimbursement under this contract shall vest in the Government upon delivery at the Plant site or at such other point or points as the Contracting Officer may designate in writing; Provided, that the right of final inspection and acceptance or rejection of such materials, tools, machinery, equipment and supplies at such place or places as he may designate in writing is reserved to the Contracting Officer; Provided, further, that upon such final inspection, the Contractor shall be given written notice of acceptance or rejection as the case may be. In the event of rejection, the Contractor shall be responsible for the removal of the rejected property within a reasonable time.

H. The following is added as paragraph 9 of Article VII-F of Title VII:

9. Immediately give notice to the Contracting Officer whenever an actual or potential labor dispute is delaying or threatens to delay the timely performance of this contract, or of any such actual or potential labor dispute.

I. The provisions of Change Order No. 15 have been incorporated in Title IV. Therefore, Change Order No. 15 is hereby superseded.

J. Except as herein provided, the terms and conditions of the Original Contract, as amended, shall continue in full force and effect and shall apply with equal force to this Supplemental Contract.

K. The following alterations were made in this Supplemental Contract before it was signed by the parties hereto:

None.

[fol. 390] In witness whereof, the parties hereto have executed this contract in triplicate as of the day and year first above written.

The United States of America, By (S.) John K. Willard, Lt. Col., Ord. Dept., Executive Officer, Field Director Ammunition Plants (Contracting Officer appointed by the Chief of Ordnance). JJMcI. Lone Star Defense Corporation (Contractor), By (S.) T. G. Graham, Business Address: 500 S. Main St., Akron, Ohio.

Two Witnesses as to Execution by the Contractor:

(S.) Edw. A. Cole, Address: 509 Avalon, Akron;
(S.) Jerome Taylor, Address: Akron, Ohio.

I, G. T. Kilmon, certify that I am the Assistant Secretary of the Corporation named as Contractor herein; that T. G. Graham, who signed this contract on behalf of the Contractor was then Vice President of said corporation; that said contract was duly signed for and in behalf of said corporation by authority of its governing body and is within the scope of its corporate powers.

(S.) G. T. Kilmon, Assistant Secretary. (Corporate Seal.)

[fol. 391] Consent of Surety

To Supplemental Contract No. 16 dated July 20, 1945, in connection with Contract No. W-ORD-516/DA-W-ORD-3 between the United States of America and the Lone Star Defense Corporation.

Consent of Surety is hereby given to the foregoing Supplemental Agreement, and the Surety agrees that its bond or bonds shall apply to and cover the due performance of the Contract as modified and extended thereby.

In witness whereof, the undersigned Surety has executed this instrument under its seal this 17th day of August, 1945.

The B. F. Goodrich Company. By (S.) T. G. Graham.
(Corporate Seal.)

Attest: (S.) W. F. Avery.

Certificate as to Corporate Surety

I, W. F. Avery, certify that I am the Secretary of the corporation named as surety in the above Consent of Surety; that T. G. Graham who signed the said Consent of Surety on behalf of the surety, was then Vice President of said corporation; that I know his signature, and his signature thereto is genuine; and that said bond was duly signed, sealed, and attested for and in behalf of said corporation by authority of its governing body.

(S.) W. F. Avery, Secretary. (Corporate Seal.)

[fol. 392] Due to change in identification system of modifications to contracts this Change Order is numbered 17 there having been executed Supplements 1, 8, 11 and 16 and Change Orders 2, 3, 4, 5, 6, 7, 9, 10, 12, 13, 14 and 15.

PMMattice/srp. Date: 15 August 1945. Change Order No. 17. Contract No. W-ORD-516 DA-W-ORD-3, as amended.

War Department—Ordnance Department

Change Order To

Cost-Plus-A-Fixed-Fee

New Ordnance Facility

Construction and Operation Contract

Contractor: Lone Star Defense Corporation, Akron, Ohio.

Name and Location of Plant: Lone Star Ordnance Plant, Texarkana, Texas.

1. Pursuant to the provisions of Article VII-B of Title VII of Contract W-ORD-516 DA-W-ORD-3, as amended, the following additional instructions are hereby issued and the following additions to and omissions from the work covered by said contract are hereby ordered:

a. You will (1) cease all loading operations immediately in connection with the Lone Star Ordnance Plant except to complete the loading of the materials in process, (2) proceed to do all things necessary to make said Plant safe and free from explosive hazards insofar as is reasonably possible to do so, (3) continue with the operation of the ammonium nitrate graining facilities at Plant, and (4) proceed with the settlement of your subcontracts cancelled due to recent schedule cutbacks and/or due to the work ordered omitted hereby (such settlement shall be made subject to the approval of the Contracting Officer).

2. It is expressly understood and agreed that the foregoing is deemed to be part of the work under said Contract W-ORD-516 DA-W-ORD-3, as amended.

3. It is further understood and agreed that the foregoing will cause a material decrease in the amount of the work under said Contract and in the estimated cost of the Contractor's services thereunder. Therefore, an equitable adjustment of the amount of the fixed-fee to be paid the Contractor shall be made and the contract modified by a future supplement thereto accordingly.

4. Except as hereby changed, the terms and conditions of said contract, as amended, shall remain in full force and

effect and shall apply with equal force and effect in carrying out the provisions of this Change Order No. 17.

The United States of America, (S.) John K. Willard, Lt. Col., Ord. Dept., Executive Officer, Field Director of Ammunition Plants, Contracting Officer, PGP.

Receipt is hereby acknowledged of the above Change Order No. 17 to Contract W-ORD-516 DA-W-ORD-3, as amended, and the Contractor hereby accepts the terms and conditions thereof.

Dated September 8, 1945.

Lone Star Defense Corporation, by (S.) A. Kelly, Vice President.

[fol. 393] Due to change in identification system to modifications to contracts this Supplement is numbered 18, there having been executed Supplements 1, 8, 11 and 16, and Change Orders 2, 3, 4, 5, 6, 7, 9, 10, 12, 13, 14, 15 and 17.

Contract No. W-ORD-516. DA-W-ORD-3. Supplement No. 18.

Cost-Plus-a-Fixed-Fee

New Ordnance Facility

Construction and Operation Contract

War Department

Contractor: Lone Star Defense Corporation, Akron, Ohio.

Place: At or near Texarkana, Texas.

Supplemental Contract: Providing for the estimated cost of the work in ceasing loading operations, decontaminating the Plant, and continuing the operation of the ammonium nitrate graining facilities.

Payments to be made by Finance Officer, U. S. Army at Red River Ordnance Depot, Texarkana, Texas.

The equipment, supplies and services to be obtained by this instrument are authorized by, are for the purposes set forth in, and are chargeable to the following procurement authority, the available balance of which is sufficient to cover the cost of the same: 605-6034 [illegible] 20 A212/61005.

This Supplemental Contract is authorized by and negotiated pursuant to the following laws: The Act approved July 2, 1940 (Public No. 703, 76th Cong.), as extended, the Act of March 11, 1941 (Public Law 11, 77th Cong.), as extended; the Act approved December 18, 1941 (Public Law 354, 77th Cong.); and Executive Order No. 9001 dated December 27, 1941.

(S.) R. H. Stratton, Lt. Col., Ord. Dept., Executive Officer, Field Director of Ammunition Plants, Contracting Officer.

[fol. 394] Supplemental Contract

This Supplemental Contract, entered into this 12th day of October 1945, by the United States of America, hereinafter called the "Government", represented by the Contracting Officer executing this contract, and Lone Star Defense Corporation, a corporation organized and existing under the laws of the State of Ohio (with offices in Akron, Ohio) hereinafter called the "Contractor", witnesseth that:

Whereas, there is now in force between the parties hereto a certain contract dated July 23, 1941, identified by the Government as Contract No. W-ORD-516 DA-W-ORD-3 and being hereinafter sometimes referred to as the "Original Contract"; and

Whereas, the Original Contract has been supplemented and amended by various Change Orders and Supplemental Agreements; and

Whereas, the Contracting Officer, after consultation with the Contractor, by a written order, dated August 15, 1945, and designated as Change Order No. 17, directed the Contractor to omit certain work covered by the said contract, to decontaminate the Plant, to continue with certain other work under the said contract; and

Whereas, the above mentioned changes caused a material decrease in the amount of the work to be done under the said contract; and

Whereas, the Original Contract, as amended, provides that an equitable adjustment of the amount of the fixed-fees to be paid the Contractor shall be made if such changes cause a material decrease in the amount of the work to be done under the said contract; and

Whereas; the Government and the Contractor, after negotiations, have arrived at an agreement as to the estimated cost of the work to be performed by reason of such changes, and the amount of the fixed-fee to be paid therefor; and

Whereas, it has been administratively determined that the foregoing will facilitate the prosecution of the war; and

Whereas, the Contractor has agreed to such modifications upon the terms, conditions and provisions hereinafter set out; and

Whereas, the accomplishment of the above described work under a cost-plus-a-fixed-fee contract entered into after negotiations approved by the Secretary of War, and without advertising for proposals, is authorized by law; and

Whereas, as a result of such negotiations the Secretary of War has directed that the Government enter into a Supplemental Contract with the Contractor for the accomplishment of the foregoing;

Now, Therefore, the parties hereto do mutually agree that the Original Contract, as amended, shall be and is hereby modified in the following particulars:

[fol. 395] A. Paragraph *c.* of Section 4 of Article IV-A of Title IV is changed to read:

c. Beginning July 22, 1945, the Contractor shall, as directed from time to time by the Contracting Officer, operate the Plant to August 15, 1945.

B. The following is added as paragraph *d.* to Section 4 of Article IV-A, Title IV:

d. Beginning August 15, 1945, the Contractor shall (1) cease all loading operations in connection with the Plant except to complete, as directed or approved by the Contracting Officer, the loading of the materials in process, (2) proceed to do all things necessary to make said Plant safe and free from explosive hazards insofar as is reasonably possible to do so, as may be required or approved by the Contracting Office, and (3) continue with the operation of the ammonium nitrate graining facilities for the production of such quantities as may be directed from time to time by the Contracting Officer for a period ending 31 December 1945.

C. Due to the omission of work under paragraph *c.* of Section 4 of Article IV-A of Title IV a reduction in the esti-

mated cost of the work in the amount of *Twenty Million One Hundred Ninety-one Thousand Three Hundred Forty-two* Dollars (*$20,191,342.00*) has been agreed upon. Therefore, paragraph *d.* of Section 1 of Article IV-B of Title IV is changed to read:

d. It is estimated that the cost of the work under paragraph *c.* of Section 4 of Article IV-A of this Title IV will be *One Million Four Hundred Eighty-four Thousand Six Hundred Fifty-eight* Dollars (*$1,484,658.00*), exclusive of the Contractor's fee. It is estimated that the cost of the work under paragraph *d.* of Section 4 of Article IV-A of this Title IV will be *One Million Six Hundred Fifty Thousand* Dollars (*$1,650,000.00*), exclusive of the Contractor's fee.

D. Due to the omission of work under paragraph *c.* of Section 4 of Article IV-A of Title IV a reduction in the fixed fee in the amount of *Three Hundred Six Thousand Nine Hundred Thirty-six* Dollars (*$306,936.00*) has been agreed upon. Therefore, Section 5 of Article IV-C of Title IV is changed to read:

5. A fixed-fee for the additional operation provided for in paragraph *c.* of Section 4 of Article IV-A hereof in the amount of *Twenty-three Thousand Sixty-four Dollars* (*$23,064.00*) which fee shall constitute complete compensation for Contractor's services from July 22, 1945 to August 15, 1945, including profit other than that included in the prices quoted pursuant to Section 8 of Article IV-A of this Title IV.

E. The following are added as Sections 6 and 7 of Article IV-C of Title IV:

6. A fixed-fee for the work provided for in subparagraphs (1) and (2) of paragraph *d.* of Section 4 of Article IV-A hereof in the amount of *Forty-six Thousand Nine Hundred Thirty-six* Dollars (*$46,936.00*), which fee shall constitute complete compensation for contractor's services under said subparagraphs (1) and (2).

7. A fixed-fee for the work provided for in subparagraph (3) of paragraph *d.* of Section 4 of Article IV-A hereof in the amount of *Five Thousand* Dollars (*$5,000.00*), which fee [fol. 396] shall constitute complete compensation for contractor's services under said subparagraph (3).

F. The following is added as paragraph *t.* of Section 1 of Article V-A, Title V:

t. Costs and expenses incurred pursuant to the terms of Change Order No. 17 dated August 15, 1945 and accepted by the Contractor September 8, 1945. Said Change Order No. 17 shall cease and terminate for all purposes upon the date of execution of this Eighteenth Supplement, except for the authority heretofore granted the Contractor by the terms of this contract, and explicitly reiterated in said Change Order No. 17, to proceed with the settlement of all cancelled subcontracts and purchase orders, which authority is hereby continued with the same force and effect as if herein set forth in full.

G. Paragraph *g.* of Section 2 of Article V-B of Title V is changed to read:

g. The fixed-fee provided for in Section 5 of Article IV-C of Title IV shall be paid as follows: *Twenty-three Thousand Sixty-four* Dollars (*$23,064.00*) for the operation of the Plant during the period provided for in paragraph *c* of Section 4 of Article IV-A hereof, payable upon completion of such work and its acceptance in writing by the Contracting Officer.

H. The following are added as paragraphs *h.* and *i.* to Section 2 of Article V-B of Title V:

h. The fixed-fee of *Forty-six Thousand Nine Hundred Thirty-six Dollars* (*$46,936.00*) provided for in Section 6 of Article IV-C of Title IV shall be paid either upon the furnishing by the Contractor to the Government of the release provided for in Section 4 of Article V-B hereof or under a Final Settlement Agreement whichever may be mutually agreed to by the parties.

i. The fixed-fee of *Five Thousand* Dollars (*$5,000.00*) provided for in Section 7 of Article IV-C of Title IV shall be paid in full upon termination of this contract anything contained herein to the contrary notwithstanding or upon completion of such work and its acceptance in writing by the Contracting Officer.

I. Paragraph *a.* of Section 4 of Article V-B of Title V is changed to read:

a. Upon completion of the work under Titles I and II and/or under Sections 1, 2 and 3 and paragraphs *a.* and *b.* of Section 4 of Article IV-A of Title IV, and again upon the completion of the work under paragraphs *c.* and *d.* of Section 4 of Article IV-A of Title IV, the Government shall pay to the Contractor the unpaid balance of the cost of the work determined under Title V hereof, and of the fees, less any sums that may be necessary to settle any unsettled claims for labor or materials, or any claims in connection with this contract which the Government may have against the Contractor. The Contracting Officer shall accept or reject the completed work with reasonable promptness.

J. Paragraph *c.* of Section 3 of Article VI-A of Title VI is changed to read:

c. The Government shall reimburse the Contractor for such further expenditures, made after the date of termina-
[fol. 397] tion, for the protection of Government property and for accounting services in connection with the settlement of this contract as are required or approved by the Contracting Officer and for all costs of the Contractor in connection with any claims or suits arising out of or connected with the performance of this contract, including but not limited to costs and expenses of litigation, accounting and clerical expenses, compensation and expenses of personnel engaged in obtaining information or preparing data.

K. The following changes were made in this contract before it was signed by the parties hereto:

None.

[fol. 398] In witness whereof, the parties hereto have executed this contract in triplicate as of the day and year first above written.

The United States of America, by (S.) R. H. Stratton (19 Oct. 45). Lt. Col., Ord. Dept., Executive Officer, Field Director Ammunition Plants (Contracting Officer appointed by the Chief of Ordnance).

Two Witnesses as to Execution by the Contractor:

(S.) C. R. Couts, Akron, Ohio. (S.) Jerome Taylor, Akron, Ohio. Lone Star Defense Corporation (Contractor), by (S.) A. Kelly, Vice President, 500 S. Main Street, Akron, Ohio. GTK.

I, G. T. Kilmon, certify that I am the Assistant Secretary of the Corporation named as Contractor herein; that A. Kelly who signed this contract on behalf of the Contractor was then Vice President of said corporation; that said contract was duly signed for and in behalf of said corporation by authority of its governing body and is within the scope of its corporate powers.

(S.) G. T. Kilmon, Assistant Secretary, (Corporate Seal.)

[fol. 399] Consent of Surety

To Supplemental Contract No. 18 dated October 12, 1945, in connection with Contract No. W-ORD-516 DA-W-ORD-3 between the United States of America and the Lone Star Defense Corporation.

Consent of Surety is hereby given to the foregoing Supplemental Agreement, and the Surety agrees that its bond or bonds shall apply to and cover the due performance of the Contract as modified and extended thereby.

In witness whereof, the undersigned Surety has executed this instrument under its seal this 12th day of October, 1945.

The B. F. Goodrich Company, by (S.) T. G. Graham, Vice President (Corporate Seal.)

Attest:

(S.) W. F. Avery, Secretary.

Certificate as to Corporate Surety

I, W. F. Avery, certify that I am the Secretary of the corporation named as surety in the above Consent of Surety; that T. G. Graham, who signed the said Consent of Surety on behalf of the surety, was then Vice President of said corporation; that I know his signature, and his signature thereto is genuine; and that said bond was duly signed, sealed and

attested for and in behalf of said corporation by authority of its governing body.

(S.) W. F. Avery, Secretary (Corporate Seal.)

[fol. 400] Army Service Forces
Office of the Chief of Ordnance
Field Director of Ammunition Plants
St. Louis 8, Missouri

18 October 1945

In Reply: SPOLY-G.
Refer to Legal Section.

Notice of Termination. Contract W-ORD-516, DA-W-ORD-3, as amended

Lone Star Defense Corp.
500 S. Main Street
Akron, Ohio

Attn.: Mr. A. Kelly

Re: Termination of the Work under Contract W-ORD-516 DA-W-ORD-3, Lone Star Ordnance Plant.

GENTLEMEN:

Effective midnight, 26 October 1945, the work under Contract W-ORD-516 DA-W-ORD-3, as amended, is terminated for the convenience of the Government.

Please execute the acknowledgement of receipt on the three inclosed copies and return the original and one of the carbon copies to this office.

For the Chief of Ordnance:

Yours very truly, (S.) R. H. Stratton, Lt. Col., Ord. Dept., Executive Officer, Field Director of Ammunition Plants, Contracting Officer.

Receipt is hereby acknowledged of above Notice of Termination to Contract W-ORD-516 DA-W-ORD-3, as amended, and the Contractor hereby accepts the terms and conditions thereof.

Date: Oct. 20, 1945.

Lone Star Defense Corporation, by (S.) A. Kelly, GTK.

[fol. 401] Due to change in identification system of modifications to contracts this Supplement is numbered 19, there having been executed Supplements 1, 8, 11, 16 and 18, and Change Orders 2, 3, 4, 5, 6, 7, 9, 10, 12, 13, 14, 15 and 17.

Contract No. W-ORD-516. DA-W-ORD-3. Supplement No. 19.

Cost-Plus-A-Fixed-Fee

New Ordnance Facility

Construction and Operation Contract

War Department

Contractor: Lone Star Defense Corporation, Akron, Ohio.

Place: At or near Texarkana, Texas.

Supplemental Contract: Providing for modification of the provisions relating to termination.

Payments to be made by Finance Officer, U. S. Army at Red River Ordnance Depot, Texarkana, Texas.

The equipment, supplies and services to be obtained by this instrument are authorized by, are for the purposes set forth in, and are chargeable to the following procurement authority, the available balance of which is sufficient to cover the cost of the same: 605-6034 P120 A212/61005.

This Supplemental Contract is authorized by and negotiated pursuant to the following laws: The Act approved July 2, 1940 (Public No. 703, 76th Cong.), as extended; the Act of March 11, 1941 (Public Law 11, 77th Cong.), as extended; the Act approved December 18, 1941 (Public Law 354, 77th Cong.); and Executive Order No. 9001 dated December 27, 1941.

(S.) R. H. Stratton, Lt. Col., Ord. Dept.; Executive Officer, Field Director Ammunition Plants, Contracting Officer.

[fol. 402] Supplemental Contract

This Supplemental Contract, entered into this 5th day of December, 1945, by the United States of America, hereinafter called the "Government", represented by the Contracting Officer executing this contract, and Lone Star Defense Corporation, a corporation organized and existing un-

der the laws of the State of Ohio (with offices in Akron, Ohio) hereinafter called the "Contractor", Witnesseth that:

Whereas, there is now in force between the parties hereto a certain contract dated July 23, 1941, identified by the Government as Contract No. W-ORD-516 DA-W-ORD-3 and being hereinafter sometimes referred to as the "Original Contract"; and

Whereas, the Original Contract has been supplemented and amended by various Change Orders and Supplemental Agreements; and

Whereas, the Original Contract, as amended, provides for termination thereof for the convenience of the Government, and provides for reimbursement for the cost of the work incurred by reason of such termination; and

Whereas, pursuant to the above mentioned provisions of the said contract, the Government, by a notice in writing, dated 18 October 1945, and accepted by the Contractor 20 October 1945, terminated as of midnight 26 October 1945, the work under said contract for the convenience of the Government; and

Whereas, various claims and suits under the Fair Labor Standards Act or other Acts, laws, regulations or Executive Orders relating to or affecting employment, hours or conditions of work, and wages or compensation paid therefor, have been instituted against the Contractor, both prior and subsequent to the effective date of said Notice of Termination by persons employed by the Contractor in the performance of the work under the Original Contract, as amended; and

Whereas, the Original Contract, as amended, provides that upon termination of the contract the Government shall assume and become liable for all obligations, commitments and claims that the Contractor may have theretofore in good faith undertaken or incurred in connection with the work and the cost of which would be reimbursable in accordance with the provisions of this contract; and

Whereas, it has been determined by the Contracting Officer that the above mentioned claims and suits are claims which the Contractor in good faith has heretofore incurred in connection with the work and the cost of which would be reimbursable in accordance with the provisions of the contract, as amended; and

Whereas, the Original Contract, as amended, provides that all work under this contract is to be performed at the expense of the Government, and the Government shall indemnify and hold the Contractor harmless against any loss, expense (including expense of litigation) or damage (including personal injuries and deaths of persons and damage to property) of any kind whatsoever arising out of or in connection with the performance of this work, unless such [fol. 403] loss, expense or damage should be shown by the Government to have been caused directly by bad faith or willful misconduct on the part of some officer or officers of the Contractor acting within the scope of his or their authority and employment; and

Whereas, it has been determined by the Contracting Officer that the above mentioned claims and litigation have not been caused by bad faith or willful misconduct on the part of some officer or officers of the Contractor; and

Whereas, the Original Contract, as amended, provides that, upon request by the Contracting Officer, the Contractor shall authorize representatives of the Government to settle and/or defend any claim against the Contractor, the cost and expense of which are reimbursable under the provisions of the Contract, or to take charge of any litigation filed against the Contractor arising out of the performance of the Contract, and that thereafter the Government shall be solely responsible for the handling of such litigation and for any settlement made or judgment rendered therein; and

Whereas, pursuant to the above mentioned provisions of the said contract and at the request and direction of the Contracting Officer, the Contractor authorized representatives of the Government to settle and/or defend the above mentioned claims and to represent and take charge of the above mentioned suits and litigation affecting the Contractor with the mutual intent that the Government should thereafter be solely responsible for the handling of such suits and litigation and for any settlements made or judgments rendered therein; and

Whereas, it has been administratively determined by Government representatives other than the Contracting Officer that Government counsel to settle and/or defend such claims and to represent and take charge of or handle such litigation will not be furnished; and

Whereas, the Original Contract, as amended, provides that in the event the Contracting Officer shall determine that the

best interests of the Government require that the Contractor initiate or defend litigation in connection with claims of third parties arising out of the performance of this contract, the Contractor will proceed with such litigation in good faith; and the costs and expenses of such litigation shall be reimbursable under the contract; and

Whereas, the Contracting Officer has determined that it is in the best interests of the Government for the Contractor to take charge of the defense and/or settlement of such claims and litigation and to employ private counsel therefor; and,

Whereas, other claims or suits arising out of or in connection with the performance of this contract may likewise be instituted against the Contractor which the Government may desire that the Contractor settle and/or defend; and

Whereas, the handling of the settlement and/or defense of such claims and suits will require the Contractor to employ and retain on its rolls personnel for such work; and

Whereas, the Contractor is willing to undertake in good faith the defense and/or settlement of all such claims and the handling of all such litigation without the payment of [fol. 404] any fee therefor, provided that the Contractor is assured that the Government will provide adequate funds for such work, and will reimburse the Contractor for all its costs and expenses of whatsoever nature in connection therewith and provided that the payment of its fixed-fees for work heretofore completed will not be delayed by reason thereof; and

Whereas, the Government hereby acknowledges its liability and responsibility for all settlements, judgments, costs and expenses whatsoever arising out of or in connection with all such claims and litigation in accordance with all the applicable provisions of said contract, as amended; and

Whereas, the Government and the Contractor, after negotiations, have agreed that the Contractor shall handle the settlement and/or defense of all such claims and take charge of such litigation for the Government; and

Whereas, it has been administratively determined that the foregoing will facilitate the prosecution of the war; and

Whereas, the Contractor has agreed to such modifications upon the terms, conditions and provisions hereinafter set out; and

Whereas, the accomplishment of the above described work under a cost-plus-a-fixed-fee contract, entered into after negotiations approved by the Secretary of War, and without advertising for proposals, is authorized by law; and

Whereas, as a result of such negotiations the Secretary of War has directed that the Government enter into a Supplemental Contract with the Contractor for the accomplishment of the above described work;

Now, therefore, the parties hereto do mutually agree that the Original Contract, as amended, shall be and is hereby modified in the following particulars:

[fol. 405] A. Paragraph *c.* of Section 3 of Article VI-A of Title VI is changed to read:

c. The Government shall reimburse the Contractor for such further expenditures as are required, approved or ratified by the Contracting Officer, (including but not limited to all types of expenditures set forth in Section 1 of Article V-A of Title V) made after the date of termination, for the protection of government property, for accounting services in connection with the settlement of the contract and for all costs of the contractor in connection with any claims or suits arising out of or connected with the performance of this contract, including but not limited to settlements approved by the Contracting Officer, judgments (including amounts for liquidated damages, plaintiffs' attorney fees or other allowances under local, state or Federal laws in connection with wages and salaries) reasonable attorney fees and charges of private counsel when the Government does not furnish counsel, court costs and court reporter's charges, costs of appeals, compensation and expenses of personnel engaged in obtaining information or preparing data, and expenses for office space equipment, facilities and supplies not furnished by the Government.

B. Paragraph *d.* of Section 3 of Article VI-A of Title VI is changed to read:

d. (1) If the contract is terminated for the convenience of the Government, the Contractor will be paid all fees which have accrued at the date of termination, less fee payments previously made. If the contract is terminated due to fault of the Contractor, no additional payment on account of the

fixed-fees will be made. (2) No additional fixed-fee will be paid for work done after the effective date of termination.

C. Except as herein provided, the terms and conditions of the Original Contract, as amended, shall continue in full force and effect and shall apply with equal force to this Supplemental Contract.

D. The following alterations were made in this Supplemental Contract before it was signed by the parties hereto:

Section 5 of Article VI-A of Title VI is added and reads:

"5. Whenever used in this Article VI-A, the term, "termination of this contract" shall be construed to mean termination of the work under the contract, rather than termination of any of the rights or obligations which continue in accordance with the provisions of this contract.

[fol. 406] In witness whereof, the parties hereto have executed this contract in triplicate as of the day and year first above written.

The United States of America, by (S.) R. H. Stratton, Lt. Col., Or. Dept., Executive Officer, Field Director Ammunition Plants (Contracting Officer Appointed by the Chief of Ordnance).

Two Witnesses as to Execution by the Contractor:

(S.) C. R. Couts, Akron, Ohio. (S.) Jerome Taylor, Akron, Ohio. Lone Star Defense Corporation (Contractor), by (S.) A. Kelly, Vice President, 500 S. Main Street, Akron, Ohio.

I, G. T. Kilmon, certify that I am the Assistant Secretary of the Corporation named as Contractor herein; that A. Kelly who signed this contract on behalf of the Contractor was then Vice President of said corporation; that said contract was duly signed for and in behalf of said corporation by authority of its governing body and is within the scope of its corporate powers.

(S.) G. T. Kilmon, Assistant Secretary (Corporate Seal.)

[fol. 407] Consent of Surety

To Supplemental Contract No. 19 dated 5 December 1945, in connection with Contract W-ORD-516 DA-W-ORD-3 between the United States of America and the Lone Star Defense Corporation.

Consent of Surety is hereby given to the foregoing Supplemental Agreement, and the Surety agrees that its bond or bonds shall apply to and cover the due performance of the Contract as modified and extended thereby.

In witness whereof, the undersigned Surety has executed this instrument under its seal this 21st day of December, 1945.

The B. F. Goodrich Company, by (S.) T. G. Graham, Vice President (Corporate Seal.)

Attest:

(S.) W. F. Avery, Secretary.

Certificate as to Corporate Surety

I, W. F. Avery, certify that I am the Secretary of the corporation named as surety in the above Consent of Surety: that T. G. Graham who signed the said Consent of Surety on behalf of the surety, was then Vice President of said corporation; that I know his signature, and his signature thereto is genuine; and that said bond was duly signed, sealed and attested for and in behalf of said corporation by authority of its governing body.

(S.) W. F. Avery, Secretary (Corporate Seal)

[fol. 408] Contract No. W-ORD-516 DA-W-ORD-3

Supplement No. 20

War Department—Ordnance Department

Supplemental Contract To Provide Assignment to the Government and Assumption by the Government of Rights and Obligations Under Various Insurance Policies

1. The Contractor does hereby assign, transfer and set over to the Government, as of the date hereof, all of its right, title and interest in and to all return premiums, premium

refunds, dividends and any other moneys due or to become due the Contractor in connection with the following policies:

Policy No.	Company
CGL-1165-E	American Mutual Liability Insurance Company
ALT-1814	American Mutual Liability Insurance Company
ME-4951-E	American Mutual Liability Insurance Company
WC-225873-E	American Mutual Liability Insurance Company

2. It is agreed that such return premiums, premium refunds, dividends and other moneys shall be paid by the Insurance Carrier directly to the Government.

3. The Government does hereby assume the obligation to pay directly to the Insurance Carrier any further or additional premium properly charged under any of the above insurance policies heretofore approved by the Government, which further or additional premium has not been paid by the Contractor, to the extent to which such premium would have been reimbursable to the Contractor if payment therefor had been made by the Contractor.

In Witness Whereof, the Contractor and the Government have executed this instrument this 31st day of May, 1946:

The United States of America, by (S.) C. W. Meldrum, Lt. Col., Ord. Dept., Executive Officer, Field Director Ammunition Plants, Contracting Officer; Contractor. Lone Star Defense Corporation, by (S.) A. Kelly, Vice President (Corporate Seal.)

Attest:

(S.) W. F. Avery, Secretary.

[fol. 409] This Supplement is numbered 21, there being in existence 7 Supplements and 13 Change Orders.

Contract No. W-ORD-516. DA-W-ORD-3. Supplement No. 21.

Supplemental Contract to Cost-Plus-A-Fixed-Fee
New Ordnance Facility Contract
War Department

Contractor: Lone Star Defense Corporation, Akron, Ohio.
Place: At or near Texarkana, Texas.
Supplemental Contract for: Final Settlement.
Payments to be made by Finance Officer, U. S. Army at Red River Arsenal, Texarkana, Texas.

The equipment, services and supplies to be obtained by this instrument are authorized by, are for the purposes set forth in, and are chargeable to the following procurement authority, the available balance of which is sufficient to cover the cost of the same: 505-8012 P120 A 212 61005.

This Supplemental Contract is authorized by and negotiated pursuant to the Contract Settlement Act of 1944 (Public Law 395, 78th Congress).

(S.) C. W. Meldrum, Lt. Col., Ord. Dept., Executive Officer, Field Director Ammunition Plants, Contracting Officer.

[fol. 410] Supplemental Contract

This supplemental contract (hereinafter referred to as "Settlement Agreement"), entered into pursuant to the Contract Settlement Act of 1944 (hereinafter called "the Act"), as of this 1st day of June 1946, by the United States of America (hereinafter called "the Government") represented by the Contracting Officers executing this contract and Lone Star Defense Corporation, a corporation organized and existing under the laws of the state of Ohio, with its principal office in Akron, Ohio (hereinafter called "the Contractor"),

Witnesseth that:

Whereas, the Contractor and the Government have entered into Contract No. W-ORD-516 DA-W-ORD-3 under date of 23 July 1941, which, together with any and all amendments, changes, and supplements thereto, is hereinafter referred to as "the Contract"; and

Whereas, the Act declares that upon the termination of any war contract (as therein defined) in whole or in part for the convenience or at the option of the Government, it shall be the responsibility of the contracting agency (as

therein defined) to provide the war contractor with speedy and fair compensation for the termination of the war contract and provides that any contracting agency may settle all, or any part of any termination claim under any war contract by agreement with the war contractor; and

Whereas, the Contract provides that the performance of work thereunder may at the option of the Government be terminated by the Government; and

Whereas, by Notice of Termination dated 18 October 1945, effective as of Midnight 26 October 1945, the Government advised the Contractor of the complete termination of the work under the Contract for the convenience and at the option of the Government; and

Whereas, the term "contract termination inventory", as used herein, shall mean all materials (including a proper part of any common materials), if any, determined by the parties hereto, in connection with this settlement, to be properly allocable to the terminated portion of the Contract, except any machinery or equipment subject to a separate contract or contract provision specifically governing the use or disposition thereof; and

Whereas, the term "subcontract termination inventory", as used herein, shall mean all materails (including a proper part of any common materials), if any, determined by the parties to any subcontract under the Contract, in connection with the settlement thereof, to be properly allocable to the terminated portion of such subcontract, except any machinery or equipment subject to a separate contract or contract provision specifically governing the use or disposition thereof; and

Whereas, the Contracting Officer, as evidenced by his execution of this Settlement Agreement, has administratively determined that the Contractor has satisfactorily completed all of its work and satisfactorily performed all of its obli- [fol. 411] gations under the Contract, except as otherwise provided herein, and has satisfactorily accounted for and delivered to the Government all property, real and personal, materials, supplies and funds which have come into its possession and for which it is in any way chargeable, and the Contractor is hereby expressly relieved and released from all accountability and responsibility therefor or in any way connected therewith;

ow, therefore, the parties hereto do mutually agree as
ws:

rticle 1. (a) The Contractor certifies that all contract
ination inventory (including scrap), if any, has been
ned, sold to third parties, returned to suppliers, stored
he Government, delivered to the Government, or other-
properly accounted for, and all proceeds or retention
s thereof, if any, have been taken into account in arriv-
t this Settlement Agreement.

). The Government hereby acknowledges that the Con-
or has turned over to the Government and accounted
ll Government-owned facilities (machinery, equipment
all other property, both real and personal), materials,
lies, and other property of whatever kind or character
iously turned over by the Government to the Contrac-
or acquired by the Contractor for the Government
r the provisions of the Contract, except such of said
erty, if any, as the Contractor has acquired, by this Set-
ent Agreement or otherwise, from the Government, for
h property a satisfactory accounting has been made,
except such items of machinery, equipment, materials,
lies, and other property as have been lost, destroyed,
out or damaged beyond repair or otherwise disposed
the course of the work under the Contract, for which
erty a satisfactory accounting has also been made, and
in respect of such lost, destroyed, worn out, damaged,
herwise disposed of items, the Government has and
hereby relieve the Contractor from any and all respon-
ty therefor.

rticle 2. (a) The Contractor certifies that, prior to the
ition of this Settlement Agreement, each of the Con-
or's immediate subcontractors whose claim has been
bursed to the Contractor under the Contract or whose
is included in the claims settled by this Settlement
ement has either (1) properly submitted his claim on
dard Form 1a of the Office of Contract Settlement or
her appropriate form, or (2) furnished to the Contrac-
certificate stating (i) that all his subcontract termina-
inventory (including scrap) has been retained, sold, re-
d to suppliers, stored for the Government, delivered to
Government, or otherwise properly accounted for, and
roceeds or retention prices thereof, if any, were taken
account in arriving at the settlement of the subcontract

or subcontracts, and (ii) that the subcontractor has received from each of his immediate subcontractors whose claim was included in his claim either a claim properly submitted on Standard Form 1a or on other appropriate form or a certificate substantially similar to clause (i) and this clause (i) of this Article 2 (a). The Contractor further certifies (except as to claims heretofore or hereafter assigned to the Government) that, prior to the execution of this Settle-
[fol. 412] ment Agreement, each of such subcontractors has executed a release of his claim on a form satisfactory to the Contracting Officer or has otherwise settled his claim in a manner satisfactory to the Contracting Officer, or that, in the event final payment has not been made prior to the execution of this Settlement Agreement, such release will be secured upon payment.

(b) The Contractor hereby transfers and conveys to the Government all the right, title and interest, if any, which the Contractor has received, or is entitled to receive, in and to subcontract termination inventory, if any, not otherwise properly accounted for, and hereby assigns to the Government any and all of its rights relating thereto whether arising under negotiated settlements, formula determinations, or otherwise.

Article 3. In all cases, if any, where the Contractor has not previously made such payments, the Contractor shall, within ten (10) days after receipt of the payments provided for in paragraph (b) of Article 4, pay to each of its immediate subcontractors and suppliers (or to their respective assignees) the respective amounts to which they are entitled, after deducting, if the Contractor so elects, any amounts then due and payable to the Contractor by such subcontractors and suppliers. If the Contractor fails to make any such payment within ten (10) days, the Contractor will, upon request, return to the Government the amount payable to such immediate subcontractors and suppliers, less any amount then due and payable to the Contractor by them.

Article 4. (a) The Contractor has received, prior to the effective date of termination, certain sums with respect to work and services performed, or articles delivered, under the Contract. The Contractor has also received, after the effective date of termination, certain additional sums for work and services performed, or articles delivered, under the

Contract, or certain sums as final payments on partial settlements or in partial payment on account of the Contractor's termination claim. The Government, as part of this negotiated settlement, hereby confirms and acknowledges the right of the Contractor to retain all such sums heretofore paid and agrees that such sums constitute a portion of the total amount to which the Contractor is entitled in complete and final settlement of the Contract.

(b) In addition, upon execution of this Settlement Agreement the Government agrees to pay to the Contractor the sum of Fifty-Five Thousand Six Hundred Ninety Dollars and Twenty-Two Cents ($55,690.22), which includes (1) full payment of the sum of Forty-Six Thousand Nine Hundred Thirty-Six Dollars ($46,936.00) as provided by Section 6 of Article IV-C of Title IV of the Contract as set forth in Supplement No. 18, dated 12 October 1945, and (2) the sum of No Dollars ($00.00) as payment in full of the due and unpaid baance, if any, of any and all fixed-fees withheld by the Government from fee payments heretofore made, and (3) the sum of Twenty-Three Thousand Sixty-Four Dollars ($23,064.00) as payment in full of the due and unpaid balance of fixed-fees, if any, which accrued pursuant to Section 5 of Article IV-C of Title IV of the Contract, as amended, as set forth in said Supplement No. 18 thereof, and (4) the sum of Five Thousand Dollars ($5,000.00) as payment in full of the due and unpaid balance of fixed-fees, if any, which accrued pursuant to Section 7 of Article IV-C of Title IV of the Contract, as amended, as set forth in said Supplement No. 18 thereof. The said sum of Fifty-Five Thousand Six [fol. 413] Hundred Ninety Dollars and Twenty-Two Cents ($55,690.22) represents the sum of Four Hundred Eighty-Three Thousand Twenty-Four Dollars and Sixty-Three Cents ($483,024.63), less (1) the sum of Three Hundred Ninety-Two Thousand Three Hundred Thirty-Four Dollars and Forty-One Cents ($392,334.41) representing all unliquidated partial or progress payments previously made on account to the Contractor or its assignee and (2) the sum of Thirty-Five Thousand Dollars ($35,000.00) representing all unliquidated advance payments (with interest, if any, thereon) and (3) the sum of No Dollars ($00.00) representing all applicable property disposal credits. All interest, if any, to which the Contractor is entitled under the Act to the date of payment is included in said sum of Fifty-Five

Thousand Six Hundred Ninety Dollars and Twenty-Two Cents ($55,690.22), or, to the extent not so included, is expressly waived by this Settlement Agreement. Said sum, together with all other sums heretofore paid, constitutes payment in full and complete settlement of the amount due the Contractor by reason of the termination of work, or otherwise, under the Contract and of all other claims of the Contractor under the Contract and under the Act, insofar as it pertains to the Contract, except as hereinafter provided..

(c) Upon payment of said sum of Fifty-Five Thousand Six Hundred Ninety Dollars and Twenty-Two Cents ($55,690.22), as aforesaid, all rights and liabilities of the parties under the Contract and under the Act, insofar as it pertains to the Contract, shall cease and be forever released except:

(1) Claims by the Contractor against the Government, which involve costs reimbursable under the Contract and which arise under the Contract or by virtue of the termination in stated or estimated amounts as follows:

(a) Claims by third parties against the Contractor, as set forth in Schedule A on page 13 hereof and hereby made a part of this Settlement Agreement.

(b) Claims of whatever kind or character under the Fair Labor Standards Act and other Acts, laws, regulations or executive orders relating to or affecting employment, hours or conditions of work, and wages or compensation paid therefor, and claims which may now appear to be settled by releases or other documents, but which are hereafter found by the Contracting Officer or by court action to be invalid. The estimated amount of payments to be made hereunder is Two Million One Hundred Fifty Thousand Dollars ($2,150,000.00).

(2) Claims by the Contractor against the Government, as to which its right of reimbursement is disputed, which are excluded without prejudice to the rights of either party and which are listed as follows:

(a) Claims in the total amount of No Dollars ($00.00), as listed in Schedule B on page 14 hereof and hereby made a part of this Settlement Agreement.

[fol. 414] (b) Any and all rights of the Contractor to reimbursement, if any, for the cost of maintaining, storing,

and preserving all books, records and other papers for that part of the period provided by Section 19 of the Act which is in excess of the period provided by Article VII-E of the Contract. This clause, however, shall not be deemed acknowledgement by the Government of a right in the Contractor to such reimbursement.

(3) Claims by the Contractor against the Government, which are based upon responsibility of the Contractor to third parties and which involve costs reimbursable under the Contract, but which are not now known to the Contractor.

(4) All rights and liabilities, if any, of the parties under the Renegotiation Act.

(5) All rights and liabilities of the parties, if any, arising under the Contract articles or otherwise which relate to reproduction rights, patent infringements, inventions, applications for patent and patents, including rights to assignments, invention reports and licenses, covenants of indemnity against patent risks and bonds for patent indemnity obligations, together with all rights and liabilities under any such bond.

(6) All rights of the Government to take the benefit of any adjustments of royalties under the Royalty Adjustment Act of October 31, 1942 (Public Law 768, 77th Congress, 35 U. S. C. 89-96) and to take the benefit of agreements reducing or otherwise affecting royalties paid or payable in connection with the performance of the Contract.

(7) All rights and liabilities of the parties under the Contract articles, if any, applicable to options (except options to continue or increase the work under the Contract), covenants not to compete, covenants of indemnity, and agreements with respect to the future care and disposition by the Contractor of Government-owned facilities remaining in his custody.

(8) All rights and liabilities of the parties arising under the Contract articles, if any, or otherwise, concerning defects in, and guarantees or warranties relating to, any completed articles or component parts furnished to the Government by the Contractor pursuant to the Contract or this Settlement Agreement.

(9) All rights and liabilities, if any, of the parties under those clauses inserted in the Contract because of the re-

quirements of Acts of Congress and Executive Orders, including, without limitation, any applicable clauses relating to the following topics: labor law, contingent fees, domestic articles, employment of aliens, and "officials not to benefit."

(10) All rights and liabilities of the parties under any agreement heretofore or hereafter made for the purpose of providing for the adjustment, as between the Government and the insurance carrier, of premiums, premium refunds, dividends, and all other refunds and moneys due or to become due under the War Department Insurance Rating Plan and/or the War Department Group Insurance Rating Plan as applied to the Contract.

[fol. 415] (11) All rights and liabilities, if any, of the parties under the Act relating to removal and storage of contract termination inventory.

(12) All rights of the Government to refunds, rebates, or other recoveries, if any, hereafter received by the Contractor on account of any item reimbursed under the Contract (including items reimbursed in this Settlement Agreement).

(13) All rights and liabilities of the parties arising under the Contract articles which relate to maintaining, storing, and preserving all books, records, and other papers.

Article 5. (a) (1) The parties to this Settlement Agreement recognize that from time to time subsequent to the date of this Settlement Agreement the Contractor will incur costs and expenses which are reimbursable to it by the Government. Therefore, in addition to payment of the sum provided for in paragraph (b) of Article 4 of this Settlement Agreement, the Government will currently reimburse the Contractor, upon certification and delivery to, and verification by, the Contracting Officer of documentary evidence satisfactory to him, for (i) all costs and expenses incurred by the Contractor, to the extent reimbursable under the Contract, in discharging claims described in subparagraphs (1) and (3) of paragraph (c) of Article 4 hereof and (ii) all costs and expenses incurred by the Contractor, to the extent reimbursable under any provision of the contract, provided that the Contractor's rights under such provision have been excepted from the release in paragraph (c) of Article 4 hereof. The Contractor and the Contracting Officer may agree upon the whole or any part

of the amounts so to be paid to the Contractor. In the event of the failure of the Contractor and the Contracting Officer so to agree upon the whole or any part of the amounts to be paid to the Contractor, the Contracting Officer may determine the amount or amounts due to the Contractor and the provisions of Section 13 of the Act shall apply to such determination.

(2) It is estimated that the total amount of payments to be made to the Contractor under subparagraphs (1) and (3) of paragraph (c) of Article 4 and under Article 5 of this Settlement Agreement is Two Million Five Hundred Thousand Dollars ($2,500,000.00). It is expressly understood and agreed that neither the Government nor the Contractor guarantees the correctness of this or other estimates contained herein. This estimate has been agreed to by both the Government and the Contractor, and copies are on file in the Office of the Chief of Ordnance.

(3) (i) At any time and from time to time after the execution of this Settlement Agreement, the Government at the request of the Contractor and subject to the approval of the Chief of Ordnance or his duly authorized representative, or the person to whom authority to make advance payments has been delegated, as to the present need therefor, shall advance to the Contractor, without payment of interest thereon by the Contractor, sums not to exceed fifty percent (50%) of the estimated cost of this Settlement Agreement as set forth in subparagraph (2) of paragraph (a) of this Article, as it may be amended from time to time. The percentage set forth herein may be changed from time to time by agreement.

[fol. 416] (ii) As a condition precedent to the making of any advance payment or payments as hereinbefore provided, the Contractor shall furnish the Government with such adequate security as the Under Secretary of War, or the person to whom authority has been delegated to make advance payments, shall prescribe; Provided: That, if other security is not prescribed, the terms of this Settlement Agreement shall be considered adequate security for such advance payments; and provided further: That if at any time the Under Secretary of War deems the security furnished by the Contractor inadequate, the Contractor shall furnish such additional security as shall be satisfactory to the Under Secretary of War.

(iii) Until all advance payments hereunder are liquidated, all funds received as advance payments under this Settlement Agreement, together with all funds received as reimbursements for costs under this Article, shall be deposited in a special bank or banks of the Federal Reserve System or any "insured" bank within the meaning of the Act creating the Federal Deposit Insurance Corporation (Act of August 23, 1935, 49 Stat. 684) as amended (12 U.S.C. 264) separate from the Contractor's general or other funds; Provided, That such bank or banks shall be approved in writing in advance by the Chief of Ordnance or his duly authorized representative. Such special bank account or accounts shall be so designated as to indicate clearly to the bank their special character and purpose, and the balance in such account or accounts shall be used by the Contractor exclusively as a revolving fund for carrying out the purposes of this Settlement Agreement and any amendments thereto and not for other business of the Contractor. Any balances from time to time in such special account or accounts shall at all times secure the repayment of the advances in connection with which the special account or accounts are opened, and the Government shall have a lien upon such balances to secure the repayment of such advances, which lien shall be superior to any lien of the bank or any other person upon such account or accounts by virtue of assignment to it of this Settlement Agreement or otherwise; Provided: That the bank shall be under no liability to any party hereto for the withdrawal of any funds from said special account upon checks, properly endorsed and signed by the Contractor, except that after the receipt by the bank of written directions from the Chief of Ordnance, or his duly authorized representative, the bank shall act thereon and be under no liability to any party hereto for any action taken in accordance with the said written directions. Any instructions or written directions received by the bank through the Contracting Officer upon War Department stationery and purporting to be signed by, or by the direction of, the Chief of Ordnance or his duly authorized representative, shall, insofar as the rights, duties, and liabilities of the bank are concerned, be conclusively deemed to have been properly issued and filed with the bank by the Chief of Ordnance or his duly authorized representative.

(iv) It is agreed that the aggregate of the advance payments outstanding under this Settlement Agreement together with funds received as reimbursement for costs under [fol. 417] this Article shall at no time exceed the total estimated costs set forth in subparagraph (2) of paragraph (a) of this Article, as revised from time to time, and any such excess shall immediately be repaid by the Contractor to the Government or if any reimbursement is due from the Government to the Contractor, shall be deducted therefrom; Provided, however, that if the total costs under this Article shall be in excess of the amount so paid to the Contractor, including said advance payments, the Government upon presentation of satisfactory evidence shall currently and promptly reimburse the Contractor to the extent of such excess costs (subject to any delay in the availability of appropriated funds).

(v) If, ten (10) years from the date of this Settlement Agreement, the advance payments made to the Contractor in respect of the Contract have not been fully liquidated in the manner herein provided, the unliquidated balance of such advance payments shall be deducted from any payments otherwise due the Contractor in respect of this Settlement Agreement; and if the sum or sums due the Contractor be insufficient to cover such balance, the deficiency shall be paid by the Contractor in cash forthwith after demand and final audit by the Government of all accounts hereunder in respect of this Settlement Agreement. Furthermore, if, in the opinion of the Chief of Ordnance or his duly authorized representative, the unobligated balance of the advance payments made by the Government under paragraph (i) hereof exceeds the amount necessary for the current needs of the Contractor, as determined by the Chief of Ordnance or his duly authorized representative, the amount of such excess shall, upon demand by the Chief of Ordnance or his duly authorized representative, be promptly returned to the Government and will be credited against the balance due the Government on advances previously made. If the demand made in any event set forth in this paragraph is not met upon receipt of such demand by the Contractor, the amount demanded will bear interest at the rate of six percent (6%) per annum from the date of the receipt of the demand until payment is made; Provided, however, that such

payment of interest is hereby waived as to any sum paid by the Contractor within fifteen (15) days after receipt of the demand hereunder. If and when the Contractor has, by means of deductions or otherwise, reimbursed the Government in full for payments made, any money remaining in the special bank account or accounts shall be free and clear of any lien hereunder and the bank or banks concerned shall have authority to pay same to the Contractor and shall thereupon be relieved of any further obligation to the Government on account thereof.

(vi) The Contractor shall, at all times, afford to the Contracting Officer, or his duly authorized representative, proper facilities for the inspection and audit of the Contractor's accounts; and the Contractor hereby agrees that the Contracting Officer, or his duly authorized representative, shall have the right so far as the Contractor's rights are concerned, during business hours, to inspect and make copies of any entries in the books and records of the bank relating to the said special account or accounts.

[fol. 418] (vii) Any assignment of moneys due or to become due under this Settlement Agreement shall be subordinate to the rights or claims of the Government arising under this Settlement Agreement or any amendment thereto by virtue of any advance payments authorized herein or otherwise; Provided that, if at any time any claim arising under this Settlement Agreement is assigned or purportedly assigned in any manner inconsistent with the said rights of the Government, the Chief of Ordnance or his duly authorized representative shall have the right to suspend further advance payments without notice.

(4) This paragraph may be amended hereafter by agreement between the parties hereto.

(b) Even though neither the existence nor the amount of any claim referred to in subparagraphs (1) and (3) of paragraph (c) of Article 4 may now be known to the Contractor, reimbursement for payments made by the Contractor in discharge of any such claim shall include, to the extent reimbursable under the Contract, wages and salaries otherwise reimbursable and all additional amounts determined (either by approval of the Contracting Officer or by litigation as hereinafter provided) to be due and payable for overtime or any other compensation and allowances under

local, state or Federal acts, laws, regulations or executive orders, relating to or affecting employment, hours or conditions of work and wages or compensation paid therefor. This paragraph (b) is not intended in any way to limit the generality of other paragraphs of this Article 5 and does not limit in any way such paragraph to reimbursement for wage and salary claims.

(c) The Contractor shall promptly notify the Contracting Officer of any claims of the type described in subparagraphs (1) and (3) of paragraph (c) of Article 4 which are asserted subsequent to the execution of this Settlement Agreement. In the event of the assertion of any such claim against the Contractor, it shall proceed in good faith promptly and diligently to assemble all data and information relative to such claim. All costs and expenses so incurred by the Contractor in the performance of this duty shall be reimbursed under the Contract.

(d) If the Contracting Officer has determined or shall determine that the best interest of the Government require that the Contractor initiate or defend litigation in connection with or settle claims of third parties arising under the Contract or by virtue of its termination, the Contractor will proceed with such litigation or settlement in good faith and the costs and expenses of such litigation, to the extent reimbursable under any provisions of the Contract, including without limitation judgments and court costs, allowances rendered or awarded in connection with suits for wages, overtime or salaries, and other items, and reasonable attorneys' fees for private counsel when the Government does not furnish Government counsel, shall be reimbursed under the Contract. The term "litigation" shall include suits at law or in equity and hearings or proceedings before any Governmental agency, including without limitation boards, commissions or other bodies.

[fol. 419] In Witness Whereof, the parties hereto have executed this Supplemental Contract in triplicate as of the day and year first above written.

The United States of America, by (S.) C. W. Meldrum, Lt. Col., Ord. Dept., Executive Officer, Field Director Ammunition Plants (Contracting Officer appointed by the Chief of Ordnance), PMM, WDW, JCB, by (S.) O. P. Easterwood, Jr., Lt. Col., Corps

of Engineers (Contracting Officer appointed by the Chief of Engineers); Lone Star Defense Corporation (Contractor), by (S.) A. Kelly, Vice President, 500 S. Main Street, Akron, Ohio (Business Address).

Two witnesses as to execution by the Contractor: (S.) Jerome Taylor, 500 S. Main St., Akron, Ohio (Address); (S.) C. R. Couts, 500 S. Main St., Akron, Ohio (Address).

I, G. T. Kilmon, certify that I am the Assistant Secretary of the Corporation named as Contractor herein; that A. Kelly, who signed this Contract on behalf of the Contractor was then Vice President of said Corporation; that said Contract was duly signed for and in behalf of said Corporation by authority of its governing body and is within the scope of its corporate powers.

(S.) G. T. Kilmon, Assistant Secretary (Corporate Seal).

[fol. 420] Consent of Surety

To Supplemental Contract No. 21 dated June 1st, 1946, in connection with Contract No. W-ORD-516 DA-W-ORD-3 between the United States of America and the Lone Star Defense Corporation.

Consent of Surety is hereby given to the foregoing Supplemental Agreement, and the Surety agrees that its bond or bonds shall apply to and cover the due performance of the Contract as modified and extended thereby.

In Witness Whereof, the undersigned Surety has executed this instrument under its seal this 1st day of June 1946.

The B. F. Goodrich Company, Surety, by (S.) T. G. Graham, Vice President, 500 S. Main St., Akron, Ohio (Business Address). (Corporate Seal).

Attest: (S.) W. F. Avery, Secretary.

Certificate as to Corporate Surety

I, W. F. Avery, certify that I am the Secretary of the corporation named as Surety in the above Consent of Surety; that T. G. Graham, who signed the said Consent of Surety on behalf of the Surety, was then Vice President of said corporation; that I know his signature, and his signature thereto is genuine; and that said bond was duly signed,

sealed and attested for and in behalf of said corporation by authority of its governing body.

(S.) W. F. Avery, Secretary, (Corporate Seal).

[fol. 421] Schedule A

Claims of third parties against the Contractor in connection with the performance and termination of the work at the Lone Star Ordnance Plant under Contract No. W-ORD-516 DA-W-ORD-3, which are excepted from Article 4 (c) of this Settlement Agreement by subparagraph (1) (a) thereof, are identified as follows:

(1) Claims of whatever kind or character involved in suits heretofore filed against the Contractor and identified as follows:

	Title	Filed In	Court File No.	Estimated Amount
(a)	Willie B. Combs vs. Lone Star Defense Corporation	Justice Court for Precinct No. 1 County of Bowie, Texarkana, Texas	1455	$ 125·00
(b)	B. F. Parker et ux. vs. Lone Star Defense Corporation	District Court Bowie County, Texas, Fifth Judicial District of Texas	05156	50,000 00
(c)	Eura C. Davie vs. Lone Star Defense Corporation	District Court Bowie County, Texas, Fifth Judicial District of Texas	05421	600 00
(d)	Vernice A. Meggs, et vir. vs. Texas Unemployment Compensation Commission, et al.	District Court, Cass County, Texas, Fifth Judicial District of Texas	13,847	300 00
(e)	Bennie G. Clayton vs. American Mutual Liability Insurance Company, et al.	District Court Bowie County, Texas, Fifth Judicial District of Texas		60,750 00

(2) Claims by the State of Texas for taxes on motor fuel or other petroleum products, or upon the purchase, storage, use or consumption thereof, heretofore acquired or used in the performance of the work under the Contract. The estimated amount of payments to be made hereunder is One Hundred Twenty-Five Thousand Dollars ($125,000.00).

(3) Claims by subcontractors and suppliers for payments due to subcontractors and suppliers arising under purchase orders or subcontracts heretofore transferred and assigned to the Government pursuant to Article VI-A of Title VI of the Contract, as amended, for settlement and payment; regardless of the amount thereof.

(4) Claim of U. S. Steel Products Company arising out of termination of purchase order for steel drums—$60,000.00.

[fol. 422] Schedule B

I. Expenditures by the Contractor which are the subject of outstanding (unrecouped) General Accounting Office exceptions and in connection with which deductions are being made in this Settlement Agreement:

None.

II. Expenditures similar in nature to those in connection with which General Accounting Office exceptions have been taken and in connection with which deductions are being made in this Settlement Agreement:

None.

III. Expenditures which are the subject of General Accounting Office exceptions in connection with which deductions have been made by the Finance Officer:

None.

[fol. 423] The undersigned, K. M. Prichard, Assistant Secretary of Lone Star Defense Corporation, an Ohio corporation, hereby certifies that the foregoing Contract No. W-ORD-516 DA-W-ORD-3, by and between the United States Government and Lone Star Defense Corporation, dated the 23rd day of July, 1941, together with Notice of Termination, Supplements Nos. 1, 8, 11, 16, 18, 19, 20, and 21, and Change Orders Nos. 2, 3, 4, 5, 6, 7, 9, 10, 12, 13, 14, 15, and 17 thereto, is a true and correct copy of said Contract as changed and amended, all as appears by the records of said corporation now in his official custody as such Assistant Secretary of said corporation.

In witness whereof, the undersigned has set his hand as Assistant Secretary of Lone Star Defense Corporation, and affixed the seal of said corporation this the 11th day of December, 1946.

K. M. Prichard, Assistant Secretary, Lone Star Defense Corporation. (Seal.)

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, ~~1948~~. 1949

R. M. POWELL et al.,
Petitioners,
vs.
THE UNITED STATES CARTRIDGE COMPANY, a Corporation,
Respondent.

No. ~~836~~ 11

PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals for the Eighth Circuit

and

BRIEF IN SUPPORT THEREOF.

THOMAS BOND,
Attorney for Petitioners.

June 2, 1949.

ST. LOUIS LAW PRINTING CO.: 415 North Eighth Street. CEntral 4477

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1948.

R. M. POWELL et al.,
Petitioners,

vs.

THE UNITED STATES CARTRIDGE COMPANY, a Corporation,
Respondent.

No. .....

PETITION FOR A WRIT OF CERTIORARI
To the United States Court of Appeals
for the Eighth Circuit.

R. M. Powell and fifty-eight other plaintiffs, who are the petitioners herein, pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit entered in the above entitled cause pursuant to opinion and concurring opinion filed on April 12, 1949, reversing the judgment of the District Court of the United States for the Eastern District of Missouri. The said judgment became final on May 7, 1949, when the said Court without opinion denied petitioners' petition for a rehearing, modified its opinion, vacated its judgment of April 12, 1949 and entered a new judgment of reversal without costs (R. 1038).

OPINION BELOW.

The opinion of the United States Court of Appeals for the Eighth Circuit in this case and the concurring opinion are unreported as yet. They will be found at pages 982 and 997 of the Record herein.

JURISDICTION.

The jurisdiction of this Court is based upon Title 28 USCA, Section 1254, being a revision of Section 240 (a) of the Judicial Code as amended (Title 28 USCA 347); also cases cited under "Reasons for Granting the Writ."

QUESTIONS PRESENTED.

The questions presented are:

1. Are the Fair Labor Standards Act and the Walsh-Healey Act mutually exclusive?

2. Are the Fair Labor Standards Act and the Walsh-Healey Act so divergent that both may not apply at the same time on the same project?

3. Did the National Defense Acts of June 28, 1940 and of July 2, 1940, or any executive action taken thereunder suspend or exclude the operation of the Fair Labor Standards Act in the St. Louis Ordnance Plant?

4. Did the Act of July 2, 1940 set up a complete scheme of labor relations at the St. Louis Ordnance Plant exclusive of the Fair Labor Standards Act?

5. Were the munitions manufactured at the St. Louis Ordnance Plant for interstate shipment "goods," and were they "produced for commerce," within the meaning of the Fair Labor Standards Act?

6. Whether petitioners while working in the Safety Department of the St. Louis Ordnance Plant were within the coverage of the Walsh-Healey Public Contracts Act, and, if so, were they for that reason excluded from the Fair Labor Standards Act?

7. Were petitioners while so employed within the coverage of the Fair Labor Standards Act?

STATUTES INVOLVED.

The United States Statutes involved are:

The Fair Labor Standards Act, 29 USCA, Sections 201 to 219.

The Walsh-Healey Act, 41 USCA, Sections 35 to 45.

The First National Defense Act enacted June 28, 1940; 50 USCA, Appendix 1151, et seq.

The Second National Defense Act enacted July 2, 1940; 50 USCA, Appendix, Section 1171, et seq; also 5 USCA, Section 189 (a).

SUMMARY STATEMENT OF THE MATTER INVOLVED.

This suit was brought by petitioners to recover overtime compensation under the Fair Labor Standards Act while employed in the Safety Department of the St. Louis Ordnance Plant operated by the respondent, The United States Cartridge Company, under a cost-plus-a-fixed-fee contract which specified that the respondent was to "operate the plant" (R. p. 764), and described respondent's status as that of an "independent contractor", and it was expressly stipulated in the contract that the contractor was "in no wise an agent of the Government" (R. p. 780), and further that the contractor should "make all * * * contracts in its own name and not bind or purport to bind the Government or the contracting officer thereunder"

(R. p. 787). The pleadings admit and the opinion below concedes that petitioners were all employees of respondent (R. pp. 30, 983).

This case is of the same general character as Kennedy v. Silas Mason Co., 334 U. S. 249 (1948), 92 L. Ed 1347. There are here raised the principal questions which this Court found important in the Kennedy case but did not decide because the record did not afford a satisfactory basis for their determination (l. c. 257). Here, however, the case was tried on its merits in the District Court, the facts were fully developed, and the trial resulted in judgments for the plaintiffs (petitioners here) for the amount of overtime due plus liquidated damages and an attorney's fee. (See Findings of Fact, Conclusions of Law and Judgment of U. S. D. C., R. 916-922.) The record here presented is thus factually complete. It contains the matter this Court found to be lacking in the Silas Mason Co. case, and we submit affords a satisfactory basis for the determination of the questions involved.

In both courts below respondent urged in defense that the products produced at the St. Louis Ordnance Plant were not commerce nor were they goods within the meaning of the Fair Labor Standards Act, supporting these defenses by the arguments used by the Fifth Circuit in Kennedy v. Silas Mason Co., 164 Fed. (2) 1016, and other cases taking that view. Petitioners, on the other hand, contended contra that they were engaged in the production of goods for commence and that the munitions produced were such goods within the meaning of the Fair Labor Standards Act, and relied upon.

Bell v. Porter, 159 Fed. (2) 117 (7th Cir.);
Umthun v. Day & Zimmerman, Inc., 235 Ia. 293, 16 N. W. (2) 259;

Jackson v. Northwestern Airlines, 75 Fed. Supp. 32;
Timberlake v. Day & Zimmerman, Inc., 49 Fed. Supp. 28;
Moehl v. Du Pont de Nemours & Co., 6 W. H. Cases 638, 12 Labor Cases No. 63545;
Clyde v. Broderick, 144 Fed. (2) 348,

and numerous other cases upholding the view that employees of the cost-plus-a-fixed-fee war contractor employed at the Government owned plants in the making of munitions were covered by and entitled to the benefits of the Fair Labor Standards Act.

When the opinion of this Court in Kennedy v. Silas Mason Co., supra, appeared the Court below transferred this case to banc, set aside a previous submission, and ordered reargument with particular reference to the statutes declared by this Court in the Kennedy case to be involved in the determination of these issues, to-wit, the Act of July 2, 1940, the Walsh-Healey Act, and the Fair Labor Standards Act. The Court below determined this case on a novel construction of the above mentioned Federal statutes, and in reversing the judgments of the District Court, the Court below ruled that the Walsh-Healey Act and the Fair Labor Standards Act are mutually exclusive; that they are so divergent that they cannot apply at the same time; that plaintiffs and all employees of respondent were covered by the Walsh-Healey Act, and were thereby excluded from the coverage of the Fair Labor Standards Act. The concurring opinion goes further and holds that the Act of July 2, 1940 provides its own scheme of labor relations and suspends operation of all other labor relation laws in the war plants, and both opinions reached the conclusion that the United States District Court was without jurisdiction to grant relief to petitioners under the Fair Labor Standards Act. Believing each and all of

the foregoing rulings of the Court below to be untenable, and they being questions of great public importance, we have brought these proceedings to obtain a review.

REASONS FOR GRANTING WRIT.

1.

The reasons why certiorari should be granted in this case cannot be better stated than by this Court in its opinion in Kennedy et al. v. Silas Mason Co., 334 U. S. 249, 92 L. Ed. 1347, decided May 17, 1948. The Kennedy case was brought under Section 16 (b) of the Fair Labor Standards Act by a group of inspectors and foremen employed at the Shreveport, Louisiana ordnance plant to recover overtime compensation as prescribed in Section 7 of the Act, plus liquidated damages and an attorney's fee. This case was brought under the same Act to obtain the same relief by fifty-nine men employed mostly as inspectors in the St. Louis Ordnance Plant. Both plants were Government owned and operated under cost-plus-a-fixed fee contracts. There were some differences in that in this case the contract described the status of the contractor as an "independent contractor," and it expressly stipulated that the contractor was "in no wise an agent of the Government" (R. p. 780), and further, that it should make all contracts in its own name and not bind or purport to bind the Government (R. p. 787), and in this case the pleadings admit petitioners to be employees of the contractor (R. p. 30). There is a further difference in that the record here shows that a by-product was produced which moved in interstate commerce in substantial quantities as private shipments by the contractor to its own subsidiary on commercial bills-of-lading (R. pp. 356-359). Otherwise, however, this record raises the same fssues as were raised in the Silas Mason Co. case, supra, and the same questfons are involved.

It appears from the first paragraph of this Court's opinion in the Silas Mason Co. case that it involved application of the Fair Labor Standards Act to workers in Government owned plants in which the munitions were produced under a cost-plus-a-fixed fee contract with the War Department. Subsidiary issues were:

1. Whether the workers were employees of the Government or the private contractor.

2. Whether munitions produced for shipment across state lines in war use are produced for commerce.

3. Whether such shipments are goods within the meaning of the Fair Labor Standards Act (l. c. 251).

This Court held that in the determination of these issues "three Acts of Congress require consideration," to-wit, the Fair Labor Standards Act, the Act of July 2, 1940, and the Walsh-Healey Public Contracts Act. This Court held that substantial claims were involved "and many other cases than this will be controlled by its decision" (l. c. 251-2), and throughout the opinion the Court referred to the issues as "far reaching," "far flung," and "important." The Silas Mason Co. case came to the Court on motion for summary judgment supported by a very scant record which contained no testimony. At the outset this Court raised the question whether it should, as a matter of good judicial administration, "attempt to decide these far flung issues on this record" (l. c. 252), and the Court concluded on the record then before it that it would not be good judicial administration to attempt decision of issues of such "far flung import," and that decision on such issues would be withheld "until this or another record shall present a more solid basis of findings based on litigation or on a comprehensive statement of agreed facts" (l. c. 257). The record presented by petitioners herewith is such a record. It is based on litigation and

affords that solid basis for decision found wanting in the Silas Mason Co. case. The Court below in its order for reargument found that this record "would seem to be sufficient to warrant the consideration of the question as to the applicability" of the three Acts of Congress above enumerated (R. p. 981). In this case many witnesses were introduced by both sides who described fully the petitioners' duties at the plant, the manner in which the plant operated under the cost-plus-a-fixed fee contract, and the contemporary interpretation placed by the parties themselves upon the prime contract, and upon the application of the Fair Labor Standards Act to the workers in this plant.

We submit that all of the reasons which impelled this Court to grant certiorari in Kennedy v. Silas Mason Co. supra apply with equal force here, and that we have presented with this petition a record which affords a satisfactory basis for the determination of the questions presented, and which this Court indicated it would determine.

2.

Further evidence of the public importance of the questions presented is found in the brief for the Administrator of the Wage and Hour and Public Contracts Division of the United States Department of Labor filed amicus curiae in the Court below in support of the petition for rehearing (R. 1023-1036). It is there made clear that the decision below has far reaching implications. For more than ten years all of the administrative and enforcement machinery set up by the Labor Department, and all of the regulations and interpretations applicable to both basic statutes, which have been issued by the Administrator or the Secretary of Labor, together with the recommendations made to Congress and the appropriations made by Congress, have all been on the assumption that the Fair Labor Standards

Act and the Walsh-Healey Public Contracts Act were not mutually exclusive. The opinion of the Court below upsets all this, throws the administration of both Acts into confusion and will require large scale review and modification of all existing administrative regulations and interpretations (Administrator's brief, supra, R. 1024-1032). The Administrator further points out that this confusion will be aggravated by the curtailment of remedies under the opinion of the Court below. In the past the availability of the employees suit, and the criminal sanctions of the Fair Labor Standards Act, have been most effective in the enforcement of both Acts (Administrator's brief, supra, R. 1032-1035). We submit that the views of the Labor Department, as set out in their brief in support of the petition for rehearing in the Court below (R. 1023 et seq.), but emphasize the public importance of the questions presented, and make it clear that this case presents important questions of Federal law that have not been, but should be settled by this Court.

3.

The opinion below is in conflict with the decision of the Court of Appeals for the Sixth Circuit in Walling etc. v. Patton-Tulley Transportation Company, 134 F. (2d) 945 (6th Cir., decided 1943). That was an enforcement proceeding by the administrator to compel compliance with the wage and hour provisions of the Fair Labor Standards Act. It involved a public project being done on the Mississippi and Missouri Rivers by Patton-Tulley Transportation Company, under contract with the United States. The workers in question were "engaged in constructing and repairing dikes and revetments" in the channels of the Missouri and Mississippi Rivers (l. c. 946). It was urged in defense that the wage and hour provisions of the Fair Labor Standards Act with respect to the employees in

question had been "superseded" (l. c. 948, top 2nd column) by an amendment to the Eight Hour Law enacted September 9, 1940 (40 U. S. C. A. 325a). The Eight Hour Law enacted June 19, 1912 (40 U. S. C. A. 324, 325) applied to public contracts, to-wit, every contract to which the United States was a party which required the employment of laborers and mechanics. The amendment of September 9, 1940, provided that "notwithstanding any other provision of law" work in excess of eight hours per day should be computed on the basic day rate of eight hours per day, and should be compensated for "at not less than one and one-half times the basic rate of pay." Section 7 of the Fair Labor Standards Act prohibits work in excess of forty hours per week unless compensated for at not less than one and one-half times the "regular rate;" and prescribes no method of computing the regular rate. The District Court had ruled that these differences made the two enactments repugnant and inconsistent, and therefore concluded that the Eight Hour Law amendment superseded the Fair Labor Standards Act in respect to wages and maximum hours of the employees in question. The Court of Appeals for the Sixth Circuit, however, disagreed. It found nothing repugnant in the two statutes, nor any difficulty in requiring compliance with both. We quote (l. c. 948) paragraph 6, to-wit:

> "We perceive no difficulty in the reconcilement of the Eight-Hour Law amendment with the Fair Labor Standards Act. The one limits employment at basic pay to 40 hours a week, the other deals solely with daily employment of men in certain classifications, and limits such employment at basic pay to 8 hours a day. No difficulty will be perceived in complying with both statutes,—giving overtime pay for work in excess of the weekly maximum in the one case, and overtime pay for work in excess of the daily maximum in the other."

The Sixth Circuit then proceeded to rule that the Fair Labor Standards Act applied to work under Government contracts, remarking that this was particularly true in war time when most major industries were operating on Government contracts (l. c. 949):

> "Like the Fair Labor Standards Act, the Eight-Hour Law is one whose purpose it is to eliminate sub-standard working conditions. As such it should be given construction to effect such purpose. Overstreet v. North Shore Corp., supra. The argument that it was the Congressional intention to make the Fair Labor Standards Act inapplicable to work under government contract, must be rejected. No reason appears why contractors for the government are to be permitted to maintain substandard labor conditions while private contractors are prohibited from so doing, and such view would thwart the clearly defined purpose of the Congress, particularly if applied at a time when all, or nearly all, major industries are operating upon government contract."

We submit that the differences between the Fair Labor Standards Act applying to employees engaged in the production of goods for commerce, and the Walsh-Healy Public Contracts Act applying to employees engaged in the manufacture of materials, supplies, articles and equipment under public contract, are no greater than the differences between the Fair Labor Standards Act and the Eight Hour Law as amended September 9, 1940, applying to public contracts requiring employment of laborers and mechanics. Yet in the latter case the United States Court of Appeals for the Sixth Circuit in Walling v. Patton-Tulley Transportation Co. had no difficulty in reconciling the two, and in giving effect to both at the same time, and on the same project. The opinion below is in direct conflict with the decision and rationale of the Sixth Circuit

in the Walling case. It has been the custom of this Court to take jurisdiction on certiorari to resolve such conflicts.

This precise question seems to have been raised in only one other case—Lasater v. Hercules Powder Company, decided by the District Court for the Eastern District of Tennessee July 25, 1947, 73 Fed. Supp. 264. In the Lasater case the plaintiffs were employees of Hercules Powder Company that operated the Government-owned ordnance plant near Chattanooga, Tennessee, under a cost-plus-a-fixed-fee contract with the War Department for the manufacture of munitions. The action was brought under the Fair Labor Standards Act to recover overtime compensation, liquidated damages and an attorney's fee. The defendant disclaimed liability, among other reasons, because "the rate of pay and working conditions of the plaintiff were regulated by the Walsh-Healey Act, the Eight Hour Law, and the Davis-Bacon Act, and not by the Fair Labor Standards Act of 1938" (l. c. 267). The Court held, however, that the Fair Labor Standards Act was not restricted because of either of these previous enactments. In so holding the Court said (l. c. 268):

> "From an examination of the Eight-Hour Law, the Davis-Bacon Act and the Walsh-Healey Act, together with the Congressional history of labor laws raising standards of pay and working conditions, the conclusion is quite evident that the intended coverage of the Fair Labor Standards Act is not restricted because of these previous enactments. I deem it unnecessary to undertake to analyze the premises resulting in this conclusion.
>
> "The Fair Labor Standards Act is applicable to work under government contracts. Walling v. Patton-Tulley Transp. Co., 6 Cir., 134 F. 2d 945."

As the Lasater case, supra, is directly in point on the facts, and rules squarely that the intended coverage of the Fair

Labor Standards Act is not restricted because of the previous enactment of the Walsh-Healey Act, it is apparent that the ruling below is not only in conflict with the Sixth Circuit, but with the weight of authority as well.

We urge further that there is also involved in this case the issues in respect to interstate commerce presented to this Court, but not decided in Kennedy v. Silas Mason Co., 334 U. S. 249. Assuming that this Court in this proceeding will reject the ruling below to the effect that the Fair Labor Standards Act and the Walsh-Healey Act are mutually exclusive and cannot apply at the same time, it still must be determined in this proceeding whether or not the products produced at the St. Louis Ordnance Plant were produced for commerce, and were goods, under the language of the Fair Labor Standards Act. These have been the principal defenses of the respondent heretofore in this case, and it would seem to us that the issue will have to be resolved in order to finally determine the question of coverage. On these points the Seventh and Fifth Circuits are in direct conflict. The Seventh Circuit in Bell v. Porter, 159 F. (2d) 117, has squarely ruled that the cost-plus-a-fixed-fee contractors with the Government engaged in war production were not agents of the Government, that they did not share in the Government's sovereign immunities, and that their employees were engaged in the production of goods for commerce within the meaning of the Fair Labor Standards Act, and that commerce included all transportation across state lines irrespective of the ownership of the plant or the munitions, or the fact that they were shipped for war purposes. (See also Umthun v. Day & Zimmermann, 235 Ia. 293, 16 N. W. [2d] 258; Clyde v. Broderick, 144 F. [2d] 348 [10th Cir.]; Jackson v. Northwest Airlines, 75 Fed. Supp. 32; Timberlake v. Day & Zimmermann, 49 Fed. Supp. 28, and numerous other decisions taking this view.) On the contrary, the Fifth Circuit in Ken-

nedy v. Silas Mason Company, 164 F. (2d) 1016, has taken a directly opposite view, holding that the transportation of such munitions is not commerce, and that the munitions produced were not goods within the meaning of the Fair Labor Standards Act, and this view has been followed in other decisions, notably in the Fifth Circuit. It was to resolve these conflicts that this Court granted certiorari in the Silas Mason case. These conflicts still exist.

We here present a record that contains all the facts necessary to afford a basis for the determination of these conflicts, and there is thus additional reason why this Court should grant certiorari in this case.

CONCLUSION.

Summarizing, we submit that we have here a classical example of the type of case in which this Court has been accustomed to grant certiorari. The questions presented are of great public importance; the decision thereof will not only decide the instant case, but will control much other litigation, and the administration by a Government department of the two most important federal statutes in the field of labor relations, and will also determine the proper construction of the National Defense Act of June 2, 1940 in an important respect. The construction placed on these statutes by the Court below is unprecedented, and we respectfully submit is supported by neither reason nor authority. It conflicts with a decision in the Sixth Circuit and is opposed to the weight of authority, and the final determination of this case will also involve a resolving of the conflict between the Seventh and Fifth Circuits in respect to commerce. The public interest would seem to require that all these conflicts be resolved, and we submit that the proper construction of the above mentioned federal statutes in the important respects here involved are matters which should be definitely settled by this Court.

PRAYER FOR WRIT.

Wherefore, petitioners pray that this Court issue its Writ of Certiorari directed to the United States Court of Appeals for the Eighth Circuit, commanding that Court to certify and send to this Court for its review and determination on a day certain to be named therein, a full and complete transcript of all the record and all proceedings in the cause numbered and entitled on its docket as No. 13663, The United States Cartridge Company, a corporation, Appellant, v. R. M. Powell et al., Appellees, and that said judgment of the United States Court of Appeals for the Eighth Circuit may be reversed by this Court; and that your petitioners may have such other and further relief in the premises as to this Court may seem meet and just.

THOMAS BOND,
Attorney for Petitioners.

BRIEF.

In Support of Petition for Certiorari.

The statement of the **grounds of jurisdiction**, reference to the **opinion below**, and the **statement of the case** required by Rule 27 are all set out in the foregoing petition for certiorari.

Specification of Assigned Errors to be Urged.

The Court of Appeals for the Eighth Circuit erred:

1. In holding that the Fair Labor Standards Act and the Walsh-Healey Act are so divergent that both may not apply at one and the same time (R. p. 995).

2. In holding that the petitioners and all other employees of respondent were at all times exclusively engaged in the production activities to which the Walsh-Healey Act applies (R. pp. 992, 995).

3. In holding that petitioners were within the coverage of the Walsh-Healey Act.

4. In holding that petitioners were not within the coverage of the Fair Labor Standards Act.

5. In holding that the provisions of the prime contract (Defendant's Exhibit 20, R. p. 783) made the Walsh-Healey Act applicable to the exclusion of the Fair Labor Standards Act.

6. In holding that the provisions of the Act of July 2, 1940, or any action of the Secretary of War thereunder, excluded petitioners from the benefits of the Fair Labor Standards Act.

7. In holding that employees of the St. Louis Ordnance Plant engaged in the production of goods for interstate commerce were not within the coverage of the Fair Labor Standards Act.

8. In holding that the United States District Court was without jurisdiction to grant relief under the Fair Labor Standards Act.

ARGUMENT.

I.

The Fair Labor Standards Act and the Walsh-Healey Act Are Not Mutually Exclusive.

The basic error in both opinions below rests in the assumption that the Walsh-Healey Act excludes coverage under the Fair Labor Standards Act, and that both Acts cannot apply at the same time. This assumption is contrary to the language of both enactments, their legislative history, long standing departmental interpretation and Court decisions. The Walsh-Healey Act was enacted June 30, 1936 (41 USCA 35-45). The Fair Labor Standards Act was enacted June 25, 1938 (29 USCA 201-209). Congress was thus aware of the existence of the Walsh-Healey Act and numerous other enactments in the field of public contracts and labor relations. Congress made express provision against any possible limitation of the Fair Labor Standards Act by reason of these enactments, to-wit: Section 18 provides that no provision of the Act shall excuse noncompliance "with any federal or state law or municipal ordinance" establishing a higher minimum wage or a lower maximum workweek (29 USCA 218). Further, by Section 13 Congress expressly excluded from the scope of the Fair Labor Standards Act employees covered by certain other acts, to-wit: employees subject to regulation under the Railway Labor Act (Sec. 13 [a] [4]), or any employee with respect to whom the Interstate Commerce Commission has power to regulate maximum hours, under the Motor Carriers Act or the Interstate Commerce Act (Sec. 13 [b] [1] [2]). The failure of Congress to make similar provision for the exclusion of employees covered by the Walsh-Healey Act is a clear indication that Congress did not intend that they be excluded if otherwise within the coverage of the Fair Labor Standards Act.

Further, on May 13, 1942 Congress amended the Walsh-Healey Act providing for the exemption of employers who had entered into agreements with their employees "pursuant to the provisions of Pars. 1 or 2 of subsection (b) of Section 7 of an Act entitled 'Fair Labor Standards Act of 1938' " (56 Stat. 277; 41 USCA 35 [c]). It is apparent that Congress thus recognized that the two statutes could overlap, and that certain employees came under both Acts, because if the two Acts could not apply at the same time, as the Court below ruled, there would have been no reason whatever for this amendment. Further, the application of the Fair Labor Standards Act to employees of cost-plus-a-fixed-fee contractors in the war plants was definitely recognized by Congress in the amendment to the Fair Labor Standards Act enacted May 14, 1947, known as the Portal-to-Portal Act of 1947. One of the stated purposes of that Act was to invalidate portal-to-portal claims by employees under the Fair Labor Standards Act because of the "increased cost of war contracts." (Public Law 49, 80th Congress, Chap. 52, 1st Sess., 29 USCA Pocket Part 251 [a] [9]).

In addition to all this, it appears that for more than ten years the Department of Labor has consistently interpreted the two Acts on the theory that they were not repugnant and that application of both Acts to employees of government contractors who were engaged in commerce or the production of goods for commerce was in harmony with the common objectives pursued by Congress in enacting both types of labor regulation. As pointed out in the brief for the Administrator of the Wage and Hour and Public Contracts Division of the Department of Labor filed below in support of the petition for a rehearing (R. 1028-1031) Congress was repeatedly made aware of the Department's interpretation, and with that knowledge made appropriations for enforcement. This has been held to be

a confirmation and ratification of the administrative interpretation. Brooks v. DeWar, 313 U. S. 354, 361; Flemming v. Mohawk Co., 331 U. S. 111, 116.

Further, the uncontradicted evidence in this case discloses that the parties themselves interpreted the two Acts as having concurrent application. All employees of the respondent on their employment were given a booklet in which the Company's labor policies were set out, and in that booklet it was expressly stated, to-wit, (Plffs' Exhibit 3-C, R. 188, 189, 206):

> "There will be eight hours in any working day, and forty hours will constitute a working week. To meet the schedule required of us by the National Defense Program, it will be necessary to employ three shifts on production operations. When production demands require a longer work day, or longer work week, the Company will pay the legal overtime rate as provided under the Walsh-Healey Act, and the Fair Labor Standards Act. When three shifts are operating there will be rotation of the first, second and third shifts every two weeks. A lunch period will be allowed on each shift and will be paid for by the Company, that is, no deduction will be made for this lunch period."

Decisions holding that the two enactments are not repugnant and that coverage under the Walsh-Healey Act does not exclude coverage under the Fair Labor Standards Act have been cited, supra, under Reasons for Granting Writ. We know of no cases to the contrary.

As additional authority, we cite the decision of this Court rendered May 16, 1949, in Brooks v. The United States (Nos. 388 and 389, October Term, 1948) holding that the Tort Claims Act and the Veterans' Laws are not mutually exclusive. In reaching this conclusion this Court said:

> "Unlike the usual workmen's compensation statute, e. g., 33 U. S. C., §905, there is nothing in the Tort Claims Act or the veterans' laws which provides for exclusiveness of remedy. * * * Nor did Congress provide for an election of remedies, as in the Federal Employees' Compensation Act, 5 U. S. C., §757. Thus **Dahn v. Davis**, 258 U. S. 421, and cases following that decision, are not in point. Compare **Parr v. United States**, 172 F. 2d 462. We will not call either remedy in the present case exclusive, nor pronounce a doctrine of election of remedies, when Congress has not done so." * * *

We submit that the decision below to the effect that these Acts cannot both apply at the same time is untenable.

II.

The Walsh-Healey Act Had No Application to Petitioners.

We have pointed out above that if there was an overlapping of the Fair Labor Standards Act and the Walsh-Healey Act with respect to petitioners, that such fact would not exclude relief. We submit further, however, that petitioners were not shown to be within the purview of the Walsh-Healey Act and that the holding below that they were is not supported by any evidence.

The Fair Labor Standards Act not only covers workers actually engaged in production but also includes workers engaged "in any process or occupation necessary to the production thereof" [Section 3 (j)].

The Walsh-Healey Act, on the contrary, does not contain such a clause and its scope is limited to workers employed "in the manufacture or furnishing of the materials," etc. [Section 1 (b)]. Petitioners were inspectors or

engineers (these terms being interchangeable) in the Safety Department. They were required to patrol the units, inspect safety conditions, and report on violations of safety rules or unsafe conditions. (See description of the duties of the safety engineers in the manual of instructions given by respondent to all petitioners, marked Plaintiffs' Exhibit F, Record pp. 68, 69 to 71.) These duties were, of course, an occupation necessary to the production of the munitions within the meaning of Section 3 (j) of the Fair Labor Standards Act and the complaint so charges (R. p. 6). This work, however, was not employment "in the manufacture or furnishing of materials," etc., within the limited language of the Walsh-Healey Act. Coverage under the Walsh-Healey Act is a question of fact which this Court has held must, in the first instance, be determined by the Secretary of Labor (Endicott Johnson Corp. v. Perkins, 317 U. S. 501, l. c. 508, 509).

The respondent, United States Cartridge Company, interpreted the Labor Department's rulings and regulations promulgated under the Walsh-Healey Act as exempting petitioners from the Act. Defendant's Exhibit 14, R. p. 611, offered in evidence by respondent (R. 613), is in part as follows:

> "(b) He is also exempt from the overtime provisions of the Walsh-Healey Act because the provisions of that Act are not 'deemed applicable to office or custodial employees'; Regulations, Article 102, A. J. McMahon, Occupational Analyst."

Petitioners' duties were largely office and clerical, particularly in making out their reports, and their activities in patroling the units and checking on safety violations were of a custodial nature. They did not question the fact that they were exempt from the provisions of the Walsh-Healey Act. Thus it appears that the Court below has

reversed this case on an issue of fact not pleaded in the answer as a defense, not tried in the District Court, and has drawn a conclusion of fact contrary to the position taken by both parties, both throughout the employment and during the trial in the District Court. We submit that the ruling was error.

See also discussion of this point in the Petition for Rehearing below [R. 1007, l. c. 1013 (b)-1015].

III.

The Act of July 2, 1940.

The concurring opinion approved by a majority of the Court below suggests that there is in the Act of July 2, 1940 [54 Stat. 712, Ch. 508, 50 U. S. C. A., App. Sec. 1171 et seq., 5 U. S. C. A., Sec. 189 (a)] "a reservoir of power in the Secretary of War so to act, independent of the Wage and Hour provisions of any other statute" (R. 1000). This resembles the defense urged by the contractor in the Silas Mason case, supra, to the effect that the 1940 Act set up a wholly new system of war production which prescribed a complete system of labor relation by statute, superseding and precluding the operation of the Fair Labor Standards Act (Kennedy v. Silas Mason Co., 334 U. S. 249, l. c. 256). We submit that these contentions are refuted:

(a) By the language of the Act itself, in that the 1940 Act did not specifically provide for the suspension of the Fair Labor Standards Act, and contains no provision which conflicts with the operation of that Act, and that these facts together with the specific suspension by Congress of a number of other statutes, clearly indicates that suspension of the Fair Labor Standards Act was not intended. [See July 2, 1940 Act, Secs. 1 (a), 1 (b), 2 (a), 2 (b), 3 and 4 (a).]

(b) By the legislative history of the 1940 Act, to-wit, the House Committee on Military Affairs, listed and explained the statutes which would be suspended by the 1940 Act (H. Rept. 2261, 76th Congress, 3rd Sess. 1940) and a member of that Committee enumerated on the floor of the House the statutes which would be suspended (86 Cong. Record 6826). In neither case was the Fair Labor Standards Act mentioned.

Further, the amendment to the July 2, 1940 Act, making reference to the Walsh-Healey Act, was proposed by Senator Wagner, who pointed out that the Walsh-Healey Act only applied to contracts let after advertisement and public bidding, whereas this National Defense Act provided for negotiated contracts. The only purpose of this amendment was to make it clear that contracts negotiated under this legislation would be subject to the provisions of the Walsh-Healey Act. He explained this fully on the floor of the Senate, and in the course of his explanation said (Cong. R., Vol. 86, pt. 7, p. 7924, June 11, 1940):

> "Unless this amendment is adopted, we should have this anomalous situation: under a contract entered into with the Government as the result of public bidding one set of minimum wages, that is, the prevailing wages, would be applied, whereas under another contract entered into as a result of negotiations, a much lower minimum wage would be paid, that is, the flat minimum **under the Wage and Hour Act.**" (Emphasis ours.)

We submit that the language just quoted makes it clear that the Senate acted on the Wagner amendment on the assumption that without it employees producing goods under contracts such as the one involved in this case would be subject **only** to the "Wage and Hour Act" meaning, of course, the Fair Labor Standards Act.

(c) The War Department in September, 1940, expressed the opinion that employees working at ordnance plants, such as the one operated by respondent in this case, were covered by the Fair Labor Standards Act. (See letter of Secretary of War to the Comptroller General, dated August 25, 1942. Full text of this letter appears in the brief for the United States filed by the Solicitor General in the Silas Mason case, pp. 13 and 14 footnotes.)

(d) We submit further that even if the Secretary of War had the powers suggested in the concurring opinion, which we deny, nevertheless he never exercised any such power in respect to wages and hours of the workers in the St. Louis Ordnance Plant. The reference in the Prime Contract [R. p. 783, Art. 3 (d)] to the Walsh-Healey Act, and the inclusion of certain representations and stipulations pursuant to that Act was not an attempt by the Secretary of War to regulate wages and hours in this Plant, but was merely a compliance with the express language of Section 1 of the Walsh-Healey Act, which required that in all public contracts involving an amount in excess of $10,000 such representations and stipulations be included. It was apparent, of course, that in the performance of this contract some employees would be employed who were within the coverage of the Walsh-Healey Act, and the representations and stipulations referred to in Section 1 of the Act were included in the contract for their benefit, as the law required they should be.

We respectfully submit that the reference in the contract to the Walsh-Healey Act, and the inclusion of this matter in the Prime Contract had no other significance.

We submit further that our contention that the Act of July 2, 1940 was not intended to suspend operation of the Fair Labor Standards Act in the war plants is supported by Executive Order No. 9301 signed by the President Feb-

ruary 9, 1940 (8 Fed. Reg. 1825), quoted in full Rec. pp. 1021-1022. This is the Executive Order that prescribed the forty-eight hour minimum wartime work week. It is the order under which petitioners herein were required to work a six day week, and it expressly provides in Paragraph 5 thereof, as follows:

> "Nothing in this Order shall be construed as superseding or in conflict with any Federal, State or local law limiting hours of work or with the provisions of any individual or collective bargaining agreement with respect to rates of pay for hours worked in excess of the agreed or customary work week, nor shall this Order be construed as suspending or modifying any provisions of the Fair Labor Standards Act (Act of June 25, 1938; 52 Stat. 1060; 29 U. S. C. 201 et seq.) or any other Federal, State or local law relating to the payment of wages or overtime."

This Executive Order remained in force throughout the entire period of the war, and we respectfully submit makes it clear that the Fair Labor Standards Act should apply for the benefit and protection of the workers in the war plants.

We submit that there is nothing in the Act of July 2, 1940, or any executive action taken by the President under his war powers that is suspensive of the Fair Labor Standards Act. The Act itself was never urged by the respondent in defense of this case, and was never even cited or mentioned in the Trial Court, where the case was tried on the theory that this enactment had no bearing on the issues involved.

IV.

The Munitions Manufactured at the St. Louis Ordnance Plant Were "Goods" and They Were "Produced for Commerce" Within the Meaning of the Fair Labor Standards Act.

Mindful of this Court's admonition, Rule 38, Parg. 2, that supporting briefs must be "direct and concise" we leave the full development of these points to a later stage of the case. Summarizing the argument, we contend that the language in Section 3 (d) of the Fair Labor Standards Act, to-wit, that it shall not include the United States, does not exempt employees of a private contractor operating a munitions plant under a cost-plus-a-fixed-fee contract with the United States. The adjudicated cases establish that employees who work for those who contract with the Government are not the Government's employees, even though the economic burden falls on the Government through a cost-plus-a-fixed-fee arrangement; and even though the Government may exercise a supervisory control over the performance of the contract. The contract here in evidence provides that the employees shall be subject to the control and constitute employees of the contractor. It subjected the contractor to many statutes inapplicable to Government employees [R. 773 (i), 790 (111-j), 786-7 (b)], and to accept the argument of the respondent herein would be to hold in effect that the employees of such contractors are Government employees for purposes of the Fair Labor Standards Act, but not with reference to anything else. We contend further that munitions produced at a Government owned plant under a cost-plus-a-fixed-fee contract and intended to be transported across state lines for war purposes are produced for commerce within the meaning of the Fair Labor Standards Act even though the title to the goods is in the Government and the shipments are at Government direction. We also contend that

a private contractor operating a plant under a cost-plus-a-fixed-fee arrangement is not an agency of the United States and does not share any of the Government's sovereign immunities, and that the goods here produced are produced for commerce within the meaning of the Fair Labor Standards Act.

We contend further that Section 3 (i) of the Act exempting goods after their delivery into the actual physical possession of the ultimate consumer does not apply to manufacturing operations which occurred before the goods came into the actual physical possession of the United States, and that the goods produced at the St. Louis Ordnance Plant were goods within the meaning of the Fair Labor Standards Act.

Amplifying somewhat on this summary and making reference to the pertinent authorities, we submit:

(a) **Petitioners not employees of the United States.** It has been decided that the employees of a private contractor operating under a cost-plus-a-fixed-fee contract are not employees of the Government, and that Government is not here present as the employer. U. S. v. Driscoll, 96 U. S. 421; Jackson v. Northwest Air Lines, 75 F. Supp. 32; Rumrich v. United States, 68 F. Supp. 792. In the Driscoll case the Supreme Court held that an employee of a cost-plus a percentage of cost contractor could not sue the United States for wages.

The contract in this case, Art. 1-E, provided that all persons engaged in the work "shall be subject to the control and constitute employees of the contractor" (R. 771).

(b) **Contractor not an agency of the United States.** It has also been authoritatively ruled that these Government Contractors are not agents, agencies or instrumentalities of the United States and are not entitled to enjoy any

of its sovereign immunities. Alabama v. King & Boozer, 314 U. S. 1; Curry v. U. S., 314 U. S. 14; Buckstaff Bath House Co. v. McKinley, 308 U. S. 358, 84 L. Ed. 322; Bell v. Porter, 159 F. (2d) 117. The Supreme Court has ruled that service performed by a private corporation under a contract with the United States does not make it an instrumentality of the latter even though the service is performed on Government owned property and under supervisory control by the Government. See Buckstaff Bath House Co. v. McKinley, 308 U. S. 358, 84 L. Ed. 322. There it was held that the exemption in the Social Security Act for services performed "in the employ of the United States Government or of an instrumentality of the United States" was inapplicable to employees of an Arkansas corporation organized for profit whose only business was the operation of a bath house on the United States Government reservation known as Hot Springs National Park, and the Court said (84 L. Ed. 325):

> "That control, being wholly supervisory, is not to be differentiated from the type of control which the United States may reserve over any independent contractor without transforming him into its instrumentality."

We submit that the foregoing ruling applies with particular force here, where the Government expressly stipulated in the contract that the contractor was "in no wise an agent of the Government" (R. 780). These stipulations as to the "status of contractor" (R. 780), characterizing it is an independent contractor and not an agent of the Government, were **not included** in the contract before the Fifth Circuit in the Silas Mason Co. case.

(c) **Commerce.** The best considered cases sustain the view of the trial court, and of the Labor Administrator, and of the Solicitor General of the United States (see his

brief in Silas Mason case), that the goods produced at these war plants under the contract and evidence in this case are commerce within the meaning of the Fair Labor Standards Act. Notably, Bell v. Porter, 159 F. (2d) 117; Umthun v. Day & Zimmermann, Inc., 235 Iowa 293, 16 N. W. (2d) 258; Jackson v. Northwest Air Lines (D. C. Minn., Oct. 9, 1947), 75 F. Supp. 32; Timberlake v. Day & Zimmermann, Inc., 49 F. Supp. 28. We earnestly ask the Court's consideration of the reasoning in these four cases.

We particularly stress the decision in the Jackson case, where it answers the argument that war is the negation of commerce (75 F. Supp., l. c. 39), pointing out that war is no more the antithesis of commerce outside the battle areas when the Government ships the goods, than it is when they are shipped by private producers or manufacturers. It is obvious that in the prosecution of a global war the Government must of necessity utilize the facilities of commerce, and this commerce does not lose its character as such merely because the Government directs the shipments.

Even the Fifth Circuit Court of Appeals in the Silas Mason case concedes that if this were a contract of a manufacturer to make and deliver munitions of war to the United States its employees would have been subject to the Fair Labor Standards Act. We quote (164 F. [2d], l. c. 1017):

> "Had the defendant been engaged under its contract in the business of manufacturing **munitions of war**, either as a general proposition, or under contract by which it agreed to produce and sell to the Government, either at fixed prices, or at prices to be fixed from time to time, then we are of opinion that it would come within the Fair Labor Standards Act." (Emphasis ours.)

Such a distinction between workers for ordinary war contractors and cost-plus-a-fixed-fee contractors is wholly illogical. It would mean that workers for these two types of contractors, working for the same end, and under the same conditions, and making the same thing for the same purposes, would by reason of a difference in the type of contract be subject to different requirements as to minimum and maximum wages and overtime payments. There is no valid reason for such a distinction, and Judge Hutcheson aptly pointed it out in his dissent (l. c. 1020):

> "I ask upon what permissible theory can it be claimed that appellants are not covered here, when it is conceded that had they been working for a private plant which made munitions for sale and delivery to the United States for war, they would have been. The munitions in both cases would be for purposes of war and not of ordinary trade, but in both cases they would have been produced for transportation from a state to a place outside thereof."

In this connection it is interesting to note that the War Labor Disputes Act (50 U. S. C. A., Appendix, Secs. 1501-1511), after authorizing the War Labor Board to decide labor disputes in plants producing articles or materials necessary or useful to the war effort, expressly provided in Sec. 1507, subparagraph (2) that:

> "In making any such decision the Board shall conform to the provisions of the Fair Labor Standards Act of 1938 as amended."

Thus clearly indicating that Congress intended the Act to apply to workers on goods produced for the war effort.

Commerce need not be commercial. Bell v. Porter, 159 F. (2d) 117, Syl. 3, l. c. 119, par. (3). Mere interstate transportation suffices.

The narrow concept of commerce as being merely trade or traffic has never obtained in this country. "Commerce," in the Constitution, is without a definition, but the United States Supreme Court has, from earliest times, construed it to include more than trade or traffic, beginning with Gibbons v. Ogden, 9 Wheat. 1, to and including United States v. Southeastern Underwriters' Ass'n, 322 U. S. 533, 88 L. Ed. 1440. In the latter case the Court observed (at p. 549): "* * * not only then may transactions be commerce, * * * though non-commercial * * *."

Recently the United States Supreme Court held, in National Labor Relations Board v. Fainblatt, 306 U. S. 600, 83 L. Ed. 1014, Syl. 3, l. c. 1018:

> "Transportation alone across state lines is commerce within the constitutional control of the national government and subject to the regulatory power of Congress."

There are many other decisions of the United States Supreme Court expressing the view that commerce need not be commercial, e. g., Gooch v. U. S., 297 U. S. 124, 56 S. Ct. 395, 80 L. Ed. 522 (kidnapped persons); Brooke v. U. S., 267 U. S. 432, 45 S. Ct. 345, 69 L. Ed. 699, 37 A. L. R. 1407 (stolen automobiles); Weber v. Freed, 239 U. S. 324, 36 S. Ct. 131, 60 L. Ed. 308, Ann. Cas. 1916C, 317 (prize fight films); Hoke v. U. S., 227 U. S. 308, 33 S. Ct. 281, 57 L. Ed. 523, 43 L. R. A., N. S., 906 Ann. Cas. 1913E, 905, and Caminetti v. U. S., 242 U. S. 470, 37 S. Ct. 192, 61 L. Ed. 443, L. R. A. 1917E, 502, Ann. Cas. 1917B, 1168 (women for immoral purposes); Champion v. Ames (lottery case), 188 U. S. 321, 23 S. Ct. 321, 47 L. Ed. 492 (lottery tickets); Reid v. Colorado, 187 U. S. 137, 23 S. Ct. 92, 47 L. Ed. 108 (diseased stock); United States v. Simpson, 252 U. S. 465, 40 S. Ct. 364, 64 L. Ed. 665, 10 A. L. R. 510, and United States v. Hill, 248 U. S. 420, 39 S. Ct. 143, 63 L. Ed. 337, (intoxicating liquors for personal use).

The respondent's argument that these shipments were administrative acts of the Government stems from a dictum in National Labor Relations Board v. Idaho Maryland Mines Corporation, 98 Fed. (2d) 129, l. c. 131. It involves the false conception that commerce must involve "commercial transactions," and the Court making it had some doubts as to its correctness (l. c. 131). Timberlake v. Day & Zimmermann, 49 Fed. Supp. 28, l. c. 32 and 33.

The argument is answered and the authorities on which it is based are distinguished in Timberlake v. Day & Zimmermann, supra, l. c. 32, 33, and in Umthun v. Day & Zimmermann, 16 N. W. (2d) 258, l. c. 260-262. It was also answered by Judge Nordbye in Jackson v. Northwest Air Lines, 75 Fed. (2d) 32, l. c. 38, 39, as follows:

> "* * * But those cases approach the problem on the theory that the transportation activity is a governmental administrative act, and therefore is not commerce, or else on the theory that the goods are war goods and therefore not in commerce. It seems more sound, however, to conclude that the rules of statutory construction and the broad intent and purpose with which Congress enacted the Fair Labor Standards Act require the view that Congress did not intend to exempt by indirection and silence the employees of private employers who perform services or furnish goods to the Government for use by it even if the Government transported the goods across state lines with its own personnel or under its own name, or even if it intended to use the goods for war purposes. The administrative capacity in which the goods were transported herein may be assumed. But is not such transportation 'commerce' as between plaintiffs and the defendant (employees and employer) in the instant situation within the meaning of the Fair Labor Standards Act? The one who transports the goods

and its status in doing so has no necessary relation to the interstate activities of private employers and employees in view of the purposes of the Fair Labor Standards Act. Moreover, it is generally recognized that, as far as commerce is concerned, the one who owns the goods when transportation is effected is immaterial."

Also in the case of Clyde v. Broderick et al., 144 F. (2d) 348, the Tenth Circuit ruled, l. c. 351, paragraph 6, that shipments across state lines "for the convenience of the United States Government" were commerce.

Respondent's contention that under the rule in United States v. Hoar, 2 Mason 311, shipments by the Government are not commerce, because the Government is not included within the general terms of the Act, was answered and rejected by the Supreme Court of Iowa in Umthun v. Day & Zimmermann, 235 Ia. 293, 16 N. W. (2d) 258, l. c. 260, as follows:

"The statement of Justice Story in the Hoar case is by no means a hard and fast rule by which the sovereign is excluded from general terms of a statute; the purpose, subject matter, context, legislative history and executive interpretation are aids to construction which may indicate an intent to bring the sovereign within the scope of the law. United States v. Cooper Corp., 312 U. S. 600, 61 S. Ct. 742, 85 L. Ed. 1071, 1074, 1075, Roberts, J.

"Cases in which the doctrine of the Hoar case have been applied are of two classes: (1) Those where the act, if the sovereign were not excluded, would deprive it of a recognized or established prerogative title or interest. A classic example of these cases is United States v. Hoar itself, holding the sovereign is exempt from general statutes of limitations. (2) Those

where the act would work obvious absurdity if the public or its officers were not held to be impliedly excluded, as, for example, the application of a speed statute to a policeman pursuing a criminal or to a fire department responding to a fire alarm. Nardone v. United States, 302 U. S. 379, 58 S. Ct. 275, 82 L. Ed. 314, 317, Roberts, J. Plainly, this case does not fall within either of these classes. The government is not a party to the case. It is not resisting plaintiff's action, but, on the contrary, the Department of Labor has filed an amicus curiae brief urging a reversal. Plaintiff was not an employee of the government but of a private corporation.

"There is another recognized exception to the rule, if it can be called such, of United States v. Hoar. Where a statute is for the public good or to prevent injury and wrong, the sovereign is bound by it, although not particularly named therein. Nardone v. United States, supra, 302 U. S. 379, 58 S. Ct. 275, 82 L. Ed. 314, 318; United States v. Herron, 20 Wall. 251, 22 L. Ed. 275, 276. It would seem that the Act involved here was intended for the public good and to prevent injury and wrong."

We submit further that if, as respondent contends, the Act could be deemed inapplicable because the procurement of these munitions was an administrative act, the same argument would exclude great segments of the working population, because all workers under Government contracts would be excluded. In other, but analogous situations, exclusion on this ground has been denied. Take the case of the United States mails as relating to the National Labor Relations Act. Employees of contract mail carriers have been held as in commerce. National Labor Relations Board v. Carroll, 120 F. (2d) 457. As relates to the Fair Labor Standards Act, employees of contract mail carriers

have been adjudged under the act. Thompson v. Daugherty, 40 F. Supp. 279; Fleming v. Gregory, 36 F. Supp. 776; Magann v. Transportation Co., 39 F. Supp. 742. And in the case of Walling v. Patton-Tulley Co., 134 F. (2d) 945, employees of an independent contractor on dike and revetment work on the Missouri and Mississippi Rivers were subject to the Fair Labor Standards Act.

Moreover, respondent's argument overlooks the fact that the existence of the Government of the United States was recognized and considered by the Congress in the enactment of the Fair Labor Standards Act, and provided for in Subsection (d) of Section 203. This is the sole provision to be found in the Act relating to governmental exemption and, as heretofore pointed out, it does not include employees of a private contractor.

The Act contains its own definition of "commerce" as "transportation * * * among the several states or from any state to any place outside thereof." The definition makes no exception in the cases of shipments at Government direction for military purposes [29 U. S. C. A. 203 (b)].

See also brief of the Solicitor General filed in this Court on behalf of the United States in the Silas Mason case, supra, pp. 23 to 37, particularly pp. 33, 34, where it is stated that all official statements of policy during the war, military as well as civil, including testimony of the officers of the War, Navy and Labor Departments, and of the War Production Board, were to the effect that war production would be harmed rather than helped by suspension of the overtime provisions of the Fair Labor Standards Act. Also that some eighteen bills were introduced in Congress proposing the suspending or restricting of the overtime provisions of the Fair Labor Standards Act, and that Congress rejected all of them, and, further, that in the enact-

ment of the Portal-to-Portal Act of 1942 [29 U. S. C. A., Pocket Part, Sec. 251 (a) (9)] Congress made it clear in its findings that it was aware of and recognized the applicability of the Fair Labor Standards Act to employees of cost-plus-a-fixed-fee contractors with the Government.

(d) **Goods.** The respondent's contention that the ammunition produced at this plant was not goods within the meaning of Section 3 (i) of the Fair Labor Standards Act was rejected in Bell v. Porter, Jackson v. Northwest Air Lines, Umthun v. Day & Zimmermann, Hamlet Ice Co. v. Fleming, 127 F. (2d) 165, and other cases. In the first place, respondent's assumption that the Government was the ultimate consumer is not based on any evidence and entirely ignores Lend-Lease. Under this enactment great quantities of ammunition produced in the United States were consumed by our allies, particularly England, Russia and China, and there is no proof that the particular ammunition referred to in this record was consumed by the United States. Moreover, the exemption in Section 3 (i) was made for the benefit of the ultimate consumer. The respondent, United States Cartridge Company, was **not** the ultimate consumer; it was the producer, manufacturer or processor, and hence **it** is not entitled to invoke the benefit of the exception stated in Section 3 (i). Jackson v. Northwest Air Lines, 75 F. Supp. 32, l. c. 41 (9).

Aside from these considerations, however, the respondent's argument is fundamentally and basically unsound, as appears from the very language of the statute itself. The exception follows the definition of the word "goods" in Section 3 (i), as follows:

> "but does not include goods after their delivery into the actual physical possession of the ultimate consumer thereof other than a producer, manufacturer or processor thereof."

It is the Wage and Hour Administrator's interpretation that the purpose of the above quoted exception was to protect ultimate consumers other than producers, etc., from the penalties attendant upon violation of Section 15 (a) (1) of the Fair Labor Standards Act, incident to transporting across a state line goods produced in violation of the Act. (Interpretative Bulletin No. 5, October, 1940, pages 3 and 4.) We quote in part, to-wit:

> "All that the term 'goods' quoted above is intended to accomplish is to protect ultimate consumers, other than producers, manufacturers, or processors of the goods in question from the 'hot goods' provision of Section 15 (a) (1)."

Thus, for example, if one buys a pair of shoes in a retail store, and wears them across the state line, he would, under the provisions of the above quoted exception, be protected from the penalties for a violation of Section 15 (a) (1), if the shoes were produced under substandard conditions.

But whatever the purpose of the exception, it is clear from its language that it only applies **after** delivery of the goods into the **actual physical possession** of the ultimate consumer. The uncontradicted evidence, including respondent's own exhibits, establishes that in this case the respondent, United States Cartridge Company, had physical possession, custody and care of the goods and materials in question for all manufacturing purposes, and for the performance of the contract. See Supplement 11 to the Contract, Art. III-Y (R. 833). This physical possession certainly continued until after manufacture was complete, and since the contractor was required by the contract to load the ammunition on to cars or carriers in accordance with the Government's shipping instructions (Contract, Art. I-E, R. 771), we contend that physical possession

could not have been obtained by the ultimate consumer until after arrival at destination. Therefore, since the work of producing the ammunition was done before actual physical possession was acquired by any ultimate consumer, obviously the exception stated in Section 3 (i) has no application. Hamlet Ice Co. v. Fleming, 127 F. (2d) 165, l. c. 170, pars. 12-14; Jackson v. Northwest Air Lines, 75 F. Supp., l. c. 40, par. (B) et seq.

We excerpt from Hamlet Ice Co. v. Fleming, 127 F. (2d) 165, l. c. 170:

> "The contention is that the word 'goods' is subject to the exception wherever it occurs in the Act, and therefore the Ice Company produces nothing and sells nothing within the intendment of the Act. We do not think this argument is sound. It disregards the precise terms of the section that the goods excluded are not those in the possession of the maker but 'goods **after** their delivery into the actual physical possession of the ultimate consumer.' Goods in the course of production are therefore not expressly excluded and exclusion, we think, should not be implied."

See also the above brief of the Solicitor General in the Silas Mason case on this point (pp. 37 to 52).

The above interpretation of Section 3 (i) is the interpretation that the Administrator of the Wage and Hour Division has consistently placed upon that section of the Act. Interpretative Bulletin No. 5 (Oct. 1940), Parg. 6; readopted without change in the 1947 revision. See 29 Code Fed. Regs. Part 776.7 (h), 12 Fed. Reg. 4583, 4585. There the Administrator interprets Section 3 (i) as not exempting employees working on the goods during the course of manufacture, and says that this section "does

not affect the coverage of the act as far as the employees producing the products are concerned," and it concludes:

> "Congress clearly did not intend to permit an employer to avoid the minimum wage and maximum hours standards of the act by making delivery within the State into the actual physical possession of the ultimate consumer, who transports or ships the goods outside the State." (Emphasis ours.)

CONCLUSION.

In conclusion, we submit that certiorari should be granted, and the decision below should be reversed, and the judgment of the District Court affirmed.

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June 2, 1949.

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1949.

R. M. POWELL et al.,
Petitioners,
vs.
THE UNITED STATES CARTRIDGE COMPANY, a Corporation,
Respondent.
No. 96.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit.

BRIEF FOR PETITIONERS.

OPINIONS BELOW.

This case is here on writ of certiorari granted by this Court to review a judgment of the United States Court of Appeals for the Eighth Circuit. The opinions below will be found at pages 982 to 1006 of the record and are reported in 174 F. (2d) 718.

JURISDICTION.

The judgment of the Court of Appeals was entered on May 7, 1949 (R. 1037-9). The petition for certiorari was filed June 3, 1949, and was granted on October 10, 1949. The jurisdiction of this Court is invoked under Title 28, U. S. C. A., Sec. 1254, being a revision of Section 240 (a) of the Judicial Code as amended (Title 28, U. S. C. A., Sec. 347). And see cases cited in **Petition for Writ of Certiorari** under heading **Reasons for Granting Writ.**

STATEMENT.

This suit was brought May 4, 1945, by fifty-nine plaintiffs, petitioners here, while the plant was still operating and petitioners were still employed in the Safety Department as a working group. The plant opefated under the Fair Labor Standards Act, and it was part of the contract of employment that the standard work week should be forty hours and the standard work day eight hours, and if "production demands require a longer work day, or longer work week, the Company will pay the legal overtime rate as provided under the Walsh-Healey Act and the Fair Labor Standards Act" (Plffs. Ex. C-3, R. 188, 189 and 206, under title "Standard Hours of Work"). Production demands did so require and petitioners were required to work a six-day week (R. 316, 332) and for part of the time eight and one-half hour shifts (R. 65, 301, 332, Plffs. Ex. G, R. 214). This forty-eight hour minimum work week was pursuant to Executive Order No. 9301 signed by the President February 9, 1943, and thereafter in effect throughout the war (8 Fed. Reg., p. 1825, R. 1021 to 1022). By this directive the President directed all departments and agencies of the Federal Government to require their contractors to establish a forty-eight hour minimum work week in the war plants, and it was by virtue of this Order that these petitioners were required to work a six-day week, and it was expressly provided in the Order that it should not be construed as suspending or modifying the Fair Labor Standards Act. We quote from Paragraph 5 of the Order as follows:

> "5. Nothing in this Order shall be construed as superseding or in conflict with any Federal, State or local law limiting hours of work * * * nor shall this Order be construed as suspending or modifying any

provisions of the Fair Labor Standards Act (Act of June 25, 1938; 52 Stat. 1060; 29 U. S. C. 201 et seq.) or any other Federal, State or local law relating to the payment of wages or overtime."

Respondent refused to pay for this overtime because it claimed that the petitioners were employed in an administrative capacity, as that term is defined and delimited by the Regulations of the Labor Administrator, and, therefore, under Section 13-A of the Act, they were exempt from the benefits of the minimum wage and maximum hour provisions of the Act (29 U. S. C. A. 213-A). Petitioners protested this classification (R. 303, 304, 306, 452, 952), and while still working at the plant brought this suit to obtain a ruling on this claimed exemption.

Petitioners prevailed in the District Court (see Findings of Fact, Conclusions of Law and Judgment, R. 916 to 922). The Court of Appeals for the Eighth Circuit reversed (174 Fed. [2] 718) on the ground that the Fair Labor Standards Act and the Walsh-Healey Public Contracts Act were mutually exclusive; that petitioners were within the coverage of the Walsh-Healey Public Contracts Act, and, therefore, could not recover under the Fair Labor Standards Act. The concurring opinion rests in part on the additional concept that the prime contract read in the light of the Act of July 2, 1940, makes the Walsh-Healey Public Contracts Act the sole arbiter of petitioners' rights. It is these rulings that are here under review. The petition raises the additional question of whether or not the products produced at this plant were "goods" and were "commerce" within the meaning of the Fair Labor Standards Act.

The respondent operated this plant under a cost-plus-a-fixed-fee contract with the War Department (Deft. Ex. 20, R. 762 to 800). The pertinent parts of this contract are as follows:

Title III, Article III-A (R. 780) defines the status of the contractor as follows:

> "It is expressly understood and agreed by the Contractor and the Government that in the performance of the work provided for in this contract, the Contractor is an independent contractor and in nowise an agent of the Government."

And it further provided that the Contractor should—

> "make all * * * contracts in its own name and not bind or purport to bind the Government or the contracting officer thereunder" (R. 787).

The contract also by way of recital (R. 764) expressed the Government's desire "to have the contractor, as an independent contractor, on a cost-plus-a-fixed-fee basis, make all necessary preparations for the operation of said plant * * * and operate said plant."

It further provided, Title III, Article III-D, (a) (R. p. 783):

> "(a) The Contractor is the manufacturer of or a regular dealer in the materials, supplies, articles, or equipment to be manufactured or used in the performance of the contract."

And also provides that the contractor's overhead, including salaries of its executive officers, interest on capital employed, and expenses of main and branch offices, and all overhead except such as is specifically authorized in Section 1, Article II-A, Title II, was **not** to be reimbursable (Title II, Art. II-A-3, R. 775). The contractor was further required to do all things necessary to operation, to hire all employees and provide, with certain exceptions, all materials, and to provide for storage at the plant and the loading of the ammunition on carriers for shipment in

accordance with the Government's shipping instructions (Defendant's Exhibit 20, Title I, Article I-E, R. pp. 770-71). And in the following Article I-F (R. p. 771), the contractor was required to inspect and check all material by its own inspectors before submitting the goods to the Government for approval (R. p. 771). The contractor was also required to keep records and books of account showing the cost of all labor, material and other expenditures (Article III B-1, R. p. 788), and the contract contemplated payment by the contractor of contributions under the Federal Social Security Act, and all state and local taxes, licenses or fees required by state law (Title II, Article II-A [i], R. p. 773), including state compensation laws (Title III, Article III-J, R. p. 790), and the contractor was required to "obey and abide by" all applicable laws and regulations of the United States, or any state, territory or subdivision thereof (Title III, Article III-F [b], R. pp. 786-7).

The raw materials and work in process were at all times in the physical possession of the contractor and under its control for all manufacturing purposes.

Supplement No. 11 of the Contract, Article III-Y (R. 833), expressly so states. This physical possession continued until after manufacture was complete and the goods inspected and accepted by the Government, and since the contractor was required to load the ammunition on cars or other carriers in accordance with the Government's shipping instructions (R. 771), we contend that the ammunition did not come into the physical possession of the government prior to arrival at destination. We excerpt from the Contract, Supplement No. 11, Article III-Y (R. 833), as follows:

> "It is recognized that property (including without limitation machine tools and processing equipment,

manufacturing aids, raw, manufactured scrap and waste materials) title of which is or may be hereafter become vested (ib) the Government, will be used by or will be in the care, custody or **possession** of the Contractor in connection with his performance of this contract. The Contractor may, with the approval of the Contracting Officer, transfer or otherwise dispose of such Government-owned property to such parties and upon such terms and conditions as the Contracting Officer may approve or ratify." (Emphasis ours, here and elsewhere in this brief.)

Also, Title I, Article I-E (R. pp. 770, 771), to-wit:

"In carrying out the work under this Title I the Contractor is authorized to do all things necessary or convenient in and about the operating and closing down of the Plant, or any part thereof, including (but not limited to) the employment of all persons engaged in the work hereunder **(who shall be subject to the control and constitute employees of the Contractor)**, the providing of all materials except such materials as the Government is to furnish or supply, as elsewhere specifically provided herein the storage of raw materials and supplies and of finished ammunition to the extent of the storage facilities at said Plant, and the loading of ammunition on cars or other carriers in accordance with the Government's shipping instructions."

Also, Title III, Article III-G (R. 788):

"The Contractor agrees to keep records and books of account on a recognized cost-accounting basis, showing the actual or agreed cost to it of all items of labor, materials, equipment, supplies, services, and other expenditures of whatever nature for which reimbursement is authorized under the provisions of this contract."

Also, Title III, Article III A-2 (R. 781):

> "If this contract is terminated due to the fault of the Contractor, the Contracting Officer may enter upon the premises and take possession of the Plant, and all manufacturing facilities, materials, work finished or in process, and supplies, title to which has been acquired by the Government under this contract."

It is thus clear that appellant had actual physical possession not only of the raw materials and work in process, but of the plant as well, and that its right to possession continued until termination of the Contract.

It should be stressed that the ammunition produced at this plant was not shipped by the Government; the Government merely "directed" the shipments. The actual shipping was done by employees of contractor (R. 771 and Answer to Interrogatories No. 11 [R. 38]). In short, the whole elaborate set-up was for the express purpose of making it clear that the contractor and not the United States was the employer and the producer.

The pleadings admit, and the opinion below concedes, that the petitioners were all employees of respondent (R. 30, 983).

Respondent produced as an independent contractor under the above contract literally billions of bullets and vast quantities of waste brass. It employed as high as forty thousand men in the operation and maintenance of this vast industrial enterprise. The plant was equipped with all requisite loading, unloading, switching and shipping facilities for the handling of interstate freight, all maintained by respondent's employees (R. 37). Respondent's crews operated the switch engines (R. 38). Its employees packed and loaded all outgoing freight and unloaded all incoming freight, maintained all loading and unloading

facilities, and prepared bills-of-lading and shipping papers (R. 332, 333). The principal raw materials used were brass, powder, lead and steel (R. 37). These moved into the plant in a steady stream from all parts of the United States, and were purchased from more than two thousand vendors located within and without the State of Missouri, and moved into the plant by the instrumentalities of interstate commerce (R. 37). Outbound shipments were of two kinds—the ammunition and the waste brass. With only one or two exceptions, the ammunition moved out at Government direction to various Government depots and to ports for shipment. Knowledge that this ammunition was produced for interstate shipment was admitted by respondent in numerous plant publications, and was a matter of common knowledge at the plant (Plffs. Exs. D and E-1 to E-7, R. 381 to 384).

Interwoven with the production of the bullets was the production of a by-product waste brass (R. 356, 359). This waste brass was created at the plant in the manufacturing operation of making bullets (R. 357). The production of the waste brass was interwoven with the production of the bullets. Hence all employees necessary to the production of bullets were also necessary to the production of waste brass. This waste brass was all shipped out as purely private shipments by the respondent, United States Cartridge Company, to Western Cartridge Co., in East Alton, Illinois, on ordinary commercial bills-of-lading, the same as are used by any industrial shipper in interstate commerce (see testimony of Hughes, R. 356 and 359, and testimony of Eifert, R. 346). This movement was continuous and substantial, averaging eighteen truckloads a day (R. 358).

The statement in the opinion below (174 Fed. [2], l. c. 720) to the effect that the title to this by-product "appears to have remained in the Government" is not sup-

ported by any evidence in the Record. There is no proof that any of this brass was shipped at Government direction or for any war purpose. The uncontradicted evidence is that they were ordinary, private commercial shipments by respondent to its own affiliate in East Alton, and the inference is that respondent acquired title to this waste product by some arrangement with the contracting officer, and shipped it to its affiliate in East Alton, Illinois, for its own commercial purposes (see Contract, Supplement 11, Defendant's Ex. 24, Article IIb, R. 825, 833). We will contend that both the bullets and the waste brass were produced for "commerce". If either were so produced, it should be sufficient to bring petitioners within the language of the Act.

These petitioners were called inspectors or engineers, the terms being interchangeable. It was their duty to patrol the various units of the plant and note and report infractions of safety rules. These rules were prescribed by management, and in the making of them the inspectors had no voice (R. 410, 411, 876, 877, 878, 904, 905, 400, 401), and ordinarily the inspector was without authority to take any corrective action in the matter himself (R. 70). They were also required to make out accident reports. A more detailed description of their duties appears in a manual prepared by management and handed to each petitioner on employment (Plffs. Ex. F, R. 69 to 71). They were merely inspectors and clerks without any administrative or executive authority.

STATUTES INVOLVED.

The United States Statutes Involved are:

The Fair Labor Standards Act, 29 U. S. C. A., Sections 201 to 219.

The Walsh-Healey Act, 41 U. S. C. A., Sections 35 to 45.

The First National Defense Act, enacted June 28, 1940; 50 U. S. C. A., Appendix 1151 et seq.

The Second National Defense Act, enacted July 2, 1940; 50 U. S. C. A., Appendix, Section 1171 et seq.; also 5 U. S. C. A., Section 189 (a).

SPECIFICATIONS OF ERROR.

The Court of Appeals for the Eighth Circuit erred:

1. In holding that the Fair Labor Standards Act and the Walsh-Healey Act are so divergent that both may not apply at one and the same time (R. 995).

2. In holding that the Walsh-Healey Act controlled petitioners' employment to the exclusion of the Fair Labor Standards Act.

3. In holding that petitioners were not within the coverage of the Fair Labor Standards Act.

4. In holding that the provisions of the prime contract (Deft. Ex. 20, R. 783) made the Walsh-Healey Act applicable to the exclusion of the Fair Labor Standards Act.

5. In holding that the provisions of the Act of July 2, 1940, or any action of the Secretary of War thereunder, excluded petitioners from the benefits of the Fair Labor Standards Act.

6. In not holding that employees at the St. Louis Ordnance Plant engaged in the production of goods for interstate commerce were within the coverage of the Fair Labor Standards Act.

7. In not holding that the munition and the by-products produced at the St. Louis Ordnance Plant were "goods" and were "produced for commerce" within the meaning of the Fair Labor Standards Act.

8. In holding that the United States District Court was without jurisdiction to grant relief under the Fair Labor Standards Act.

SUMMARY OF THE ARGUMENT.

I.

We contend that the fundamental error in both opinions below rests in the assumption that the application of the Walsh-Healey Act excludes coverage under the Fair Labor Standards Act. This assumption is contrary to the language of both enactments, their legislative history, departmental interpretation and court decisions. Contrary to the rulings below, we urge that Federal regulation of wages and hours is contained not only in the Fair Labor Standards Act of 1938, but also in a series of Government contract laws, some of which are the Walsh-Healey Public Contracts Act, the Davis-Bacon Act, the Eight-Hour Law, and the Act of July 2, 1940. Coverage under the Government contract laws does not depend on the same factors as coverage under the Fair Labor Standards Act. In enacting the Fair Labor Standards Act Congress exercised its power under the commerce clause of the Constitution, and hence the coverage is limited under that Act to employees engaged in commerce or the production of goods for commerce. On the other hand, the series of Public Contracts Acts, not having been enacted under the commerce clause of the Constitution, engagement in commerce or the production of goods for commerce is not a prerequisite to coverage. These enactments, however, all form a pattern and have the same general objective which is to raise labor standards in their respective fields. Necessarily, these fields overlap where workers who are covered under Government contract laws are also engaged in commerce or the production of goods for commerce. They are not, however, repugnant and neither excludes the other, and a Government contractor is not excused from compliance with the Fair Labor Standards Act where he is engaged in commerce or the

production of goods for commerce, whenever the standards set by the Fair Labor Standards Act are stricter than the provisions of the several Public Contract Acts. Sub-standard labor conditions affecting employees of Government contractors are just as deleterious and as much the concern of Congress as in industry generally, and Congress made no exception in the Fair Labor Standards Act in respect to them [Brooks v. United States (Dec. May 16, 1949), 93 L. Ed. 884; Walling etc. v. Patton-Tulley Transportation Co., 134 F. (2d) 945 (6th Cir., Dec. 1943); Lasater v. Hercules Powder Co. (D. C. E. D. Tenn., July 25, 1947), 73 F. S. 264]. Nor does the Act of July 2, 1940, suspend the operation of the Fair Labor Standards Act, and any contrary contention is refuted not only by the terms of the Act of July 2, 1940, itself, but also by its legislative history, and the circumstances surrounding its enactment.

II.

We contend that munitions manufactured at the St. Louis Ordnance Plant were "goods," and that they were "produced for commerce" within the meaning of the Fair Labor Standards Act. Section 3 (d) of the Fair Labor Standards Act to the effect that it shall not include the United States does not exempt employees of a private contractor operating a munitions plant under a cost-plus-a-fixed-fee contract with the United States. The adjudicated cases establish that employees who work for those who contract with the Government are not the Government's employees even though the economic burden falls on the Government through a cost-plus-a-fixed-fee arrangement, and even though the Government may exercise a supervisory control over the performance of the contract. The contract here in evidence provides that the employees shall be subject to the control and constitute employees of the contractor. It subjected the contractor to many statutes in-

applicable to Government employees, and to accept the argument of the respondent herein would be to hold in effect that the employees of such contractors are Government employees for purposes of the Fair Labor Standards Act, but not with reference to anything else. We contend further that munitions produced at a Government owned plant under a cost-plus-a-fixed-fee contract, and intended to be transported across state lines for war purposes, are produced for commerce within the meaning of the Fair Labor Standards Act, even though the title to the goods is in the Government and the shipments are at Government direction. We also contend that a private contractor operating a cost-plus-a-fixed-fee arrangement is not an agency of the United States and does not share any of the Government's sovereign immunities, and that the goods here produced are produced for commerce within the meaning of the Fair Labor Standards Act [Bell v. Porter, 159 Fed. (2) 117 (7th Cir.); Umthun v. Day & Zimmerman, Inc., 235 Ia. 293, 16 N. W. (2) 258; Jackson v. Northwest Airlines, 75 Fed. Supp. 32; Timberlake v. Day & Zimmerman, Inc., 49 Fed. Supp. 28; Moehl v. Du Pont de Nemours & Co., 6 W. H. Cases 638, 12 Labor Cases No. 63545; Clyde v. Broderick, 144 Fed. (2) 348; U. S. v. Driscol, 96 U. S. 421; Alabama v. King & Boozer, 314 U. S. 1].

III.

We contend further that Section 3 (i) of the Act exempting goods after their delivery into the actual physical possession of the ultimate consumer does not apply to manufacturing operations which occurred before the goods came into the actual physical possession of the United States, and that the goods produced at the St. Louis Ordnance Plant were goods within the meaning of the Fair Labor Standards Act [Hamlet Ice Co. v. Fleming, 127 F. (2) 165; Jackson v. Northwest Air Lines, 75 F. S. 32, l. c. 40, par. B et seq.].

IV.

Involved in this question of commerce are the facts shown in the record establishing that there were produced at this plant large quantities of waste brass that were shipped in interstate commerce for purely commercial purposes. The production of this by-product was interwoven with the production of ammunition, and in the production of this by-product appellees were unquestionably engaged in the production of goods for commerce within the meaning of the Fair Labor Standards Act, and since the production of the waste brass was interwoven with the production of the ammunition, it comes within the principle that where a transaction claimed not to constitute commerce is commingled with those which are undoubtedly commerce, the regulatory Federal power under the commerce clause extends to all [Walling v. People's Packing Co., 132 Fed. (2), 10th Cir. 236, syl. 6, 7 and 8, and l. c. 240].

ARGUMENT.

SPECIFICATION OF ERRORS NUMBERS 1, 2 AND 3.

I.

The Fair Labor Standards Act and the Walsh-Healey Act Are Not Mutually Exclusive.

The assumption in both opinions below that the Walsh-Healey Act excludes coverage under the Fair Labor Standards Act is contrary to the language of both enactments, their legislative history, long standing departmental interpretation, and all court decisions on the point. It is not limited to cost-plus war contractors, but apparently would also apply to peacetime contractors with the Government; and their employees, engaged in commerce or in the production of goods for commerce, would, under the ruling below, be likewise excluded from the benefits of the Fair Labor Standards Act.

The Walsh-Healey Act was enacted June 30, 1936 (41 U. S. C. A. 35-45). The Fair Labor Standards Act was enacted June 25, 1938 (29 U. S. C. A. 201-209). Congress was thus aware of the existence of the Walsh-Healey Act and numerous other enactments in the field of public contracts and labor relations. Congress made express provision against any possible limitation of the Fair Labor Standards Act by reason of these enactments, to-wit: Section 18 provides that no provision of the Act shall excuse non-compliance "with any federal or state law or municipal ordinance" establishing a higher minimum wage or a lower maximum work-week (29 U. S. C. A. 218). Further, by Section 13 Congress expressly excluded from the scope of the Fair Labor Standards Act employees covered by certain other acts, to-wit: employees subject to regulation under the Railway Labor Act [Sec. 13 (a) (4)], or any

employee with respect to whom the Interstate Commerce Commission has power to regulate maximum hours, under the Motor Carrier's Act or the Interstate Commerce Act [Sec. 13 (b) (1) (2)]. The failure of Congress to make similar provision for the exclusion of employees covered by the Walsh-Healey Act, is a clear indication that Congress did not intend that they be excluded if otherwise within the coverage of the Fair Labor Standards Act.

Further, on May 13, 1942 Congress amended the Walsh-Healey Act providing for the exemption of employers who entered into agreements with their employees "pursuant to the provisions of Pars. 1 or 2 of subsection (b) of Section 7 of an Act entitled 'Fair Labor Standards Act of 1938'" [56 Stat. 277; 41 U. S. C. A., 35 (c)]. It is apparent that Congress thus recognized that the two statutes could overlap, and that certain employees came under both Acts, because if the two Acts could not apply at the same time, as the Court below ruled, there would have been no reason whatever for this amendment. Further, the application of the Fair Labor Standards Act to employees of cost-plus-a-fixed-fee contractors in the war plants was definitely recognized by Congress in the amendment to the Fair Labor Standards Act enacted May 14, 1947, known as the Portal-to-Portal Act of 1947. One of the stated purposes of that Act was to invalidate portal-to-portal claims by employees under the Fair Labor Standards Act because of the "increased cost of war contracts" [Public Law 49, 80th Congress, Chap. 52, 1st Sess., 29 U. S. C. A. Pocket Part 251 (a) (9)].

In addition to all this, it appears that for more than ten years the Department of Labor has consistently interpreted the two Acts on the theory that they were not repugnant, and that application of both Acts to employees of government contractors who were engaged in commerce or the production of goods for commerce was in harmony

with the common objectives pursued by Congress in enacting both types of labor regulation. As pointed out in the brief for the Administrator of the Wage and Hour and Public Contracts Division of the Department of Labor filed below in support of the petition for a rehearing (R. 1028-1031) Congress was repeatedly made aware of the Department's interpretation, and with that knowledge made appropriations for enforcement. This has been held to be a confirmation and ratification of the administrative interpretation. Brooks v. DeWar, 313 U. S. 354, 361; Fleming v. Mohawk Co., 331 U. S. 111, 116.

Further, the uncontradicted evidence in this case discloses that the parties themselves interpreted the two Acts as having concurrent application. All employees of the respondent on their employment were given a booklet in which the Company's labor policies were set out, and in that booklet it was expressly stated, to-wit (Plffs'. Exhibit 3-C, R. 188, 189, 206):

> "There will be eight hours in any working day, and forty hours will constitute a working week. To meet the schedule required of us by the National Defense Program, it will be necessary to employ three shifts on production operations. When production demands require a longer work day, or longer work week, the Company will pay the legal overtime rate as provided **under the Walsh-Healey Act, and the Fair Labor Standards Act.** When three shifts are operating there will be rotation of the first, second and third shifts every two weeks. A lunch period will be allowed on each shift and will be paid for by the Company, that is, no deduction will be made for this lunch period."

The Court decisions on the subject all reach a conclusion contrary to the ruling of the Court below herein, to wit: Walling etc. v. Patton-Tulley Transp. Co., 134 F.

(2d) 945 (6th Cir., decided 1943); Lasater v. Hercules Powder Co. (D. C. E. D. Tenn., July 25, 1947), 73 F. Supp. 264; Brooks v. United States (decided May 16, 1949), 337 U. S. 49, 93 L. Ed. 884.

The Walling case, supra, was an enforcement proceeding by the administrator to compel compliance with the wage and hour provisions of the Fair Labor Standards Act. It involved a public project being done on the Mississippi and Missouri Rivers by Patton-Tulley Transportation Company, under contract with the United States. The workers in question were "engaged in constructing and repairing dikes and revetments" in the channels of the Missouri and Mississippi Rivers (l. c. 946). It was urged in defense that the wage and hour provisions of the Fair Labor Standards Act with respect to the employees in question had been "superseded" (l. c. 948, top 2nd column) by an amendment to the Eight Hour Law enacted September 9, 1940 (40 U. S. C. A. 325a). The Eight Hour Law enacted June 19, 1912 (40 U. S. C. A. 324, 325) applied to public contracts, to-wit, every contract to which the United States was a party which required the employment of laborers and mechanics. The amendment of September 9, 1940, provided that "notwithstanding any other provision of law" work in excess of eight hours per day should be computed on the basic day rate of eight hours per day, and should be compensated for "at not less than one and one-half times the basic rate of pay." Section 7 of the Fair Labor Standards Act prohibits work in excess of forty hours per week unless compensated for at not less than one and one-half times the "regular rate," and prescribes no method of computing the regular rate. The District Court had ruled that these differences made the two enactments repugnant and inconsistent, and therefore concluded that the Eight Hour Law amendment superseded the Fair Labor Standards Act in respect to wages and maximum hours of the employees in question. The

Court of Appeals for the Sixth Circuit, however, disagreed. It found nothing repugnant in the two statutes, nor any difficulty in requiring compliance with both. We quote (l. c. 948) paragraph 6, to-wit:

> "We perceive no difficulty in the reconcilement of the Eight-Hour Law amendment with the Fair Labor Standards Act. The one limits employment at basic pay to 40 hours a week, the other deals solely with daily employment of men in certain classifications, and limits such employment at basic pay to 8 hours a day. No difficulty will be perceived in complying with both statutes—giving overtime pay for work in excess of the weekly maximum in the one case, and overtime pay for work in excess of the daily maximum in the other."

The Sixth Circuit then proceeded to rule that the Fair Labor Standards Act applied to work under Government contracts, remarking that this was **particularly true in war time** when most major industries were operating on Government contracts (l. c. 949):

> "Like the Fair Labor Standards Act, the Eight-Hour Law is one whose purpose it is to eliminate substandard working conditions. As such it should be given construction to effect such purpose. Overstreet v. North Shore Corp., supra. The argument that it was the Congressional intention to make the Fair Labor Standards Act inapplicable to work under government contract, must be rejected. No reason appears why contractors for the government are to be permitted to maintain substandard labor conditions while private contractors are prohibited from so doing, and such view would thwart the clearly defined purpose of the Congress, particularly if applied at a time when all, or nearly all, major industries are operating upon government contract."

We submit that the differences between the Fair Labor Standards Act applying to employees engaged in the production of goods for commerce, and the Walsh-Healey Public Contracts Act applying to employees engaged in the manufacture of materials, supplies, articles and equipment under public contract, are no greater than the differences between the Fair Labor Standards Act and the Eight Hour Law as amended September 9, 1940, applying to public contracts requiring employment of laborers and mechanics. Yet in the latter case the United States Court of Appeals for the Sixth Circuit, in Walling v. Patton-Tulley Transportation Co., had no difficulty in reconciling the two, and in giving effect to both at the same time, and on the same project. The opinion below is in direct conflict with the decision and rationale of the Sixth Circuit in the Walling case.

This precise question seems to have been raised in only one other case—Lasater v. Hercules Powder Company, decided by the District Court for the Eastern District of Tennessee, July 25, 1947, 73 Fed. Supp. 264. In the Lasater case the plaintiffs were employees of Hercules Powder Company that operated the Government-owned ordnance plant near Chattanooga, Tennessee, under a cost-plus-a-fixed-fee contract with the War Department for the manufacture of munitions. The action was brought under the Fair Labor Standards Act to recover overtime compensation, liquidated damages and an attorney's fee. The defendant disclaimed liability, among other reasons, because "the rate of pay and working conditions of the plaintiff were regulated by the Walsh-Healey Act, the Eight Hour Law, and the Davis-Bacon Act, and not by the Fair Labor Standards Act of 1938" (l. c. 267). The Court held, however, that the Fair Labor Standards Act was not restricted because of either of these previous enactments. In so holding the Court said (l. c. 268):

"From an examination of the Eight Hour Law, the Davis-Bacon Act and the Walsh-Healey Act, together with the Congressional history of labor laws raising standards of pay and working conditions, the conclusion is quite evident that the intended coverage of the Fair Labor Standards Act is not restricted because of these previous enactments. I deem it unnecessary to undertake to analyze the premises resulting in this conclusion.

"The Fair Labor Standards Act is applicable to work under government contracts. Walling v. Patton-Tulley Transp. Co., 6 Cir., 134 F. 2d 945."

As additional authority, we cite the decision of this Court rendered May 16, 1949, in Brooks v. The United States (Nos. 388 and 389, October Term, 1948), holding that the Tort Claims Act and the Veterans' Laws are not mutually exclusive. In reaching this conclusion this Court said (l. c. 887):

"Unlike the usual workman's compensation statute, e. g., 33 U. S. C. A., Sec. 905, 10 F. C. A., title 33, Sec. 905, there is nothing in the Tort Claims Act or the veterans' laws which provides for exclusiveness of remedy. United States v. Standard Oil Co., 332 U. S 301, 91 L. ed. 2067, 67 S. Ct. 1604, indicates that, so far as third party liability is concerned. Nor did Congress provide for an election of remedies, as in the Federal Employees' Compensation Act, 5 U. S. C. A., Sec. 757, 2 F. C. A. title 5, Sec. 757. Thus Dahn v. Davis, 258 U. S. 421, 66 L. ed. 696, 42 S. Ct. 320, and cases following that decision, are not in point. Compare Parr v. United States (C. C. A. 10th, Kan.), 172 F. 2d 462. We will not call either remedy in the present case exclusive, nor pronounce a doctrine of election of remedies, when Congress has not done so."

See also C. C. H. Labor Law Rep., 4th Ed., Vol. 3, sec. 26011, supporting the proposition that the application of both laws, to-wit, Fair Labor Standards Act and Walsh-Healey Act, to employees of government contractors who are engaged in interstate commerce or in the production of goods for commerce, "is in harmony with the common objectives pursued by Congress in enacting both types of laws."

There is no factual basis whatever for the statement in the opinion below that the application of both acts would entail "confusion" (174 Fed. [2], 718, l. c. 725) and the statement is incorrect. Indeed, it appears from the brief of the Labor Department on the motion for rehearing below (R. 1026 to 1036) that this statement of the Court below is not borne out by more than ten years' experience in the administration and enforcement of both acts. Further, since all administrative and enforcement machinery is now set up on the assumption that the acts are consistent and mutually enforcing, the opinion of the Court below, if allowed to stand, would necessitate a change in all existing administrative and enforcement practices, together with a change in or modification of existing interpretations and regulations, and would throw the administration of both acts into the greatest confusion.

For all of the above reasons we submit that the decision below is untenable.

II.

The record affords no basis for the assumption in the opinion below that all petitioners were within the coverage of the Walsh-Healey Act, and that issue was not tried in the District Court.

While we have endeavored to point out above that if there was an overlapping of the Fair Labor Standards Act

and the Walsh-Healey Act with respect to petitioners, such overlapping would not exclude relief. We submit further, however, that these petitioners were not shown to be within the purview of the Walsh-Healey Act, and that the issue was not tried in the District Court. The Fair Labor Standards Act not only covers workers actually engaged in production, but also includes workers engaged "in any process or occupation necessary to the production thereof" (Section 3 [j]). The Walsh-Healey Act, on the contrary, does not contain such a clause, but its scope is limited to workers employed "in the manufacture or furnishing of the materials," etc. (Section 1 [b]). Petitioners were inspectors or engineers (these terms being interchangeable) in the Safety Department. They were required to patrol the units, inspect safety conditions, and report on violations of safety rules or unsafe conditions (see description of the duties of the safety engineers in the manual of instructions given by respondent to all petitioners marked (Plff. Ex. F, R. 68, 69 to 72). These duties were, of course, an occupation necessary to the production of the munitions within the meaning of Section 3 (j) of the Fair Labor Standards Act and the complaint so charges (R. 6), and the Court below so found (R. 917, par. 5). This work, however, was not necessarily employment "in the manufacture or furnishing of materials," etc., within the limited language of the Walsh-Healey Act.

Coverage under the Walsh-Healey Act is a question of fact which this Court has held must, in the first instance, be determined by the Secretary of Labor (Endicott-Johnson Corp. v. Perkins, 317 U. S. 501, l. c. 508, 509). Whether these petitioners, or any of them, were within the coverage of the Walsh-Healey Act was an issue of fact to be determined from the evidence in the light of the Secretary of Labor's Regulations. No interpretations have been issued that would include safety inspectors. (See Walsh-Healey

Public Contracts Act, Rulings and Interpretations No. 3, dated October 1, 1945, Sections 36, 37, 38 and 39). Interpreting these Regulations, respondent ruled that petitioners were all exempt from the Walsh-Healey Act. See Defendant's Exhibit 14, Record p. 611, in part, as follows:

> "(b) He is also exempt from the overtime provisions of the Walsh-Healey Act because the provisions of that Act are not 'deemed applicable to office or custodial employees'; Regulations, Article 102, A. J. McMahon, Occupational Analyst." (Appears only in the ten records filed with the Petition. See Stipulation, R. 1055.)

Petitioners' duties were largely office and clerical, particularly in making out their reports, and their activities in patroling the units and checking on safety conditions were of a custodial nature. They did not question respondent's interpretation of the above Regulation. In the District Court respondent did not plead the Walsh-Healey Act as a defense. The District Court made no finding of fact as to coverage under the Walsh-Healey Act. Respondent did not object to the failure to so find, and did not include the point in its Statement of Points to be relied upon on appeal (R. 963 to 971). Thus it appears that the Court below reversed this case on an issue of fact not pleaded in the answer as a defense (R. 30 to 32), not tried, and on which the trial court made no finding (R. 916), and not included by respondent in the points to be relied upon on appeal (R. 963), and hence not properly before it. And the conclusion of fact on which the court below grounded its opinion is not only without any factual basis in the record, but is contrary to the position taken by the parties themselves during the entire period of employment. Surely petitioners are at least entitled to a trial of this issue before being cast out of court.

For further discussion of this point see petition for rehearing below (R. 1013 [b] to 1015.)

III.

The Act of July 2, 1940.

SPECIFICATIONS OF ERROR NOS. 4 AND 5.

The concurring opinion suggests, but does not decide, that there is in the language of the Act of July 2, 1940, "a reservoir of power in the Secretary of War" to act "independent of the wage and hour provisions of any other statute"; that under this concept the only limitations on the Secretary's power would be "an executive order issued by the President," and the provisions of Section 4 (b) of the Act (5 U. S. C. A. 189 [a]) limiting the working hours of laborers and mechanics in the plants directly operated by the War Department to eight hours per day or forty hours per week, unless overtime is paid at one and one-half times the regular rate (174 Fed. [2] 718, l. c. last two paragraphs 727 and first paragraph 728). It then rules that if the Secretary of War had such plenary powers as above suggested, the Walsh-Healey Act is controlling "because the War Department in its contract with the operator of the plant specifically made the provisions of the Act (Walsh-Healey) applicable to the wage and overtime rights of the employees." And if, on the contrary, the Secretary of War did not have such plenary powers, then the Walsh-Healey Act and not the Fair Labor Standards Act "is controlling here as a matter of general application in the field involved" (l. c. 728).

This whole thesis is in our judgment untenable for the following reasons:

1. In respect to the first alternative, the prime contract did not specifically make the Walsh-Healey Act applicable. It merely complied with Section 1 of the Walsh-Healey Act (41 U. S. C. A. 35). That section required that in all public contracts for the manufacturing or furnishing of materials, etc., in an amount exceeding $10,000 there shall "be included the following representations and stipulations." Then follow the stipulations that appear in this contract (Deft. Ex. 20, Article III-D, R. 783). Since this contract was of the type defined in Section 1 of the Walsh-Healey Act, the inclusion of these stipulations was mandatory. Their inclusion had no other significance. Certainly complying with the law in this respect does not indicate any intention to exclude coverage of the Fair Labor Standards Act in respect to employees who are within its terms. Respondent did not so understand it and did not so interpret the inclusion of these stipulations in the contract. Respondent expressly stated in its booklet declaratory of its policy that it was operating under **both** Acts (Plff. Ex. C-3, R. 206).

2. To so construe the prime contract would conflict with Executive Order No. 9301 signed by the President February 9, 1943, and in effect throughout the war (8 Fed. Reg. 1825), quoted in full (R. 1021-2). The concurring opinion below admits that any action by the Secretary of War under the Act of July 2, 1940, would be subject to the Executive Orders of the President (174 Fed. [2] 718, l. c. 727). This Executive Order directed the six-day minimum wartime work week in the war plants, and specifically provided that it should not be construed as suspending or modifying "any provisions of the Fair Labor Standards Act * * * nor any other Federal, state or local law relating to the payment of wages or overtime." The construction placed on the prime contract by the Court below would nullify this Executive Order.

3. The other alternative suggested in the concurring opinion that if the Walsh-Healey Act was not made exclusively applicable by the Secretary of War under his extraordinary powers, then it is "controlling as a matter of general application in the field involved" would seem to be intended as a concurrence in Judge Collet's opinion. This opinion we have endeavored under Point I, supra, to demonstrate to be untenable, and for the reasons we have stated we submit that the Walsh-Healey Act is not controlling to the exclusion of the Fair Labor Standards Act. Neither Act is exclusive of the other. As this Court said in Brooks v. U. S., supra, 93 L. Ed. 884, at page 887:

> "We will not call either remedy in the present case exclusive, nor pronounce a doctrine of election of remedies, when Congress has not done so."

4. The whole concept of the concurring opinion is basically unsound because the Act of July 2 did not suspend the Fair Labor Standards Act.

A. The 1940 Act mentions labor standards in only two places. Section 1 (a) and 5 provide that contracts with manufacturers under the new law, which would otherwise be subject to the Walsh-Healey Act, shall not be exempt from that Act because made without advertising, and Section 4 (b) requiring the payment of overtime "to laborers and mechanics employed by the War Department."

The reference to the Walsh-Healey Act was due entirely to an amendment offered by Senator Wagner. He pointed out that the Walsh-Healey Act only applied to contracts let after advertisement and bidding, whereas this National Defense Act contemplated contracts to be let "without advertising." 50 U. S. C. A., War Appendix, §1171. And Senator Wagner was concerned lest the Walsh-Healey Act would be held not to apply to such contracts. He ex-

plained this on the floor of the Senate as follows (Cong. Record, Vol. 86, Part 7, p. 7924, June 11, 1940):

> "Unless this amendment is adopted, we should have this anomalous situation: under a contract entered into with the Government as the result of public bidding one set of minimum wages, that is, the prevailing wages, would be applied, whereas under another contract entered into as a result of negotiations, a much lower minimum wage would be paid, that is, the flat minimum **under the Wage and Hour Act.**"

We submit that the language just quoted makes it clear that the Senate acted on the Wagner amendment on the assumption that without it employees producing goods under contracts such as the one involved in this case would be subject **only** to the "Wage and Hour Act" meaning, of course, the Fair Labor Standards Act.

Section (b) of the July, 1940 Act, 5 U. S. C. A. 189 (a), has no reference to these petitioners or to this plant. It applied only to plants operated directly by the War Department and then only to "laborers and mechanics". A "laborer" is one who labors in a toilsome occupation that requires strength rather than skill (Webster's Unabridged Dictionary). A "mechanic" is one who is employed in one of the mechanical arts requiring the use of materials or tools (Webster's Unabridged Dictionary). This expression "laborers" and "mechanics" has persisted in Federal statutes since prior to 1900 (see 40 U. S. C. A. 321, 324, 325, 326). It is fair to assume that as used in this Act of July 2, 1940, this expression has the same meaning that has been ascribed to it in previous acts and therefore does not include petitioners (See Ellis v. United States, 206 U. S. 246, 51 L. Ed. 1049 [excluding masters, mates, engineers, firemen]; 1912 Op. Atty. Gen. 583 [excluding seamen]; Breakwater v. United States, 183 F. 112

[excluding seamen]; Gordon v. United States, 31 Ct. Cl. 254 [excluding watchmen]; Swisher v. United States, 57 Ct. Cl. 123 [excluding firemen]).

It (5 U. S. C. A. 189 a) also provided that "notwithstanding the provisions of any other law" the working hours of "laborers and mechanics" employed "by the Department of the Army" shall be eight hours per day, or forty hours per week, with a proviso that such hours may be exceeded under regulations prescribed by the Secretary of the Army, but that compensation for the overtime computed at not less than one and one-half times the regular rate "shall be paid to such laborers and mechanics". The purpose of this Section was to provide for payment of overtime to this group of Government employees. Existing laws in effect at that time prohibited overtime payments to Government employees. See Section 5 of the Act of March 3, 1893, as amended; 30 Stat. 316, 5 U. S. C. A. 29; also Act of March 3, 1931; 46 Stat. 1482, 5 U. S. C. A. 26-a, relating to Saturday work. Congress has subsequently provided overtime compensation for Government employees. See joint resolution of December 22, 1942, 56 Stat. 1068, and see notes to 5 U. S. C. A., Sections 26 b and 29 a. At that time, however, there were laws in effect which prohibited payment of such overtime, and hence the use by Congress of the above language to make the intent clear that the mechanics and laborers to be employed by the Department of the Army were to receive time and a half for overtime.

It is submitted that neither of the above provisions in reference to labor standards contained in the Act of July 2, 1940 indicate any intention to exclude or supersede the Fair Labor Standards Act.

Repeal or suspension of a statute by implication is not favored. A law with no express repealing clause will

not be construed as repealing a prior law unless the two are so clearly repugnant that no other conclusion can reasonably be drawn. Posadas v. National City Bank, 296 U. S. 497; West India Oil Co. v. Domenech, 311 U. S. 20; United States v. Borden Co., 308 U. S. 188; United States v. Jackson, 302 U. S. 628; United States v. Burroughs, 289 U. S. 159; General Motors Corp. v. United States, 286 U. S. 49; Indiana Mfg. Co. v. Koehne, 188 U. S. 681; United States v. Hemmer, 241 U. S. 379; United States v. Noce, 268 U. S. 613; Cope v. Cope, 137 U. S. 682; Wilmot v. Mudge, 103 U. S. 217; Red Rock v. Henry, 106 U. S. 596.

B. The Act of July 2, 1940, specifically suspends certain other statutes that it was intended to supersede. Thus, Section 1 (a) provided for the suspension of Sections 1136 and 3734 of the Revised Statutes and of "any statutory limitations with respect to the cost of any individual project or construction." Section 2 (a) suspended all "existing limitations" on the number of certain air corps personnel, and Section 3 suspended "all existing limitations" with respect to the number of aircraft. Further, Section 1 (b) authorized the Secretary of War to provide for the operation and maintenance of plants or facilities and to sell or lease such plants or facilities "without regard to the provisions of Section 321 of the Act of June 30, 1932." Also, Section 2 (b) permitted the Secretary of War to assign enlisted men and officers "irrespective" of the provisions of the National Defense Act of June 3, 1916. Under Section 4 (a) he was authorized to remove from the classified civil service any employee of the Military Establishment "notwithstanding the provisions of Section 6 of the Act of August 24, 1942," and certain other employees could be hired "without regard to the requirements of civil service laws, rules or regulations." Further, in Section 1 (a) Congress provided that "the cost-plus-a-percentage-of-cost system of contracting shall

not be used under this section" by the Secretary of War, thereby suspending certain statutes which had permitted purchases by means of that system.

The Act did not, however, contain any provision suspending the Fair Labor Standards Act, and it is submitted that this failure to specifically exclude the Fair Labor Standards Act, coupled with the specific suspension of other statutes, clearly indicates that suspension of the Fair Labor Standards Act was not intended.

Further, the legislative history of the 1940 Act negatives any intention to suspend the Fair Labor Standards Act, to-wit: The House Committee on Military Affairs listed and explained the statutes which would be suspended by the 1940 Act (H. Rept. 2261, 76 Cong., 3rd Sess. 1940), and a member of that Committee enumerated on the floor of the House the statutes which would be suspended (86 Cong. Rec. 6828). In neither case was the Fair Labor Standards Act mentioned.

The governmental agencies directly concerned with the July, 1940, Act did not consider it suspensive of the Fair Labor Standards Act. The War Department in September, 1940, expressed the opinion that employees working at ordnance plants, such as the one operated by respondent in this case, were covered by the Fair Labor Standards Act (see letter of Secretary of War to the Comptroller General dated August 25, 1942. Full text of this letter appears on page 13 [footnote] of the brief for the United States filed by the Solicitor General in Kennedy v. Silas Mason Co., 334 U. S. 249). The Comptroller General advised the War Department that it would approve for reimbursement overtime payments made by cost-plus-a-fixed-fee contracts pursuant to the Fair Labor Standards Act (22 Comp. Gen. 277, 278 and 279; 23 Comp. Gen. 439 and 444).

As further indicating that it was not the intention of the July, 1940, Act to curtail in any way the social gains that had been made for labor's benefit, we cite President Roosevelt's radio broadcast on May 26, 1940, in reference to the Defense Program, when he made the following statements:

> "But as the program proceeds there are several things we must continue to watch and safeguard, things which are just as important to the sound defense of a Nation as physical armament itself. • • • We must make sure in all we do, that there is no break-down or cancellation of any of the great social gains which we have made in these past years. • • • There is nothing in our present emergency to justify making the workers of our Nation toil for longer hours than now limited by statute. • • • There is nothing in our present emergency to justify a lowering of the standards of employment. Minimum wages should not be reduced. • • • There is nothing in our present emergency to justify a breaking down of old-age pensions or unemployment insurance. • • • the policy and laws providing for collective bargaining are still in force (86 Cong. Rec. App. 3243, 3244)."

This, we submit, is a clear indication of a fixed policy, in implementing the Defense Program, not to curtail in any way labor's gains under existing legislation.

For all of the above reasons we deny that the Act of July 2, 1940, in any way excluded the contemporaneous operation of the Fair Labor Standards Act, and we deny that any executive action of the Secretary of War or the President curtailed the rights of Labor under the Fair Labor Standards Act (Executive Order No. 9301, supra).

IV.

"Commerce" and "Goods."

SPECIFICATION OF ERRORS NOS. 6 AND 7.

Summary of Argument, Points II, III and IV.

While the opinion below went off on a construction of the Walsh-Healey and the July 2, 1940, Acts, we are hopeful that this Court will reverse, and it will then be necessary to decide whether or not the products of this plant were "goods" and were "produced for commerce" within the meaning of the Fair Labor Standards Act. Hence we have raised these questions in order that the entire question of coverage may be decided in this proceeding, and the conflicts between the Seventh and Fifth Circuits resolved.

Our position on these questions and the authorities on which we rely are stated in the supporting brief printed with our petition for certiorari herein (point IV, pp. 27 to 40), which we ask be now considered as our opening brief on these points. We also expect the Solicitor General to brief these points fully from petitioners' viewpoint as he did in Kennedy v. Silas Mason Co., 334 U. S. 249. We do not deem it necessary, therefore, to pursue this part of the argument further until we have heard from respondent.

CONCLUSION.

We wish to notice briefly the irrelevant suggestion that is invariably thrown out by those who would deny to petitioners the benefit of the Fair Labor Standards Act, to the effect that permitting suits of this character would subject the Government to great and unanticipated costs. This has never been established and this record supports a con-

trary inference. The straight overtime at one and one-half times the regular rate is a labor cost that the Government anticipated and expected to pay. All official statements of policy during the war, military as well as civil, were to the effect that war production would be harmed rather than helped by suspension of the overtime provisions of the Fair Labor Standards Act, and the Secretary of War and the Ordnance Department were of the opinion that the overtime provisions of the Fair Labor Standards Act applied to employees of cost-plus-a-fixed-fee contractors. This contractor, itself, in its statement of policy, professed to operate under the Fair Labor Standards Act, and the Secretary of War and the Ordnance Department were of the opinion that the Act applied (see letter of the Secretary of War to the Comptroller General dated August 25, 1942, 22 Comp. Gen. Dec. 277, 278 and 279), so that in so far as these judgments included straight overtime, it is a labor cost that the Government fully anticipated that it would have to meet.

The liability for liquidated damages and attorneys' fees was directly and solely caused by the contractor's violation of Section 16 (b) of the Fair Labor Standards Act, and we do not think it is reimbursable. The prime contract (R. 786-7) required the contractor to "obey and abide by" all applicable laws, regulations, or other rules of the United States, or of any other duly constituted public authority. The liability for liquidated damages and attorneys' fees resulted from the refusal of the contractor to obey and abide by the Fair Labor Standards Act and the President's Executive Order No. 9301. We can see no theory upon which this part of the liability would be reimbursable and we submit, therefore, that any suggestion that ultimate liability for the liquidated damages and attorneys' fees must be borne by the United States is not only an irrelevancy, but is wholly unwarranted.

We ask that the decision of the Court of Appeals be reversed, and that the judgment of the District Court be affirmed, with allowance of counsel fees to petitioners' attorney in this Court and in the Court of Appeals, or appropriate directions for such allowance.

Respectfully submitted,

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November, 1949.

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1949.

No. 96.

R. M. POWELL et al.,
Petitioners,

vs.

THE UNITED STATES CARTRIDGE COMPANY,
a Corporation,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit.

BRIEF OF RESPONDENT.

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1949.

No. 96.

R. M. POWELL et al.,
Petitioners,

vs.

THE UNITED STATES CARTRIDGE COMPANY,
a Corporation,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit.

BRIEF OF RESPONDENT.

THE OPINION BELOW.

The District Court filed no opinion. The opinion of the Court of Appeals is printed in the Record (R. 982-1006) and reported in 174 F. (2d) 718.

JURISDICTION.

The judgment of the Court of Appeals was entered on May 7, 1949 (R. 1037-9). The petition for certiorari was filed on June 3, 1949 and granted on October 10, 1949. The jurisdiction of this Court is invoked under Section 1254 of the Revised Judicial Code (28 U. S. C. 1254).

QUESTIONS PRESENTED.

1. Did the coverage of the Fair Labor Standards Act extend to those who, during the recent war, were engaged in the production of munitions at Government-owned ordnance plants operated through the agency of private contractors by authority of the National Defense Act of July 2, 1940?

2. Were such persons engaged in the production of goods for commerce within the meaning of the Fair Labor Standards Act?

3. Were such persons "employees" within the meaning of the Fair Labor Standards Act?

STATUTES INVOLVED.

The statutes involved are the Walsh-Healey Public Contracts Act of June 30, 1936 (c. 881, 49 Stat. 2036; 41 U. S. C. Sec. 35, et seq.), the Fair Labor Standards Act of 1938 (Act of June 25, 1938, c. 676, 52 Stat. 1060, 29 U. S. C., Sec. 201, et seq.), and the National Defense Act of July 2, 1940 (c. 508, 54 Stat. 712, 50 U. S. C. App., Secs. 1171, 1172, and 5 U. S. C., Sec. 189 [a]). In the interest of brevity reference is made to Appendix A of the Brief of Respondent in the companion case of *Aaron et al. v. Ford, Bacon & Davis, Incorporated*, No. 79, October Term, 1949, where the pertinent statutory provisions will be found.

STATEMENT.

In order that this Court may understand the case presented by the present record, it will be necessary to disregard entirely the incomplete and misleading Statement which appears in the Brief for Petitioners.

The Government has intervened as *amicus curiae* in this case as well as in *Cruel v. Lone Star Defense Corporation*, No. 58, October Term, 1949, and *Aaron v. Ford, Bacon & Davis*, No. 79, October Term, 1949, and has filed a consolidated brief in which the statements are made that the "salient facts * * * are concededly substantially similar in all three cases"; and, "The contracts, employment relationships and method of operations in all three cases were substantially the same. The three records together afford a complete and representative picture of the operations and relationships." With these statements we are in complete agreement. However, the Summary Statement of Facts which appears in the Government's brief is not much more satisfactory than the Statement which appears in petitioners' brief in the present case. The explanation is that the author of the Government's brief has attempted to construct a synthetic case, first, by dipping into all three records and extracting from them certain facts which create an impression favorable to petitioners' claims, and, second, by quoting extracts from a publication (not to be found in any of the three records) which sets forth at length the conclusions of the writer on certain questions which are before this Court for decision. Accordingly, we find it necessary to restate the salient facts so as to present a truer picture of the operation of the St. Louis Ordnance Plant, which is typical, not only of similar operations at the Arkansas Ordnance Plant and the Lone Star Ordnance Plant, which are involved in the two companion cases, but also the more than one hundred

similar operations undertaken by the Ordnance Department preparatory to and during World War II.

The Proceedings Below.

This suit was begun by the filing of a complaint in the United States District Court for the Eastern District of Missouri on May 4, 1945 (R. 2). By leave of court, an amended complaint was filed on April 5, 1946 (R. 3-29), on which the cause was tried. This amended complaint alleged that the respondent was engaged in operating a munitions plant for the manufacture of small arms ammunition, all of which was used by the military forces of the United States and its allies in the prosecution of the war. It was alleged that petitioners were employees of respondent who, while employed at respondent's plant, were engaged in interstate commerce and in the production of goods for commerce within the meaning of the Fair Labor Standards Act of 1938. Petitioners claimed that they were employed as safety men at agreed salaries for a forty hour work week and that each of them was required to work overtime for which they had received no compensation. They claimed overtime pay at the statutory rate, liquidated damages, and attorneys' fee.

In respondent's answer, filed April 18, 1946, respondent alleged that the complaint failed to state a claim upon which relief could be granted; denied generally all allegations not specifically admitted, but admitted that petitioners had been employed by it for the periods stated in the complaint; denied that it was engaged in interstate commerce or in the production of goods for interstate commerce; denied that petitioners were employed in the production of goods for interstate commerce; denied that petitioners were employed at agreed salaries for a 40 hour week; and denied that petitioners were entitled to be paid

for all overtime worked in excess of 40 hours per week; alleged that each of the petitioners was employed in a bona fide administrative capacity and hence that the provisions of the Act did not apply with respect to petitioners, or any of them; and affirmatively alleged that none of the petitioners was engaged in commerce or in the production of goods for commerce within the meaning of the Act (R. 30-32).

Thereafter petitioners filed interrogatories to which respondent filed sworn answers (R. 33-42). Petitioners also filed a request for the admission of certain facts to which respondent replied, admitting some and declining to admit others (R. 45-48). The case was then heard in open court, without a jury, where the testimony of numerous witnesses was taken and voluminous exhibits introduced in evidence. Counsel for petitioners and respondent filed extensive briefs discussing numerous points of law.

On May 19, 1947, the trial court filed written findings of fact and conclusions of law and entered a judgment for petitioners in the aggregate amount of $246,251.44 plus $24,625 attorneys' fees and costs (R. 916-922). On May 29, 1947, respondent filed its motion for new trial. Respondent called the attention of the trial court to the fact that the Portal-to-Portal Act of 1947 had become law five days prior to the filing of the findings of fact and conclusions of law and alleged that the intervening time had been insufficient in which to call the court's attention to the provisions of the Act and to certain facts which were set forth in affidavits attached to the motion which respondent believed were sufficient to show that the Act required a modification of the court's findings and conclusions (R. 923-945). On September 2, 1947, the trial court entered an order overruling respondent's motion for new trial (R. 959). Respondent filed a notice of appeal

from the final judgment of the trial court and the order denying the motion for a new trial (R. 1).

The case was first argued before the Court of Appeals prior to the announcement of the opinion of this Court in *Kennedy v. Silas Mason Co.*, 334 U. S. 249 (1948). After that case had been decided, the Court of Appeals set aside the submission of the present case and set it for reargument before the Court *en banc*. The parties were granted leave to file supplemental briefs "particularly directed to the applicability, if any, of either the Fair Labor Standards Act of 1938 * * *; the Act of July 2, 1940 * * *; or the Walsh-Healey Public Contracts Act * * *" (R. 984). On reargument, all seven judges of the Eighth Circuit concurred in reversing the judgment of the trial court.

Two opinions were filed. Six judges concurred in the opinion delivered by Judge COLLET, and three judges, besides joining in the Court's official opinion, concurred also in the separate concurring opinion written by Judge JOHNSEN.

Petitioners thereupon filed their petition for a writ of certiorari, stating that the questions presented were as follows:

> "1. Are the Fair Labor Standards Act and the Walsh-Healey Act mutually exclusive?
>
> "2. Are the Fair Labor Standards Act and the Walsh-Healey Act so divergent that both may not apply at the same time on the same project?
>
> "3. Did the National Defense Acts of June 28, 1940, and of July 2, 1940, or any executive action taken thereunder suspend or exclude the operation of the Fair Labor Standards Act in the St. Louis Ordnance Plant?

"4. Did the Act of July 2, 1940, set up a complete scheme of labor relations at the St. Louis Ordnance Plant exclusive of the Fair Labor Standards Act?

"5. Were the munitions manufactured at the St. Louis Ordnance Plant for interstate shipment 'goods,' and were they 'produced for commerce,' within the meaning of the Fair Labor Standards Act?

"6. Whether petitioners while working in the Safety Department of the St. Louis Ordnance Plant were within the coverage of the Walsh-Healey Public Contracts Act, and, if so, were they for that reason excluded from the Fair Labor Standards Act?

"7. Were petitioners while so employed within the coverage of the Fair Labor Standards Act?"

On October 10, 1949, this court entered an order granting the writ and assigning the case for hearing along with *Creel et al. v. Lone Star Defense Corp.*, No. 58, October Term, 1949, and *Aaron et al. v. Ford, Bacon & Davis*, No. 79, October Term, 1949.

Findings of Fact.

The Findings of Fact of the trial court, dealing mainly with the details of petitioners' claims (R. 916-19) set forth nothing but conclusions with respect to the coverage and applicability of the Fair Labor Standards Act (R. 916-17). Nor is any help to be gotten from the Conclusions of Law filed by the trial court, for they were confined to the bare statements "that at all times referred to in the evidence herein, defendant was engaged in commerce and in the production of goods for commerce and was an employer within the meaning of the Fair Labor Standards Act of 1938," and "that during their respective periods of employment plaintiffs and each of them were engaged in

the production of goods for commerce within the meaning of said Act" (R. 919). No opinion of the trial court elucidated these conclusions.

Faced with this situation, the Court of Appeals undertook to make findings of its own (R. 986-990). But, as the reversal of the judgment of the trial court was based solely on the ground that Congress intended the Walsh-Healey Act to apply rather than the Fair Labor Standards Act, the findings do not cover certain facts which this Court should have before it in considering the important issues raised by the petition for a writ of certiorari.

The St. Louis Ordnance Plant and Its Operation.

The St. Louis Ordnance Plant was erected by the United States Government just prior to the United States' entry into World War II. The Western Cartridge Company was employed by the United States, by a contract dated the 5th day of December, 1940, designated W-ORD-481 (Defendant's Exhibit 22, R. 722-753) to furnish certain management service in connection with the construction of the plant and the procuring and installation of equipment (R. 718-719). This contract contained on its face the statement:

> "This contract is authorized by the following laws: Act of July 2, 1940 (Public No. 703, 76th Cong.)."

The respondent, The United States Cartridge Company, a wholly owned subsidiary of the Western Cartridge Company (R. 707), was employed by the United States by a contract also dated the 5th day of December, 1940, designated W-ORD-491 (Defendant's Exhibit 20, R. 761-795), and certain supplements thereto (including Defendant's Exhibits 23, 24 and 25, R. 804-823, 825-833, 836-837), to operate the St. Louis Ordnance Plant on a cost-plus-a-fixed-fee basis.

This contract W-ORD-491 also contained on its face the statement (R. 763):

> "This contract is authorized by the following laws: Act of July 2, 1940 (Public No. 703, 76th Cong.)."

Supplement No. 7 (Defendant's Exhibit 23), which was dated the 3rd day of June, 1942, contained on its face the statement (R. 805):

> "This contract is authorized by the following laws: The Act approved December 18, 1941 (Pub. Law 354—77th Cong.) and Executive Order No. 9001 dated December 27, 1941."

Under the terms of this contract the respondent was employed to render certain services in connection with the operation of said plant, all as more specifically described in the contract. All work was done at the risk of the United States (R. 786), and the Government bore all costs and expenses of every character and description incurred by the respondent under the contract (R. 771). The funds with which these costs and expenses were paid were advanced by the Government to the respondent (R. 413, 438, 777), and kept in a special account separate and apart from other funds of the respondent (R. 438-439, 779-780).

Although the respondent was designated in the contract as an "independent contractor," nevertheless the extent and character of the work to be done by the respondent was subject to the approval of the Government's representative, the Contracting Officer (R. 786), as were the respondent's records and accounts (R. 788) and organization and methods (R. 791). The Contracting Officer had the right at any time and from time to time to make changes in or additions to the work, or to direct the omission of work covered by the contract (R. 792), and this right

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was exercised (R. 801-837). The Government also reserved the right to order the discharge of employees (R. 782). All disputes concerning questions of fact arising under the contract were to be decided by Government representatives whose decision was final (R. 791). For its services under the contract it was agreed that the respondent should receive fixed fees, based upon the number of rounds of ammunition of the different classes produced at the plant (R. 770).

Contract W-ORD-491 contains representations and stipulations pursuant to the Walsh-Healey Act (R. 783, 785), and the applicability of the Walsh-Healey Act was reaffirmed in Supplement No. 11 (R. 825). Nowhere in the contract, nor in any of the supplements, was there any reference to the Fair Labor Standards Act, or any indication that it was deemed to apply.

The St. Louis Ordnance Plant, land, buildings, machinery, tools and equipment was, at all times, owned by the United States of America (R. 713). All raw materials, work in process and rounds of completed ammunition were, at all times, owned by the United States of America (R. 713-716, 786, 860-862).

Some of the raw materials were furnished to the St. Louis Ordnance Plant by the United States Government, having been manufactured or purchased elsewhere and outside of the State of Missouri by the Government and shipped into the plant on a free-issue basis. Thus all of the smokeless powder (R. 440), some of the brass (R. 412, 413, 415, 425) and other raw materials, were manufactured or acquired by the Government and shipped in to the St. Louis Ordnance Plant. Some of the brass and other raw materials were purchased by The United States Cartridge Company (R. 412-440). The purchase orders, each containing a specific reference to the fact that it

was issued under the provisions of Contract W-ORD-491 (R. 708-711), covering each such purchase by the respondent of raw materials, and everything else that was purchased by the respondent during the operation of the plant, were first approved in writing by the Contracting Officer's Representative (R. 437), and each purchase was paid for with funds advanced by the Government. All raw materials received at the St. Louis Ordnance Plant were checked in by a representative of the United States Government, an officer of the Ordnance Department in the Property Accountability Office, along with respondent's employees (R. 439, 862). Records were kept of all such raw materials all the way through, which were Government records. The respondent never kept records of its own of raw materials, work in process or the finished products (R. 862).

All ammunition produced at the St. Louis Ordnance Plant, which was transported across State lines, was shipped by the United States of America, at Government expense, on Government bills of lading (R. 346), in which the United States Government, or some agent of the Government, was the consignee (R. 362-379). These shipments by the Government were made for the uses and purposes of the Government in connection with the prosecution of World War II (R. 380, 383).

When actual manufacturing operations at the St. Louis Ordnance Plant ceased, all physical property on hand, including machinery, tools, appliances, raw materials, supplies, work in process and finished ammunition, if any, was turned over to the Ordnance Department, and the respondent obtained a receipt and release from the Government for all such property on hand (R. 862).

The St. Louis Ordnance Plant, the land and buildings, which constituted a military reservation, together with all machinery, tools, equipment, raw materials, work in

process and completed ammunition, were, at all times, in the possession, charge and control of a Commanding Officer, a member of the United States Army, stationed at and with his office within the St. Louis Ordnance Plant. The Commanding Officer was assisted in the performance of his duties by a large staff of Army officers and other Government representatives, inspectors, clerical and other employees, with their offices and performing their duties in the St. Louis Ordnance Plant, all under the direction, supervision and control of the Commanding Officer (R. 437-439, 635, 636). This was done pursuant to the authority of Ordnance Procurement Instructions, issued by direction of the Chief of Ordnance pursuant to authority conferred upon him by the War Department Procurement Regulations.[1]

These Ordnance Procurement Instructions set out in considerable detail the policies and procedures to be followed in "general matters concerning the administration of cost-plus-a-fixed-fee contracts," including such matters as the duties of Commanding Officers and Contracting Officer's Representative (50,002-50,002.14), the maximum salary to be paid any employee (50,066.1), the preliminary preparations for the administration of such a contract (50,030-50,034), the setting up of the field office, "in the same building or in the immediate vicinity of the quarters of the contractor's staff" (50,060-50,071), the method to be followed in the making of all purchases (50,100-50,108.2), the reports to be made and records to be kept (50,200-50,202.2), the policies to be followed in the interpretation of such contracts (50,250-50,261.2). Specific instructions were given with respect to the handing of funds (51,200-51,211.2),

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1 These Ordnance Procurement Instructions were given wide public circulation and may be found in the services published during the war by Commerce Clearing House, Inc., and the Prentice-Hall Corporation. Excerpts from these instructions are printed in the record in the Aaron case (S. R. 76-78, 163-164). The Court may take judicial notice of such regulations. Standard Oil Co. v. Johnson, 316 U. S. 481, 483-484 (1942).

auditing (52,000-52,302), every aspect of the problem of accounting for government-owned property (53,000-53,203.2), the formation of Ordnance Department Industry Integration Committees, whereby not only parts, materials, tools, machines, etc., but also knowledge, experience and skill, were to be interchanged between different contractors, with assurance against anti-trust law prosecution (56,000-56,222), plant security, wherein the statement is made that "Government-owned contractor operated plants are miliary reservations. Commanding officers appointed by War Department orders were responsible for the safety of all personnel and government property" (57,000-57,201.7). They also covered the procedures to be followed in disposing of government-owned property (7,100-7,905), the payment or non-payment of various Federal, State and local taxes (8,000-8,500), every aspect of labor relations, including the employment policies to be followed, the fixing and changing of wage rates and obtaining government approval therefor, the negotiation of collective bargaining agreements and obtaining government approval therefor, the payment of overtime and wage and salary stablization (9,000-9,303.3), and, finally, the procedure to be followed in the event the contract should be terminated for the convenience or at the option of the Government (15,111-15,987.1).

Much additional light will be thrown upon the exact nature of the operations at the St. Louis Ordnance Plant, and upon similar ordnance plants operated by the Small Arms Division of the Ordnance Department by an examination of Small Arms Ammunition, a History of an Industry, two volumes, published by the Ammunition Branch, Small Arms Division, Office of Chief of Ordnance, in which it is stated, Volume I, page 1:

"This report proposes to present the complete general story of the Ordnance Department's small arms

ammunition activities in the times of peace following World War I, ... he defense just prior to World War II, and during the all-out war period of 1941 to 1944."

This report discloses how the Ordnance Department, in the Government's own Frankford Arsenal, over a period of years, developed every step in the manufacturing process of small arms ammunition, embodied the information thus obtained, with detailed drawings and specifications, in Descriptions of Manufacture, which were furnished to the operators of each of the Government-owned contractor-operated ordnance plants making small arms ammunition, of which the St. Louis Ordnance Plant was the largest (pages 65, 74, 75, 78, 79); how the Ordnance Department developed all the key facts with respect to each operation on every current type of ammunition to be manufactured, embodied the same in an Operations Control Manual, which was likewise furnished to each such operator (page 80); and how the Ordnance Department also developed every step of the inspection processes and procedures necessary in connection with the production of small arms ammunition, embodied the same in a Standard Inspection Procedure Quality Control, which was likewise furnished to each of such operators (pages 339-341). Not only were the operators required to follow and comply with the various procedures thus prescribed, but the personnel of the operating contractors whose duty it was to carry out the instructions thus given were taken to Frankford Arsenal and trained by the Government to that end. Thus it was said (pages 76-77):

"The contract signed by * * * the Western Cartridge Company stipulated that personnel for these plants could be trained, if so desired by the contractor, at the Government arsenals.

"Since Frankford Arsenal was the logical place for training such personnel, the program was established there. * * *

"The plan was prepared in conjunction with the liaison representatives of * * * the Western Cartridge Company. On 21 April, 1941, the first trainees from each of these facilities arrived at Frankford Arsenal and were assigned to their positions * * *. The average length of the training course was approximately six months * * *. In all, the Arsenal trained approximately eight hundred persons either in supervisory or production work."

Finally, the method of administration by the Ordnance Department of these ordnance plants is described at considerable length (pages 101 et seq.), in the course of which it is pointed out (pages 109-110), that in the exercise of "executive and administrative control" the Office of the Field Director of ammunition plants exercised specific functions with respect to plant administration, plant design and maintenance, technical and quality control over loading and assembly, technical and control units for powder and explosives, safety and security.

As stated in Plaintiffs' Exhibit C-3, with respect to the St. Louis Ordnance Plant, "The United States Cartridge Company is the operating agent" (R. 191); and again "The United States Cartridge Company is merely managing the plant for the Federal Government" (R. 204). The wage rates were determined by the Ordnance Department of the United States (R. 203), and periodic wage surveys were conducted by the United States Government to maintain sound wage rates (R. 206).

The St. Louis Ordnance Plant was not leased to the respondent by the terms of Contract W-ORD-491, nor was the respondent otherwise put into "possession" of it, or of the raw materials, work in process or the finished parts, since such possession cannot be read into said contract (R. 762, et seq.).

Scrap brass created at the St. Louis Ordnance Plant as a by-product in the manufacture of ammunition was shipped, on commercial bills of lading, from the plant to the Western Cartridge Company at East Alton, Illinois, by trucks, which would pick up the scrap brass at the receiving docks at the various manufacturing units (R. 356-358). No petitioner testified, and there was no evidence to indicate that any of the petitioners in the course of their duties had anything to do, directly or indirectly, with the production or shipment of the scrap brass, the title to which, when produced and shipped, was in the United States Government (R. 786).

The St. Louis Ordnance Plant commenced regular production operations in November, 1941, and continued in operation until August, 1945. Petitioners were employed at different times in connection with the operation of said Ordnance Plant. During the times involved in this action they were all paid on a salary basis, and were paid no overtime.

Only three of the petitioners testified in petitioners' case (R. 62-342, 384-393, 395-411, 451-456), and only eight of the petitioners testified, very briefly, in rebuttal (R. 874-906). These eleven petitioners identified themselves as having been employees in the Safety Department of the respondent, but the other forty-eight petitioners did not testify.

Correction of Errors.

In the Brief for Petitioners the statement is twice made (pages 2 and 3) that the present suit was brought while the petitioners were still employed at the St. Louis Ordnance Plant. We fail to see the significance of this statement, but the fact is that, at the time the suit was filed, forty-seven of the fifty-nine petitioners were no longer employed by the respondent (R. 7-29).

In the Brief for Petitioners (page 2) the statement is made that the St. Louis Ordnance Plant operated on a forty-eight hour work week pursuant to Executive Order No. 9301, promulgated February 9, 1943, and that it was by virtue of this Order that the petitioners were required to work a six day week. The purpose of this statement is apparently to bring into the case the mention of the Fair Labor Standards Act in Paragraph 5 of the Order. The fact is that, as disclosed by the petitioners' own testimony, the St. Louis Ordnance Plant operated on a forty-eight hour work week from the very beginning of its operations, and long before the promulgation of Executive Order No. 9301 (R. 401-403, 7, 300, 302, 8, 332, 140-181).

In the Brief for Petitioners (page 5) the statement is made that because the contractor was required to load the ammunition on cars or other carriers, in accordance with the Government's shipping instructions, the ammunition did not come into the actual physical possession of the Government prior to arrival at destination. The fact is, of course, that upon completion of the manufacturing processes the ammunition was accepted by the Ordnance Department of the United States Army (R. 36); after being so accepted it was, upon specific orders of the United States Government, loaded on to cars and the cars were sealed under supervision of the United States Army (R. 344, 347); thereupon Government bills of lading were prepared by either Government employees or respondent's employees pursuant to shipping orders issued by the Commanding Officer of the St. Louis Ordnance Plant (R. 346, 360), signed by the Transportation Officer of the United States Army (R. 361), and one copy delivered to the carrier (R. 361). The typical Government bill of lading would provide for billing to the "War Department, Finance Officer, U. S. Army, Washington, D. C."; the consignor would be an officer of the Ordnance Department

of the United States Army; and the consignee would be the Commanding Officer of an Ordnance Depot (R. 365). Clearly, the undisputed facts in the case show that, in any event, the ammunition did come into the actual physical possession of the Government and before intrastate transportation commenced.

In the Brief for Petitioners the statement is made (page 8) that the production of waste brass was interwoven with the production of the bullets, and hence all employees necessary to the production of bullets were also necessary to the production of waste brass. If, by this is meant that waste brass was produced through various steps of the manufacturing process, the statement is not correct. The fact is that the waste brass was produced in the very first step of the manufacturing process when "the strip brass is fed into the blank and cup machine which stamps out round disks of metal and forms these disks into cups, in one operation * * *" (Plaintiffs' Exhibit D, R. 379-381—not printed in full in the Record). What is left of the strip brass after this initial operation is the scrap brass referred to in the evidence. None of the petitioners testified to the rendering of any services in connection with either the initial manufacturing operation or the production of scrap brass.

In the Brief for Petitioners the statement is made (pages 8-9) that the statement in the opinion below to the effect that the title to the waste brass appears to have remained in the Government, is not supported by any evidence in the Record. The fact is that the evidence shows that all raw materials and work in process were at all times owned by the Government, and there was no exception of any kind with respect to scrap brass (R. 713-716, 786, 860-862).

In the Brief for Petitioners the statement is made (page 24) that the "petitioners were not shown to be within the

purview of the Walsh-Healgy Act, and that the issue was not tried in the District Court." The fact is that the undisputed evidence in the Record, including that of those of the petitioners who testified, clearly shows that they were within the purview of the Walsh-Healey Act (with the possible exception of a few of the petitioners who occupied executive positions higher than that of inspectors or safety engineers), and that the issue as to the applicability of the Walsh-Healey Act was squarely presented to and tried in the District Court (R. 1044-1053).

In the Brief for Petitioners (page 25) the statement is made that "In the District Court respondent did not plead the Walsh-Healey Act as a defense." It was, of course, not necessary to plead this Act by name.

ARGUMENT.

The arguments which follow are made with the full approval of the Department of the Army.

Foreword.

As indicated above, the consolidated Brief for the United States as Amicus Curiae presents an unsatisfactory Summary Statement of Facts selected from portions of the records in all three cases, which is highly confusing and somewhat misleading. It was felt by counsel for the respondents in all three cases that it would only add to the confusion to file a single Consolidated Brief for Respondents, and that a separate Brief for Respondent should be filed in each of the three cases.

However, it is recognized that there is no difference in certain general principles of law equally applicable to all three cases, and that it would place an unnecessary burden upon the Court and add unnecessary expense, ultimately to be borne by the Government, to repeat the argument on these general principles in each of three separate Briefs.

Accordingly, the argument on such general principles will be found only in the Brief of Respondent in the case of *Aaron v. Ford, Bacon & Davis, Incorporated*, No. 79, October Term, 1949. In the argument to follow in this Brief there will be appropriate cross references to the argument in the Brief of Respondent in that case, supplemented by such further argument as may be required by reason of the variation as to details in the facts of the two cases and in the questions presented.

The reason why the argument on these general principles applicable to all three cases is made in the Brief

of Respondent in the case of *Aaron v. Ford, Bacon & Davis, Incorporated*, is that, as pointed out above, there were no detailed findings of fact by the trial court in the present case, or any findings of fact in the case of *Creel v. Lone Star Defense Corporation*, whereas detailed findings of fact were made by an experienced trial judge in the Aaron case, and not disturbed by the Court of Appeals, which findings should relieve this Court of the necessity of searching through thousands of pages of the Records in three cases in order to arrive at the "salient facts".

Summary of Argument.

Petitioners contend that they were engaged in the production of goods for interstate commerce within the meaning of the Fair Labor Standards Act. Respondent contends that when the Fair Labor Standards Act is read in the light of the system of Government Contract Laws, and particularly the Walsh-Healey Act, which were in force and effect at the time the Fair Labor Standards Act was enacted, and in the light of the laws subsequently enacted, pursuant to which the St. Louis Ordnance Plant was erected and operated, and when the nature of that operation is clearly understood, it necessarily follows that the petitioners were not engaged in the production of goods for interstate commerce within the meaning of the Fair Labor Standards Act, and were not included within the coverage of that Act. As will more fully appear below, this general proposition is not only sound in principle, but finds direct support in an overwhelming majority of the decisions of the various United States Courts of Appeal, United States District Courts, and State Courts.

These decisions are based upon one or more, in varying combinations, of the following general principles of law,

each of which are discussed more fully in the Brief of Respondent in the case of *Aaron v. Ford, Bacon & Davis*, and supplemented to a limited extent below:

I.

The National Defense Act of July 2, 1940, set up a wholly new system of war production which was completely outside the scope of the Fair Labor Standards Act.

II.

The Walsh-Healey Act applied to employees of the St. Louis Ordnance Plant to the exclusion of the Fair Labor Standards Act.

(a) The Fair Labor Standards Act was never intended to cover employees working under Government contracts.

(b) The National Defense Act of July 2, 1940, excluded the operation of the Fair Labor Standards Act.

III.

The petitioners were not engaged in the production of goods for commerce within the meaning of the Fair Labor Standards Act.

(a) The shipment by the Government across State lines of Government-owned munitions of war, manufactured and shipped solely for war purposes, is not "commerce" within the meaning of the Fair Labor Standards Act.

(b) Government-owned munitions of war are not "goods" within the meaning of the Act.

IV.

The petitioners were employees of the United States within the meaning of the Fair Labor Standards Act.

In addition to the foregoing general principles applicable to all three cases, there are the following applicable only to the present case:

V.

The shipments of scrap brass from the St. Louis Ordnance Plant do not bring petitioners within the coverage of the Fair Labor Standards Act.

VI.

In addition to the questions presented to this Court by the Petition for Writ of Certiorari, there were a number of other questions presented to and not decided by the Court of Appeals below which should be decided in the event the decision of the Court below is reversed.

Argument.

I.

The National Defense Act of July 2, 1940, Set Up a Wholly New System of War Production Which Was Completely Outside the Scope of the Fair Labor Standards Act.

In the interest of brevity, this respondent adopts the Argument on this point which will be found under Point II of the Argument, pages 25-44, of the Brief of Respondent in the case of *Aaron v. Ford, Bacon & Davis*, No. 79, October Term, 1949.

II.

The Walsh-Healey Act Applied to Employees of the St. Louis Ordnance Plant to the Exclusion of the Fair Labor Standards Act.

(a) The Fair Labor Standards Act was never intended to cover employees working under Government contracts.

In the interest of brevity, this respondent adopts the Argument on this point which will be found under Point III (a) of the Argument, pages 44-55, of the Brief of Respondent in the case of *Aaron v. Ford, Bacon & Davis*, No. 79, October Term, 1949.

Supplementing what is said there, it should be noted that in the Brief for Petitioners, Point II of the Argument, pages 23-26, it is contended that petitioners were not shown to be within the coverage of the Walsh-Healey Act, and that the issue was not tried in the District Court. As we have already pointed out, this question was specifically presented to the District Court (R. 1044-1053).

Furthermore, the Record clearly shows that the petitioners (with the possible exception of a few who occupied executive positions higher than that of inspectors or safety engineers) were clearly within the coverage of the Walsh-Healey Act. Their duties were summarized in the Job Description (Defendant's Exhibit 13—R. 596-599), where it is shown that 30% of the time of the inspectors or safety engineers was spent in regular inspections of the property in the areas to which they were assigned, inspecting machinery, lighting, floors, exits and storage of materials; that 40% of their time was spent in checking manual movements of employees, pointing out unsafe practices to their superiors; and that an additional 5% of their time was spent seeing that injured employees

received first aid. They were thus engaged "in the manufacture or furnishing of the materials, supplies, articles or equipment used in the performance of the contract" and the regulations promulgated pursuant to the provisions of the Walsh-Healey Act provide, in general terms, that:

> "All employees (except those in bona fide executive, administrative, or professional capacities, and office, custodial and maintenance employees) who, after the date of the award, are engaged in any operation preparatory or necessary to or in the performance of the Government contract are subject to the Act."[2]

In an attempt to bring petitioners within the exceptions, it is suggested that they might be classed as "office" or "custodial" employees. But the regulations provide that the exclusion of office employees refers to those who are:

> "engaged exclusively in office work relating generally to the operation of the business and not engaged in the production of the materials, supplies, articles or equipment required by the Government contracts."[3]

And it has been specifically ruled that clerical office employees

> "will be considered subject where their duties are a part of the production process."[4]

And it has also been ruled that the custodial employees who are exempt are those

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2 Rulings and Interpretations No. 3, U. S. Department of Labor, October 1, 1945, § 35 (a-b), p. 18.

3 Rulings and Interpretations No. 3, U. S. Department of Labor, October 1, 1945, § 39 (b), p. 23.

4 Public Contracts Division Special Opinion February 8, 1945, Prentice-Hall Wage and Hour Service, Volume 1, Par. 13142.4.

> "whose duties are directed to the maintenance of the plant and who do not perform work on the commodities required by the Government * * *."[5]

The fact that a Government contractor who is himself clearly subject to the provisions of the Walsh-Healey Act may have one or more employees who are not subject to the Act, will not defeat the force of the arguments presented on this point in the case of *Aaron v. Ford, Bacon & Davis*. If it was the intention of Congress in enacting the Walsh-Healey Act to use the purchasing power of the Government to require certain minimum labor standards in the field of Government contracts, and if in enacting the Fair Labor Standards Act Congress intended to provide

> "that interstate commerce should not be made the instrument of competition in the distribution of goods produced under substandard labor conditions, which competition is injurious to the commerce and to the states from and to which the commerce flows"[6]

the mere fact that isolated employees, or groups of employees, of a Government contractor might not come within the Walsh-Healey Act would not operate to make the Fair Labor Standards Act overlap or even apply pro tanto.

The case of *Brooks v. United States*, 338 U. S. ..., 93 L. Ed. 884, decided May 16, 1949, is cited in the Brief of Petitioners in the present case and also in the Government's Consolidated Brief in support of the proposition that the Walsh-Healey Act was not intended to exclude the application of the Fair Labor Standards Act. In that case this Court did hold that the provisions of the veter-

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[5] Rulings and Interpretations No. 3, U. S. Department of Labor, October 1, 1945, § 39 (c), p. 23.

[6] United States v. Darby, 312 U. S. 100, 115.

ans' laws do not preclude an action under the Tort Claims Act by a serviceman for an injury not incident to his military service. However, the Court did say, l. c. 886:

> "Were the accident incident to the Brooks' service, a wholly different case would be presented. We express no opinion as to it, but we may note that only in its context do Dobson v. United States (CCA 2d N. Y.), 27 F. (2d) 807; Brady v. United States (CCA 2d N. Y.), 151 F. (2d) 742; Jefferson v. United States (DC Md.), 77 F. Supp. 706, have any relevance."

In the cases referred to recovery for service connected injuries had been denied upon substantially the same principle as that for which we are now contending. And this Court further clearly implied that the amount of the payments under the veterans' laws should be applied to reduce the damages allowable under the Tort Claims Act, saying, l. c. 887:

> "we now see no indication that Congress meant the United States to pay twice for the same injury."

So in the present case there is no indication that Congress intended the United States to pay, under the Fair Labor Standards Act, time and one-half overtime, plus an equal amount as liquidated damages, when it had approved the sums paid in the first instance, and caused them to be paid out of funds advanced by it.

Finally, in the Brief for Petitioners (pages 34 and 35), the contention is made that the ultimate liability for liquidated damages and attorneys' fees claimed in this litigation must be borne by the respondent and not by the United States. Apparently it is recognized that Congress could not have intended to impose such liability under the Fair Labor Standards Act upon the Government, but it is implied that a different rule of law would apply if this

liability could be imposed upon a private contractor alone. However, this argument has been disposed of by the United States in its Consolidated Brief, where in the introduction to the Summary of Argument it is specifically admitted that "petitioners' claims, if they ultimately succeed, will be paid by the Government."

(b) The National Defense Act of July 2, 1940, excluded the operation of the Fair Labor Standards Act.

In the interest of brevity, this respondent adopts the Argument on this point which will be found under Point III (b) of the Argument, pages 55-61, of the Brief of Respondent in the case of *Aaron v. Ford, Bacon & Davis*, No. 79, October Term, 1949.

III.

The Petitioners Were Not Engaged in the Production of Goods for Commerce Within the Meaning of the Fair Labor Standards Act.

(a) The shipment by the Government across state lines of Government-owned munitions of war, manufactured and shipped solely for war purposes, is not "commerce" within the meaning of the Fair Labor Standards Act.

(b) Government-owned munitions of war are not "goods" within the meaning of the Act.

In the interest of brevity, this Respondent adopts the Argument on this point which will be found under Point IV (a) and (b) of the Argument, pages 61-80, of the Brief of Respondent in the case of *Aaron v. Ford, Bacon & Davis*, No. 79, October Term, 1949.

Supplementing what is said there, it should be noted that, in the present case, the trial court made no finding on

the question of the actual physical possession of the raw materials, work in process or finished ammunition. In the course of the opinion of Judge Collet in the Court of Appeals there appears the statement: "Defendant manufactured those raw materials into arms and ammunition at the plant in Missouri. In doing so it had the actual physical possession of the material and products thereof but all operations were under the direct supervision of representatives of the United States Government."

In the first place, it will be observed that this finding as to possession is limited to possession during the manufacturing operations. The Court of Appeals did not undertake to find, and upon the record could not find, that the ammunition did not come into the actual physical possession of the ultimate consumer, i. e., the United States Government, when it accepted the completed ammunition and caused it to be loaded on freight cars at the plant and then to be shipped by the Government, on Government bills of lading, at Government expense, to Government military installations, to be used in the prosecution of World War II.

Even if the ammunition did not come into the actual physical possession of the Government until all manufacturing operations had been completed, nevertheless the ammunition clearly was, before leaving the plant, in the actual physical possession of the Government. It follows that the ammunition at the time of transportation in interstate commerce was in the "actual physical possession of the ultimate consumer thereof" within the meaning of Section 3 (i) of the Act, and, accordingly, such ammunition did not constitute "goods" within the meaning of the Act. And if the ammunition did not constitute "goods" within the meaning of the Act, the manufacture of such ammunition could not constitute "the production

of goods for commerce" within the meaning of those words as used in Sections 6 and 7 of the Act.

In the second place, and considering only the question of possession during the process of manufacture, since there was no finding by the trial court on this point, and the Court of Appeals placed its decision on grounds which made any finding on this point unnecessary, this Court is not bound by the statement of the Court of Appeals; and may, of course, examine the facts in the record and determine for itself whether or not the raw materials and work in process were in the actual physical possession of the Government, within the meaning of the Act. There is no conflict in the testimony on this point. The facts disclosed by such testimony have already been pointed out above in the Statement (pages 9-17), and need not be here repeated.

Disregarding the vastness of the operation and reducing the transaction to simple terms, the relationship of the respondent to the St. Louis Ordnance Plant and the operations carried on there was comparable to the relationship which a general manager, works manager, production manager, or any similar official, by whatever title he be known, would have to any plant under his supervision. Respondent was employed by the Government to operate the plant for and at the expense and risk of and pursuant to the direction and control of the Government, and was paid a fee for its services in so doing. The respondent no more had legal "possession" of the St. Louis Ordnance Plant or of the materials, supplies and ammunition produced therein, than any general manager has of a plant which he is operating. As stated in Plaintiffs' Exhibit C-3 (R. 204): "The United States Cartridge Company is merely managing the plant for the Federal Government." At the most, respondent had the "care" or "custody" of

such materials, supplies and ammunition during the process of manufacture, but the Government at all times had "possession."

The distinction between custody and possession is well recognized and of long standing. A vast number of cases could be cited in which this distinction is recognized and discussed, but a few should be sufficient. *Gibson v. St. Paul Fire & Marine Insurance Co.*, 184 S. E. (West Va.) 562; *Shipp v. Patton*, 93 S. W. (Ky.) 1033; *Tripp v. United States Fire Ins. Co.*, 44 Pac. (2d) (Kansas) 236.

On similar facts other Courts have found that the Government had actual physical possession not only of the products of such plants upon completion of the manufacturing processes, but of the raw materials, component parts and work in process while the manufacturing operations were actually going on. *Divins v. Hazeltine Electronics Corp.*, 70 F. Supp. 686 (S. D. N. Y. 1946), aff. 163 F. (2d) 100 (2 Cir. 1947); *Kennedy v. Silas Mason Co.*, 164 F. (2d) 1016 (5 Cir. 1948), reversed on other grounds 334 U. S. 249 (1948); *Crabb v. Welden Bros.*, 164 F. (2d) 797 (8 Cir. 1947); *Lynch v. Embry-Riddle Co.*, 63 F. Supp. 992 (D. C. Fla. 1945); *Anderson v. Federal Cartridge Corp.*, 72 F. Supp. 644 (D. C. Minn. 1947).

IV.

The Petitioners Were Employees of the United States Within the Meaning of the Fair Labor Standards Act.

In the interest of brevity, this respondent adopts the Argument on this point which will be found under Point V of the Argument, pages 80-93, of the Brief of Respondent in the case of *Aaron v. Ford, Bacon & Davis*, No. 79, October Term, 1949.

Supplementing what is said there, it should be noted that both the Brief for Petitioners in the present case and the Brief for the United States as Amicus Curiae make much of the fact that respondent's answer contains the admission "that plaintiffs, and each of them, were employed by the defendant for the period stated" in the first amended complaint (R. 30). Apparently it is contended that because of this admission respondent is not now in a position to urge that, in the operation of the St. Louis Ordnance Plant, it was not acting as an independent contractor, but as an agency of the United States, and that petitioners are barred by the provisions of Section 3 (d) of the Act, which excludes the United States as an employer.

That petitioners had been hired by the respondent, and were, respectively, on respondent's payroll for the periods alleged in the complaint, could not, and cannot now be denied. But these facts, standing alone, are not determinative of the question, and the admission in the answer was not intended to be, and should not be construed as, an admission with respect to the ultimate legal effect of these and all other facts which must be taken into consideration in determining the relationship between the United States and the petitioners within the meaning of the Fair Labor Standards Act.

In the same answer respondent not only pleaded that the complaint "fails to state a claim against the defendant upon which relief can be granted" (R. 30), but denied the allegations that defendant "was subject to the provisions of the Fair Labor Standards Act of 1938" (R. 5), and that petitioners "were and are subject to the provisions, and entitled to the benefits and protection of the Act and particularly Sections 6 and 7 thereof." Further, respondent affirmatively alleged that "none of the plain-

tiffs was engaged in commerce or in the production of goods for commerce within the meaning of the Fair Labor Standards Act of 1938 or the definition of such terms as contained in the said Act, and hence the provisions of said Act do not apply to the plaintiffs or any of them" (R. 31). Under these pleadings the defense that the United States was the "employer" was and is available.

In this connection we also point out that all of the evidence which would establish the fact that the United States was the "employer" of the petitioners within the meaning of the Fair Labor Standards Act was offered and received in evidence without objection, a large part of the evidence having been offered on behalf of the petitioners themselves, and that, therefore, the issue was tried by the express or implied consent of the parties within the meaning of Rule 15 (b) of the Rules of Civil Procedure.

It is respectfully submitted that the admission did not touch upon the relationship of the Government to the St. Louis Ordnance Plant, the respondent and the petitioners; that, despite the admission in the pleadings, this defense is available to respondent; and that, upon the undisputed facts in this case, the United States was the "employer" of the petitioners within the meaning of the Fair Labor Standards Act.

V.

The Shipments of Scrap Brass From the St. Louis Ordnance Plant Do Not Bring Petitioners Within the Coverage of the Fair Labor Standards Act.

Petitioners contend that even though the ammunition produced at the St. Louis Ordnance Plant may not have been produced for commerce, within the meaning of the Act, nevertheless certain waste brass was a by-product of the manufacture of ammunition, and that the shipment of

this waste brass to the respondent's parent corporation, Western Cartridge Company, at East Alton, Illinois, constituted interstate commerce so as to bring petitioners within the coverage of the Act. There are at least two fallacies in this contention.

In the first place, the title to such scrap brass was no different than the title to every bit of raw material and work in process which was at any time in the plant. It was in the Government, and, whether shipped on Government bill of lading or on private bill of lading, the shipment was a shipment of Government-owned property incident to the production of military ammunition, made only with the consent and approval of the Government acting through its Contracting Officer (R. 833), and, as already pointed out above, shipments of munitions of war, in time of war, for war purposes, do not constitute commerce within the meaning of the Fair Labor Standards Act.

In the second place, the evidence fails to show that the petitioners, or any of them, devoted any time whatsoever to the rendering of services in connection with that portion of the manufacturing operations which produced scrap brass. Only three of the petitioners testified in petitioners' case (R. 62-342, 384-393, 395-411, 351-456); and only eight testified very briefly in rebuttal (R. 874-906). Not one of them mentioned scrap brass, or the manufacturing operation which produced scrap brass, and the testimony of some of the petitioners clearly showed that they could not have rendered any services in connection with the production of scrap brass (R. 874, 876, 878, 883, 885, 886, 906).

The burden was, of course, upon petitioners to prove not only that they were engaged in the production of goods, as the term "goods" is defined in the Act, but that the

production of such goods was for interstate commerce.[7] And in this connection it should be borne in mind that the question as to whether or not an individual employee is engaged in the production of goods for commerce depends upon the activities of that particular employee, and not the activities of the employer.[8]

Accordingly, if the petitioners were engaged in the production of goods for both intrastate commerce and interstate commerce, and rely upon the production of scrap brass as constituting the production of goods for interstate commerce, then the burden was upon petitioners to prove that a substantial portion of their time was devoted to work within the protection of the Act.[9]

In the present case there was not only no evidence as to the portion of petitioners' time devoted to the production of scrap brass, there was no evidence that any time whatsoever was devoted to such production by any of the petitioners.

Accordingly, the fact that scrap brass was shipped from the St. Louis Ordnance Plant to East Alton, Illinois, will not serve to bring petitioners within the Act, because such scrap brass was owned by the Government, and its shipment did not constitute commerce, and not one of the petitioners has in any way connected himself with the production of said scrap brass, much less shown what portion of his time was devoted to such production.

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7 Warren Bradshaw Co. v. Hall, 317 U. S. 88; Schulte, Inc., v. Gangi, 328 U. S. 108.

8 Kirschbaum Co. v. Walling, 316 U. S. 517; McLeod v. Threlkeld, 319 U. S. 491.

9 Maitrejean v. Metcalfe Construction Co., 165 F. (2d) 571; Skidmore v. John J. Casale, Inc., 160 F. (2d) 527; Cody et al. v. Dossin's Food Products Co., 156 F. (2d) 678; Walling v. Mutual Wholesale Food & Supply Co., 141 F. (2d) 331, 339; Schwarz v. Witwer Grocer Co., 141 F. (2d) 341, cert. denied 322 U. S. 753; Guess v. Montague, 140 F. (2d) 500, 504; Davis v. Goodman Lumber Co., 133 F. (2d) 52; Super-Cold S. W. Co. v. McBride, 124 F. (2d) 90.

VI.

In Addition to the Questions Presented to This Court by the Petition for Writ of Certiorari, There Were a Number of Other Questions Presented to and not Decided by the Court of Appeals Below Which Should Be Decided in the Event the Decision of the Court Below Is Reversed.

As pointed out in the opinion below, other issues were presented to the Court of Appeals besides those relating to the applicability and coverage of the Fair Labor Standards Act. These other issues were stated in the opinion of Judge Collet as follows (R. 985):

> "Defendant contends * * * (6) that plaintiffs were employed in a bona fide administrative capacity and were exempt from the provisions of the Fair Labor Standards Act, (7) that the judgment of the trial court is in any event excessive in that it (a) is based on the erroneous assumption that the salaries paid plaintiffs were base pay for a 40-hour week instead of a variable or 48-hour week, (b) includes in the computations of hours worked a one-half hour lunch period, and (c) includes as hours worked, time prior to the beginning of and following the ending of plaintiffs' regular work shifts, (8) that the claims of certain plaintiffs were barred by Sections 1012 and 1015, R. S. Mo. 1939, (9) that the provisions of the Portal-to-Portal Act of 1947 are binding in this case and defendant should have been given the opportunity to plead and sustain the defenses made available to it under the Act, and (10) that two of the plaintiffs died while the cause was under submission and there has been no proper substitution and revival."

Since the Court of Appeals held that petitioners could not maintain an action under the Fair Labor Standards Act,

it was not necessary, and the Court of Appeals did not undertake, to pass upon any of these other issues before it. If, therefore, the decision of the Court of Appeals should be reversed, the cause should be returned to that Court for consideration and decision of these other issues.

CONCLUSION.

In conclusion, we submit that employees such as the petitioners, employed at the St. Louis Ordnance Plant, owned by the Government, engaged in the production, at Government expense and under Government direction, supervision and control, of military ammunition also owned by the Government, and shipped by the Government across state lines, were not engaged in the production of goods for interstate commerce within the meaning of the Fair Labor Standards Act, and were not included within the coverage of that Act. It is immaterial whether this proposition be sustained on the basis of one or more or all of the principles outlined above in Points I to IV, inclusive. The result is the same and requires that the judgment of the Court of Appeals be affirmed.

Respectfully submitted,

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In the Supreme Court of the United States

October Term, 1949

E. M. Powell, et al., *Petitioners*

v.

The United States Cartridge Company

[illegible] Labor, Etc., et al., *Petitioners*

[illegible], *Intervening Petitioner*

[illegible]

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In the Supreme Court of the United States

OCTOBER TERM, 1949

No. 96

R. M. POWELL, ET AL., *Petitioners*

v.

THE UNITED STATES CARTRIDGE COMPANY

No. 79

JULIA RHODA AARON, ETC., ET AL., *Petitioners*

v.

FORD, BACON AND DAVIS, Incorporated

No. 58

ROY CREEL, ET AL., *Petitioners*

v.

LONE STAR DEFENSE CORPORATION

On Writs of Certiorari to the United States Courts of Appeals for the Eighth and Fifth Circuits

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

OPINIONS BELOW

No. 96 (*Powell* case). The district court opinion (R. 916) is not officially reported. The opinion of the Court of Appeals for the Eighth Circuit (R. 982) appears at 174 F. 2d 718.

No. 79 (*Aaron* case). The district court opinion (1 R. 58) is reported at 70 F. Supp. 690, and the

opinion of the Eighth Circuit (3 R. 7) is reported at 174 F. 2d 730.

No. 58 (*Creel* case). The district court opinion (R. 95) is not officially reported. The opinion of the Court of Appeals for the Fifth Circuit (R. 234) appears at 171 F. 2d 964.

JURISDICTION

The judgment of the Court of Appeals for the Fifth Circuit in No. 58 (*Creel* case) was entered on January 18, 1949 (R. 243), and it became final on February 7, 1949, when a petition for rehearing was denied (R. 247). The petition for certiorari was filed on April 21, 1949, and granted on June 6, 1949 (337 U. S. 923). In No. 79 (*Aaron* case), the judgment of the Court of Appeals for the Eighth Circuit was entered on April 12, 1949 (3 R. 33). On May 24, 1949, a petition for certiorari was filed and it was granted on June 27, 1949 (337 U. S. 955). In No. 96 (*Powell* case), the judgment of the Court of Appeals for the Eighth Circuit became final on May 7, 1949, when a petition for rehearing was denied and the court modified its opinion (R. 1038). The petition for certiorari was filed on June 3, 1949, and was granted on October 10, 1949. Nos. 79 and 58 (the *Aaron* and *Creel* cases) were at that time transferred to summary docket.

In each case the jurisdiction of this Court has been invoked under Title 28, United States Code, section 1254 (formerly section 240(a) of the Judicial Code).

QUESTIONS PRESENTED

1. Whether the Act of July 2, 1940, prescribed a complete system of labor relations which superseded or was intended to preclude the operation of the Fair Labor Standards Act with respect to defense and war production contracts made pursuant to the 1940 Act.

2. Whether Congress intended to exclude from the Fair Labor Standards Act employees working under Government contracts covered by the Walsh-Healey Act.

3. Whether persons employed pursuant to a cost-plus-fixed-fee contract between a private company and the United States to produce munitions for use in the prosecution of war are employees of the Government or of the private contractor.

4. Whether the munitions produced under such circumstances and shipped across State lines for use in the war are produced for "commerce" within the meaning of the Fair Labor Standards Act.

5. Whether the munitions produced under such circumstances are "goods" within the meaning of Section 3(i) of the Act.

STATUTES INVOLVED

The statutes involved are: Fair Labor Standards Act of 1938, c. 676, 52 Stat. 1060, 29 U. S. C. 201;[1] Walsh-Healey Public Contracts Act, June

[1] The Fair Labor Standards Act was amended on October 26, 1949 (c. 736, Public 393, 81st Cong., 1st Sess.), but the new amendments are not pertinent to the instant cases.

30, 1936, 49 Stat. 2036, 41 U. S. C. 35; Act of July 2, 1940, c. 508, 54 Stat. 712. The pertinent provisions of these statutes are reprinted in Appendix A to this brief, pp. 147-156.

SUMMARY STATEMENT OF FACTS

These three actions were brought pursuant to Section 16(b) of the Fair Labor Standards Act of 1938 to recover unpaid overtime compensation and liquidated damages allegedly due petitioners for violations of the Act. In the *Powell* case (No. 96), the district court, after a full trial, rendered judgment in favor of petitioners (R. 916), but the Court of Appeals for the Eighth Circuit, sitting *en banc*, reversed the judgment (R. 982). In the *Aaron* and *Creel* cases (Nos. 79 and 58), the respondents' motions for summary judgment were granted by the respective district courts (*Aaron*, 1 R. 56; *Creel*, R. 95) and the judgments were affirmed by the Courts of Appeals for the Eighth and Fifth Circuits, respectively (*Aaron*, 3 R. 33; *Creel*, R. 243).

This statement is limited to a brief summary of the salient facts, which, we believe, are concededly substantially similar in all three cases. More detailed facts are set forth in the arguments on particular points.

A. General Nature of Respondents' Operations and Petitioners' Work

Respondents in all three cases were engaged from 1941 to 1945 in the manufacture and assembly of munitions of war for the Ordnance Department of the War Department. The completed munitions were shipped overseas for use in the prosecution of the war. The United States Cartridge Co. was a subsidiary of the Western Cartridge Co., which prior to the war production program engaged in the manufacture of ammunition (*Powell*, R. 707, 764). Ford, Bacon and Davis was in business as a general construction contractor, while the Lone Star Defense Corporation was established as a subsidiary of the B. F. Goodrich Rubber Co. (*Creel*, R. 254-255). The plant used by each respondent in the manufacture of munitions was newly constructed for that purpose under contracts with the Ordnance Department. The Lone Star Defense Corporation and the Western Cartridge Co. supervised and directed the construction by other contractors of the Lone Star and United States Cartridge plants, respectively (*Creel*, R. 255, 288; *Powell* R. 722), while Ford, Bacon and Davis itself constructed the plant it used (*Aaron*, 2 R. 25).

Petitioners in the *Powell* case were employed as safety men. They inspected buildings, equipment, materials and the working practices of production employees, and they reported any unsafe conditions discovered (R. 5-6). In the *Aaron* case, petitioners worked as production employees and proc-

essed, assembled and loaded munitions (1 R. 4-5). In the *Creel* case, petitioners were employed as truck drivers, lift-fork operators, loaders and unloaders in the warehouse, transportation and maintenance departments of the munitions plant (R. 10).

B. Relationship between the Contractor and the Government

The contracts, employment relationships, and method of operation in all three cases were substantially the same. The three records together afford a complete and representative picture of the operations and relationships. All the contracts in question were cost-plus-a-fixed-fee contracts[2] under which the respondent agreed to manufacture or assemble a certain quantity of a specified kind of munitions in return for a fixed fee and reimbursement for its expenses. The Government held title to the plant and the equipment, and it furnished most of the powder and other necessary raw

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[2] The use of such cost-plus-a-fixed-fee contracts in the war production program was not novel. Out of a total of 143 billion dollars in contracts made by the War Department during the period from 1941 to 1946, over 40 billions were in the form of cost-plus contracts. (See testimony of Under-Secretary of War Kenneth C. Royall, Hearings before Subcommittee of the Senate Committee on the Judiciary on S. 70, 80th Cong., 1st sess., pp. 422-423.) Out of a total of 68 billion dollars in Navy contracts during the war period, 18 billions were in cost-plus contracts. (Statement by Assistant Secretary of the Navy W. John Kenney, Senate Hearings on S. 70, pp. 624-626.)

materials. The contractor, however, was to furnish all necessary materials not furnished by the Government and was permitted to use materials of its own manufacture (*Powell*, R. 771, 768; *Aaron*, 2 R. 41; *Creel*, R. 295, 300).

After the munitions had been manufactured or assembled by the contractor, they were "loaded for shipment by persons on the payroll of" the contractor (affidavit on behalf of defendant in *Aaron*, 2 R. 3; to the same effect, *Powell*, R. 344, 346, 355, 771; *Aaron*, 1 R. 54; 2 R. 41; *Creel* R. 268, 300) "in accordance with the Government's shipping instructions" (*Powell*, R. 771; *Aaron*, 2 R. 41; *Creel*, R. 300). The munitions were shipped on Government bills of lading to points that concededly were mostly outside the State (*Powell*, R. 345-346, 355, 373-374, 379-384; *Aaron*, 1 R. 54; 2 R. 3).

The provisions of the contract with respect to the relationship between the Government and the contractor, were essentially the same in each of the instant cases. It was agreed that the contractor would have possession of the plant and the equipment (*Powell*, R. 833, 834; *Creel*, R. 343, 352; see also *Powell*, R. 781, 788; *Creel*, R. 316, 320; *Aaron*, 2 R. 59, 64), and would operate the plant (*Powell*, R. 764; *Aaron*, 2 R. 24; *Creel*, R. 288), doing "all things necessary or convenient in and about operating and closing down of the Plant" (*Powell*, R. 770-771; *Aaron*, 2 R. 41; *Creel*, R. 300, 351). The "control and direction of the work" rested in the contractor (*Powell*, R. 792; *Aaron*, 2 R. 68; *Creel*,

R. 267, 323), who was designated as the "manufacturer" of the munitions (*Powell*, R. 783; *Aaron*, 2 R. 43; *Creel*, R. 302). As pointed out in detail *infra* (Point III), all the contracts contained provisions indicating that the contractor was intended to operate independently and not as the agent of the Government.

The contracting officer, who represented the Ordnance Department, was at all times to have access to the premises for the purpose of inspecting the work and examining the contractor's books pertaining to the cost of the work (*Powell*, R. 788; *Aaron*, 2 R. 64; *Creel*, R. 320). The contractor was to manufacture the munitions in accordance with specifications and production schedules furnished by the Ordnance Department (*Aaron*, 2 R. 11, 20; *Creel*, R. 83). Further, the contractor agreed to furnish the contracting officer with a statement of the administrative procedure "to be followed by the Contractor for the control or direction of the work" (*Powell*, R. 792; *Aaron*, 2 R. 68; *Creel*, R. 267, 323), and a schedule of all wage rates and job classifications established by the contractor (*Powell*, R. 792, 938; *Aaron*, 1 R. 55; 2 R. 143; *Creel*, R. 83). Each contract provided that if it were terminated due to the contractor's fault, the contracting officer could "enter upon the premises and take possession of the plant" for the purpose of completing the work (*Powell*, R. 781; *Aaron*, 2 R. 59; *Creel*, R. 316).

During most of the period covered by the contracts in the instant cases the relationship between the contractor and the Ordnance Department was subject to Ordnance's "Manual of Instructions for the Administration of Contracts."[3] These Instructions, applicable to "plants of contractors and at Government-owned plants, engaged in the fulfillment of cost-plus-a-fixed-fee contracts with the Ordnance Department" (Section I(A)), describe the relationship between the contractor and Ordnance as follows (Section I(G)(3), Appendix, *infra*, p. 158):

> Without minimizing the importance of the duties of the Contracting Officer's Representative, it is deemed advisable to remind him that it is *not* his function to take charge of the Contractor's plant or attempt to prescribe methods of manufacture. The Contractor is an independent Contractor, not an agent or employee of the Government. His contract requires him to produce a result, and the selection of the means to be employed in producing it is his responsibility. The Contracting Officer's Representative is stationed at the Contractor's plant, *first*, to see to it that the product delivered by the Contractor is in accordance with Government drawings and specifications, *second*, to make sure that the Government gets what it pays for, and *third*, to safeguard the interests of the Contracting

[3] The pertinent provisions of these instructions are printed in Appendix B, *infra*, pp. 157-171.

Officer and the Chief of Ordnance by verifying and preauditing every item for which Government funds are disbursed. [To the same effect, see Ordnance Procurement Instructions, pars. 9,002.1-9,002.3, 9,104.1; 2 War Law Service pars. 24,843 and 24,865, reprinted in Appendix D, *infra*, pp. 171-182.]

C. The Employment Relationship

Each contract specifically provided that the contractor would hire the employees and that they "shall be subject to the control and constitute employees of the Contractor" (*Powell*, R. 771; *Aaron*, 2 R. 41; *Creel*, R. 300, 351-352). The contractor agreed to comply with Federal and State labor laws applicable to private employers (*Powell*, R. 783, 790, 793, 826; *Aaron*, 2 R. 36, 39, 43, 70; *Creel*, R. 296, 297-298, 301, 306, 354). Reimbursement was promised for any bonuses or other extra wage payments it made, provided that such payments were "consistent with the Contractor's general employee relations policies throughout its organization" (*Powell*, R. 774; *Aaron*, 2 R. 48; *Creel*, R. 306, 356). While the contracting officer had authority to require the contractor to dismiss any employee for incompetence or in the national interest (*Powell*, R. 782; *Aaron*, 2 R. 65; *Creel*, R. 321), the contractor had the right to appeal any such order to higher War Department officials (*Powell*, R. 791, 831; *Aaron*, 2 R. 68; *Creel*, R. 323, 363). In order to secure reimbursement for its labor costs, the contractor had to submit to the con-

tracting officer for approval the names, classifications and wage rates of all new employees hired by the contractor, as well as any subsequent changes in the status of such employees (*Powell*, R. 938, 943, 951; *Aaron*, 1 R. 21; 2 R. 146). The contractor also submitted his payrolls for verification and certification (*Powell*, R. 776; *Aaron*, 2 R. 53; *Creel*, R. 309).

The records in all the instant cases disclose that the contractor did the actual hiring, promoting, discharging and paying of the employees (*Powell*, R. 190, 202, 207, 209, 210, 940; *Aaron*, R. 43, 46; 2 R. 17; *Creel*, R. 85, 259, 269). The *Powell* record reveals that the contractors specifically informed the employees that it was their employer (R. 189, 191-192, 194, 196, 198, 200), and both the *Powell* and *Aaron* records show that the notices of employment and other employment records were issued in the contractor's name (*Powell*, R. 321-327, 589, 597, 701, 611, 623, 625; *Aaron* 2 R. 155-161). The employees worked exclusively under the supervision and direction of the contractor's personnel, and their duties were prescribed by the latter's rules, regulations and bulletins (*Powell*, R. 69, 217, 466; *Aaron*, 1 R. 45-49; *Creel*, R. 258). This was in conformity with the Ordnance Procurement Instructions, which directed the contracting officer that if he had any criticism to make regarding the contractor's personnel, such criticism was to be made only "by direct contact" with the contractor's chief official at the plant (OPI par. 50,002.12; 2

War Law Service par. 25,203, reprinted in Appendix D, *infra*, pp. 180-182).

The respondent in the *Powell* case informed all of its employees, including petitioners, when they were hired that they would be paid in accordance with the overtime provisions of the Fair Labor Standards Act (R. 206). The records in the other two cases are somewhat sketchy with respect to the relationship between the contractor and the employees, but they reveal that in those cases, as well as in the *Powell* case, the contractor paid overtime compensation for all hours over forty a week which it regarded as working time. The only employees excluded from such overtime payments were those whom the contractor classified as exempt "administrative" or "executive" employees under Section 13(a)(1)[4] of the Fair Labor Standards Act (*Powell*, R. 689, 692, 939; *Aaron*, 2 R. 128, 144; *Creel*, R. 251, 270-275, 278). The instant cases involve the claims of employees who were classified as exempt under Section 13(a)(1) (the *Powell* case) or who contend that they worked certain overtime hours which the contractor did not regard as time worked (the *Aaron* and *Creel* cases).

In general, the employment relationship appears to have accorded with the War Department's

[4] Section 13(a)(1) exempts from the minimum wage and overtime provisions of the Act "any employee employed in a bona fide executive, [or] administrative * * * capacity * * * (as such terms are defined and delimited by regulations of the Administrator)."

"Manual of Instructions" for the administration of its cost-plus contracts. These instructions described in detail the respective functions and status of the contractor and of the contracting officer's representative in the hiring and supervision of the employees working there, as follows:

> Under the provisions of Ordnance Department Cost-plus-a-fixed-fee Contracts the Contractor is responsible for the hiring, firing, and working conditions of employees on the project and, subject to the approval of the Contracting Officer, the determination of their wages and hours. The Contractor must furnish and supervise all labor required for the performance of the work and the employees thus furnished are those of the Contractor and in no sense those of the Government. The Contractors is responsible for its relations with its employees.
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> * * *
>
> The Fair Labor Standards Act applies to every employee (except those specifically exempted thereunder) engaged in interestate commerce or in the production of goods for such commerce. Under this statute an employee is deemed engaged in "production" if he is employed in "any process or occupation necessary to the production" of goods. The interpretation of this definition is, at the present time, so broad as to include virtually all employees of Cost-plus-a-fixed-fee Contractors

except those specifically exempted by the terms of the statute.[5]

D. Defenses Advanced by Respondents

In the *Powell* case, the respondent, in reply to petitioners' claims, alleged below that the latter were exempt under Section 13 (a)(1) of the Fair Labor Standards Act, and raised certain defenses under the Portal-to-Portal Act of 1947 (61 Stat. 84, 29 U.S.C., Supp. II, 252 *et seq.*) and the Missouri statute of limitations. In addition, respondent denied that petitioners were engaged in the production of "goods" for "commerce" within the meaning of Sections 3(i), 3(j) and 7(a) of the Fair Labor Standards Act, basing its denial on various theories. It argued that commerce is restricted to "buying and selling," and since munitions produced under a "cost-plus" contract are not bought or sold, they were produced for "war" and not for "commerce." Further, it asserted that transportation by the United States of Government-owned goods is a mere administrative act of the Government and does not constitute "commerce." Finally, with respect to "production of goods for commerce," respondent claimed that the

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[5] Manual of Instructions for the Administration of Contracts (War Department; Office of the Chief of Ordnance; 1941), Sections X(A) and XI(I). To the same effect as the above instructions, see Ordnance Procurement Instructions, pars. 50,002.11; 50,002.12 (2 War Law Service par. 25,203). The pertinent provisions of these instructions are printed in the Appendix B, *infra*, pp. 157-171, and Appendix D, pp. 176, 182, respectively.

munitions, and the raw materials out of which they were produced, remained during the manufacturing process in the "actual physical possession" of the United States, rather than that of the contractor, so that the munitions were not "goods" within the meaning of Section 3(i).[6] Respondent further claimed that petitioners were covered by the Walsh-Healey Public Contracts Act (49 Stat. 2036, 41 U. S. C. 35) and that such coverage excluded them from the coverage of the Fair Labor Standards Act. It also contended that the Act of July 2, 1940 (54 Stat. 712), under which the cost-plus contract was made, set up a wholly new system of labor relations that excluded the operation of the Fair Labor Standards Act.

Respondent conceded, however, that petitioners were its employees and not those of the United States (R. 30, 34, 37-39), and it does not claim that it was an agent or instrumentality of the United States in the performance of its contract.

In the *Aaron* case, respondent made the same contentions as those advanced in the *Powell* case with respect to the production of goods for commerce and the Act of July 2, 1940. In addition, it claimed that in employing petitioners it had acted as an agent of the United States and, therefore,

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[6] Section 3(i) defines "goods" as meaning all commodities excepting "goods after their delivery into the actual physical possession of the ultimate consumer thereof other than a producer, manufacturer, or processor thereof."

the exemption provided by Section 3(d)[7] applied. Respondent also alleged that plaintiffs' claims were barred by the Portal-to-Portal Act.

In the *Creel* case, respondent denied that petitioners were engaged in producing "goods" for "commerce," advancing the same general theories for that contention which appeared in the other two cases. It also relied on the Portal Act, the Texas statute of limitations, and the Section 13(a)(1) exemption of the Fair Labor Standards Act. Like respondent in *Powell*, however, it conceded that petitioners were its employees and it claimed no exemption under Section 3(d). (R. 16, 251, 252, 266, 268, 279.)

E. Decisions Below

The Court of Appeals for the Eighth Circuit, reversing the judgment for petitioners in the *Powell* case and affirming that for respondent in the *Aaron* case, adopted the wholly novel view that the Fair Labor Standards Act and the Walsh-Healey Act are mutually exclusive and that only the latter statute was applicable to petitioners. Although the court stated "It is clear and undisputed" that petitioners were covered by the Walsh-Healey Act, no evidence had been introduced in the district court with respect to their status under that Act. On the contrary, an exhibit offered by respondent

[7] Section 3(d) provides that the term "employer" "shall not include the United States."

in the *Powell* case revealed that it had classified petitioners as excluded from the Walsh-Healey Act (R. 611). Judge Johnsen filed a concurring opinion which adopted another novel concept, with Judges Sanborn, Woodrough and Riddick joining in that opinion as well as in the official opinion. The view expressed in the concurring opinion was that the Secretary of War, in providing for operation of Government-owned munition plants under cost-plus contracts, had power to establish whatever wage policies he desired "independent of the wage and hour provisions of any other statute" (R. 1000). Judge Johnsen stated that such power was implicit in the authority granted to the Secretary of War by the Act of July 2, 1940, to provide for operation of the Government plants "under such conditions as he may deem necessary" (Section 1(a)). Inasmuch as the cost-plus contracts in the *Powell* and *Aaron* cases specifically required the contractor to comply with the Walsh-Healey Act, Judge Johnsen concluded that the Secretary of War intended the contractor to comply with that Act but not with the Fair Labor Standards Act.

Neither opinion of the Eighth Circuit touched upon the "employment," or the "commerce," or the "goods," questions or on the other issues raised on appeal. The court called attention, however, to the fact that the respondent in the *Powell* case conceded that it was the employer of petitioners (R. 989).

The opinion of the Court of Appeals for the Fifth Circuit in the *Creel* case (R. 234), which affirmed the judgment for respondent, is one of five opinions of that court dealing with the applicability of the Fair Labor Standards Act to employees producing war materials under cost-plus contracts. The others are *Kennedy* v. *Silas Mason Co.*, 164 F. 2d 1016; *St. Johns River Shipbuilding Co.* v. *Adams*, 164 F. 2d 1012; *Reed* v. *Murphey*, 168 F. 2d 257, and *McDonald* v. *Kershaw, Butler, Engineers*, 172 F. 2d 798. In the *Silas Mason*, *Reed* and *Creel* cases, the court concluded that the Act was inapplicable, but in the *Adams* case, certain employees were held to be within the coverage of the Act. The *Kershaw, Butler* case was remanded to the district court "for retrial and resubmission." Upon remand, a compromise decree was entered awarding plaintiffs claimed unpaid overtime compensation without liquidated damages [See *infra*, p. 117, fn. 46].

In its *Silas Mason* opinion, the Fifth Circuit gave the following reasons for holding the Act inapplicable: (1) The munitions were not produced for "commerce," because they "were not manufactured for sale, nor were they ever intended or used for commercial purposes." Further, "transportation by the Government of Government owned munitions during war for use by its armed forces is not 'commerce'" (164 F. 2d 1016 at 1017); (2) munitions produced in Government-owned plants are not "goods" within the meaning of Section 3(i); (3) the cost-plus contractor was

an agent or instrumentality of the United States, bringing it within the Section 3(d) exemption. In the *Creel* case, the court held that the contractor was an agent of the United States,[8] and that it was not engaged in the production of goods for commerce.

SUMMARY OF ARGUMENT

All the Government agencies concerned with war production contracts, including the War Department, were agreed throughout the defense and war production program that cost-plus contracts were within the scope of the Fair Labor Standards Act. The labor policy announced by the National Defense Advisory Commission in the summer of 1940, and explicitly incorporated into both the Army and Navy procurement programs, recognized the applicability of the Federal labor laws (including specifically the Fair Labor Standards and the Walsh-Healey Acts) to national defense cost-plus-a-fixed-fee contracts. Every invitation for bids on, and every award of, such contracts was required to be conditioned upon compliance with these laws. Army Ordnance Department "Manual of Instructions" stated unqualifiedly that "The Fair Labor Standards Act applies to every employee (except those specifically exempted

[8] The Fifth Circuit's statement in the *Creel* opinion that "The contract in this case provided that appellee was operating the plant as a Government agency" (R. 236) is incorrect. The contract contains no such provision. Its provisions are essentially the same as those in the other four cases decided by the Fifth Circuit, and as the contracts in the *Aaron* and *Powell* cases (*supra*, pp. 7-8).

thereunder) engaged in interstate commerce or in the production of goods for such commerce." Legislative understanding and intent throughout the period accorded with this view. This appears from the refusal of Congress to pass any of the 20 odd bills introduced in the years immediately following our entry into the war proposing suspension or restriction of the overtime compensation laws. At the hearings on these legislative proposals all Government agencies concerned—including the War, Navy and Labor Departments and the War Production Board—were unanimously agreed, and so testified, that adherence to the statutory standards, far from hindering the war effort, would have a stabilizing effect, and that suspension of overtime compensation would indeed positively hamper war production.

None of the reasons advanced by respondents or the courts below for holding the Act inapplicable is consistent with the general understanding and assumption by everyone in 1940 and for years thereafter that employees of cost-plus contractors were subject to the Fair Labor Standards Act.

I

The defense that the Act of July 2, 1940, prescribed a complete system of labor relations superseding the operation of the Fair Labor Standards Act and other Federal labor laws is without any support in the terms of the statute and is conclu-

sively refuted by the legislative and administrative background.

The two statutes are in no way inconsistent. Concededly, the 1940 Act did not expressly suspend the Fair Labor Standards Act, although a number of other laws were suspended by specific reference. This omission from the 1940 Act, considered in the light of the express suspension of other statutes, seems clear indication that suspension of the Fair Labor Standards Act was not intended.

Not only are the legislative debates and history preceding the enactment of the 1940 Act significantly lacking in any such evidence, but the course of events subsequent to its enactment unquestionably confirms the view that suspension of the Fair Labor Standards Act was not contemplated. If the 1940 Act intended an exception as far-reaching as now asserted by respondents, not only was such intent unexpressed in the statutes or in any of the debates preceding its enactment, but it was completely overlooked by all Government agencies that might be concerned with it, including the War Department which presumably drafted and proposed the legislation to Congress.

The provision in the 1940 Act expressly preserving the Walsh-Healey Act carries no implication of intent to suspend the Fair Labor Standards Act, as the legislative history of that provision shows beyond doubt. The sole purpose of the proviso was "simply to remove the ambiguity" as to the appli-

cability of the Walsh-Healey Act to negotiated contracts. The 1940 Act, by permitting negotiated contracts without advertising for bids, might have taken certain previously covered Government contracts outside the terms of the Walsh-Healey Act (which applied to the usual Government contracts requiring advertising), unless it was made clear by specific provision that there was to be continued coverage by that Act. Since there was no similar possible conflict between the 1940 Act and the Fair Labor Standards Act, there was no occasion for a specific proviso on the Fair Labor Standards Act.

II

The Fair Labor Standards Act and the Walsh-Healey Public Contracts Act are not mutually exclusive. The statutes are not inconsistent, and neither contains any provision excluding the operation of the other. The Walsh-Healy Act requires employees on government contracts to be paid the wage prevailing in the community; the Fair Labor Standards Act fixes basic minimum standards for employees in interstate industry. The subsequent Fair Labor Standards Act sets the barrier below which the standards may not be relaxed in the absence of an express *legislative* exemption. Congress was very explicit in the Fair Labor Standards Act when it wished to exclude employees because they were regulated by other possibly overlapping Federal statutes. See Sec-

tion 13(a)(4), exempting employees subject to regulation under the Railway Labor Act, and Section 13(b)(1) and (2) exempting employees subject to regulation by the Interstate Commerce Commission. The absence of an express exemption for employees subject to the Walsh-Healey Act indicates clearly that no such exemption was intended. Furthermore, Section 18 provides that nothing in the Act "shall excuse noncompliance with any Federal or State law or municipal ordinance establishing * * * a higher standard than the standard established under this Act;" this would clearly seem to cover the Walsh-Healey Act.

The ten years of experience in administering the statutes also refute the view of the court below that "the two Acts are sufficiently divergent that both may not apply at one and at the same time" (174 F. 2d 718 at 725). While the two Acts may overlap in some instances, there is nothing inconsistent in their simultaneous application.

III

The employees of the contractors were not exempt from the Fair Labor Standards Act as employees of the United States. This has been conceded by respondents in both the *Powell* and *Creel* cases and was apparently assumed by the Eighth Circuit.

It is well established under this Court's decisions that persons working for a private corporation under a contract with the United

States are not employees of the United States, even though their service is performed on Government-owned property, under "supervisory" control by the Government, and at the expense of the Government through a cost-plus arrangement. Here each contract specifically provided that the contractor would hire the employees and that they "shall be subject to the control and constitute employees of the contractor." And each contract made clear the fact that the contractor had possession of the plant for the purpose of operating it. The contract provisions accurately described the actual employment relationship and the actual conduct of the parties in the performance of the contract. The "Manual of Instructions for the Administration of Contracts" issued by the Army's Ordnance Department, which was in effect during most, if not all, of the period of these contracts repeatedly instructed the Government contracting officer that "the contractor is an independent contractor, not an agent or employee of the Government," and provided that "the contractor must furnish and supervise all labor required for the performance of the work and the employees thus furnished are those of the contractor and in no sense those of the Government." The relations and dealings between the contractors and the employees show that in actual practice the contractor hired, promoted and discharged the employees, directed and controlled their work and handled all labor relations with them.

While concededly the contracts in these cases reserved to the Government a considerable degree of supervisory control (necessary because of the Government's financial responsibility and because of the dangers inherent in handling munitions and high explosives), this supervisory control was precisely of the same nature as the control exercised under the contracts involved in *Alabama* v. *King & Boozer*, 314 U. S. 1, and *Curry* v. *United States*, 314 U. S. 14. That the contractors in the instant cases were not simply agents or instrumentalities of the United States in the employment of petitioners is conclusively demonstrated by comparing the basic facts of the instant cases with the facts in *Alabama* v. *King & Boozer* and *Curry* v. *United States* on the one hand, and with those in *Cosmopolitan Shipping Co.* v. *McAllister*, 337 U. S. 783, on the other. The marked similarity of the instant cases to the *King & Boozer* and *Curry* cases is paralleled by the equally marked contrast between these cases and *Cosmopolitan Shipping Co.* v. *McAllister*.

IV

Munitions intended to be carried across State lines by the Government for war purposes are produced for interstate commerce. The Fair Labor Standards Act defines interstate commerce in Constitutional terms, to include "trade, commerce, transportation, transmission, or communication among the several States or from any State to any

place outside thereof." Since the munitions were produced for "transportation", from the State where they were produced to a "place outside thereof," they were produced for "commerce" within the literal terms of the statutory definition. It is established by many decisions of this Court that such commerce is not limited to interstate transactions for commercial purposes in the strict sense. Nothing in the language or purpose of the Act supports a restrictive interpretation, or suggests "that Congress intended that transportation effected by the Government or of Government goods be treated differently from all other transportation." See *Bell* v. *Porter*, 159 F. 2d 117, 119 (C.A. 7), certiorari denied, 330 U.S. 813.

Nor does there appear any valid reason or authority for divergence from the established concept of "commerce" by reason of the fact that the transportation is for war purposes. The powers granted to Congress under the Constitution were not mutually exclusive; the Government has frequently acted simultaneously under the "war" and "commerce" powers. The Department of Justice, the Wage and Hour Administrator, the National Labor Relations Board, the Comptroller General, and even the War Department have all been of the view that the shipment of Government owned munitions across State lines constitutes interstate commerce under the national labor legislation. Furthermore, in enacting the Portal-to-Portal Act, Congress predicated its findings on the assumption

that the employees of cost-plus contractors were subject to the Fair Labor Standards Act.

V

Section 3(i) of the Fair Labor Standards Act, which excepts from the definition of goods "goods *after* their delivery into the actual physical possession of the ultimate consumer thereof other than a producer, manufacturer, or processor," does not apply to respondents' manufacturing operations which occurred *before* the goods were delivered into the possession of the United States as ultimate consumer. Inasmuch as the exemption excludes the productive operations of the ultimate consumer, the result of the construction urged by respondents would be to subject to the Act the manufacturing operations of an ultimate consumer but to exempt the same operations if carried on by an independent manufacturer who sells to the ultimate consumer within the State but for interstate shipment. It would also mean that if an ultimate consumer takes delivery within the state the producers' operations are exempt, but if he takes delivery after interstate transportation the producers' operations are covered. The language, purpose, and history of Section 3(i) show that it was not intended to have any such capricious results, which would seriously impair the general coverage of the Act, but was designed to protect only *the consumer* from liability for transporting goods

produced under substandard conditions. The consistent administrative interpretation has limited the exemption to consumers, as Congress intended, and has not extended it to producers of goods for commerce. The circuit courts of appeals (except for the Fifth Circuit in some of its decisions) have come to the same conclusion.

ARGUMENT

Introduction

A. Nature of the Government's Interests and Position in These Cases.

As this Court stated in its opinion in *Kennedy* v. *Silas Mason Co.*, 334 U. S. 249, 256, the issues presented by the petitions in these cases are "extremely important * * * probably affecting all cost-plus-fixed-fee war contractors and many of their employees." And, as the Court also pointed out, ultimately the Government is the main party in interest and to be affected by the determination of these issues. The Government's interest is a dual one, with possibly conflicting facets. It has a financial interest because, if the employees ultimately succeed in these cases, the expense may be reimbursable by the Government, and as indicated in the *Silas Mason* opinion, this may ultimately affect the cost of national defense. On the other hand, the Government also has a countervailing interest in the good faith enforcement of the Federal labor laws in accordance with the Congressional intent and the consistent Government policy

throughout the period of the performance of the contracts in question.

This Court's observation in the *Silas Mason* opinion that "The Government, the ultimate party in interest, appears through the Department of Justice in support of the statutory basis for the claims against itself" (334 U. S. at 254), suggests the need, at the outset, for a full explanation of the legislative and administrative background out of which this litigation has arisen. A review of this background will show beyond doubt that, far from being inconsistent, the position advanced in the brief *amicus* in *Silas Mason* and in this brief on behalf of the Government accords with the long-standing and carefully considered Congressional and administrative intent and policy. It was the consistent view of all the Government agencies concerned—including the responsible national defense and war-time agencies—throughout the defense and war production program, that cost-plus contracts were within the scope of the Fair Labor Standards Act, and such contracts were awarded and carried out upon the explicit understanding that they were subject to the Act. The view that the Federal labor laws apply to defense and war production contracts was not only regarded as both valid and sound by all responsible Government officials at the time the contracts in question were entered into and were being carried out, but was widely publicized as the official labor policy for the defense and war production program. Nor

was it a hastily or superficially considered position. It was based upon a careful weighing and debating of the purposes and effects of the laws involved and upon the virtually unanimous recognition that the application of the labor laws to war production contracts would in no way deter, but would be a positive benefit to, the Government's war effort.

Thus, far from being anomalous that the Government should support petitioners' position on the issues presented here, it would indeed be a breach of faith on the part of the Government to do otherwise. This does not mean that the Government supports the particular claims of any of the individual petitioners. Irrespective of the issues here presented, there still remains the question whether the particular petitioners have any valid claim in view of the various other defenses such as particular exemptions, defenses under the Portal-to-Portal Act, failure of proof, statutes of limitations. Even if the Court should rule in favor of the petitioners' position on all of the issues here presented, the decision would not be determinative of petitioners' right to recover. The other defenses are still available. So far as these other defenses are concerned, we take no position on the question of the validity of the claims.

The issues at present before the Court, however, relate to important and basic interpretations and policy regarding the application of Federal labor laws, which affect hundreds of thousands of em-

ployees who may work under similar Government contracts in the future as well as employees who worked under past defense and war contracts. The vast majority of employees working under such contracts have been paid in accordance with the statutory standards of the Fair Labor Standards Act. This was done pursuant to instructions from the Government contracting agencies, in accordance with the mutual understanding of the various Government departments concerned that the Fair Labor Standards Act was applicable to employees of such cost-plus contractors. That this law was generally applicable to such contractors was not questioned until the institution of litigation by employees who were thought to be within some exemption provision of the Act or as to whom there was some dispute regarding hours of work. For example, petitioners in the *U. S. Cartridge* case were foremen or safety inspectors who were believed to be employed in an "executive" or "administrative" capacity within the exemption provided by Section 13(a)(1), a defense still to be determined in the event the decision below is reversed. Employees involved in other cases have been firemen as to whom there has been a dispute as to what hours are to be counted as hours worked (e.g. *Bell* v. *Porter*, 159 F. 2d 117 (C. A. 7), certiorari denied, 330 U. S. 813). Similarly, the *Ford, Bacon & Davis* and *Lone Star Defense* cases involve disputes regard-

ing hours worked. Except for employees as to whom there was some such particular defense, the employees of cost-plus contractors were considered subject to the Act and were compensated accordingly throughout the years of the operation of these contracts.

Thus, while the Department of the Army now takes the view that the arguments advanced by respondents on the issues here presented have merit, this view clearly does not represent or reflect the Congressional understanding or the Government's position throughout the defense and war production period. The legislative and administrative background with respect to wage and hour regulations in war-time production shows conclusively that respondents' contentions with respect to the applicability of the Act (which includes *all* of the defenses under consideration here) are in direct conflict with the legislative intent and with the Government's (including the War Department's) official policy throughout the national defense and war production program.

It is because of these considerations, because of the governmental responsibility to see that the benefits of the Fair Labor Standards Act reach those who are entitled to them, even if the Government must bear the cost, and because we are convinced, as a matter of law, that there is no merit to the interpretation of the statutes adopted by the courts below, that this brief is submitted on behalf of the Government.

B. The legislative and administrative background demonstrates that it was generally assumed that the employees of Government cost-plus contractors were subject to the Fair Labor Standards Act.

1. *The consistent administrative understanding and express policy was that the Fair Labor Standards Act was applicable.*

As early as May 26, 1940, when the defense program was just commencing, President Roosevelt, in his National Defense Address, declared:

> But as the program proceeds there are several things we must continue to watch and safeguard, things which are just as important to the sound defense of a nation as physical armament itself. * * * we must make sure in all that we do, that there is no break-down or cancelation of any of the great social gains which we have made in the past years. * * * There is nothing in our present emergency to justify making the workers of our Nation toil for longer hours than now limited by statute. * * * There is nothing in our present emergency to justify a lowering of the standards of employment. Minimum wages should not be reduced. * * *. There is nothing in our present emergency to justify a breaking down of old-age pensions or unemployment insurance. * * * The policy and laws providing for collective bargaining are still in force. [86 Cong. Rec. App. 3244.]

On May 28, 1940, the National Defense Advisory Commission[9] was established, and a Labor Division

[9] The Advisory Commission, consisting of no more than seven members, was appointed pursuant to Act of Congress

was immediately created. Shortly thereafter, the following Statement of Labor Policy was drawn up and unanimously adopted by the Advisory Commission on September 1, 1940:

> All work carried on as a part of the defense program should comply with Federal statutory provisions effecting labor wherever such provisions are applicable. This applies to the Walsh-Healey Act, Fair Labor Standards Act, the National Labor Relations Act, etc. There should also be compliance with State and local statutes affecting labor relations, hours of work, wages, workmen's compensation, safety, sanitation, etc. [National Defense Advisory Commission's Report of Progress, "Labor Speeds Defense," p. 31.]

This statement of policy was widely publicized and was included in the text of the President's special message to Congress on September 13, 1940 (86 Cong. Rec., 76th Cong., 2d sess., p. 12114). It was also published in the October 4, 1940, issue of the official bulletin of the Advisory Commission (*Defense*, Vol. I. No. 6, pp. 7-8).

This labor policy was explicitly incorporated into the Army and Navy procurement programs in December 1940. Procurement Circular No. 43 is-

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of August 29, 1916 (39 Stat. 619, 649), by the Council of National Defense, composed of the Secretaries of War, Navy, Interior, Agriculture, Commerce and Labor. See "The National Defense Advisory Commission, Functions and Activities," December 28, 1940 (U. S. Government Printing Office 279485).

sued in that month by the Adjutant General's Office of the War Department contained the requirement that "every invitation for bids pertaining to national defense contracts will include the following":

> The general principles governing the letting of national defense contracts and the statements of labor policy adopted by the advisory commission to the council of national defense and approved by the President * * * will be the guide in the award of contracts under this invitation for bids * * * All work executed under any such contract * * * will be carried out in compliance with the provisions of the statement of labor policy relative to overtime pay and in compliance with Federal statutory provisions affecting labor wherever such provisions are applicable, as well as with State and local statutes affecting labor relations, hours of work, wages, workmen's compensation, safety, and sanitation. [5 F. R. 5122.]

The Navy adopted a similar procedure (Commission's Report of Progress, p. 31). The applicability of the Fair Labor Standards and Walsh-Healey Acts generally to war production contracts was spelled out in utmost detail by the Army's Ordnance Department in its "Manual of Instructions for the Administration of Contracts," the labor provisions of which are printed in Appendix B, *infra*, pp. 157-171. This "Manual" not only expressly and specifically recognized the applicabil-

ity of these two statutes to ordnance cost-plus contractors, but also emphasized that the contractor, and not the Government, was responsible as the employer under these contracts. Section XI of the Manual, entitled "Labor Laws," after stating that cost-plus-a-fixed fee contracts were subject to "Federal Labor Laws," explained as follows:

> *These statutes include not only the Walsh-Healey* ("Public Contracts) *Act* referred to in sub-section C. *f.* above, *but also various statutes not referred to in the contracts themselves such as the Fair Labor Standards Act of 1938*, and where appropriate the National Labor Relations Act, the Norris-LaGuardia Anti-Injunction Act, etc. Certain problems of frequent occurrence arising under the wages and hours provisions of the two former acts are of major importance and are considered below. [Italics supplied; Sec. XI, Subsection D(1). Appendix, *infra*, p. 163.]

Subsequent sections of the "Manual" gave further details on the applicability of the Fair Labor Standards Act as follows:

> [XI] G. *Fair Labor Standards Act Applicable to Cost-Plus-A-Fixed-Fee Contracts.*
>
> 1. The Fair Labor Standards Act (Wage-Hours Law) must also be considered applicable to Ordnance C. P. F. F. Contracts. The Fair Labor Standards Act as well as the Walsh-Healey Act prescribes minimum wage, maximum hours, and child labor employment

standards. It does not, as does the Walsh-Healey Act, provide for the regulation of health and safety. *

* * * * * *

3. Although no provision relative to the Fair Labor Standards Act is included in Government contracts, Contractors are nevertheless required to comply with it as well as the Walsh-Healey Act insofar as each may be applicable. * * * [Appendix B, *infra*, pp. 165, 166.]

In another provision, the Ordnance Manual stated unqualifiedly that "*The Fair Labor Standards Act applies to every employee (except those specifically exempted thereunder) engaged in interstate commerce or in the production of goods for such commerce*" (Section XI (I)(1), Appendix B, *infra*, p. 169; italics supplied). This additional explanation of the extent of the applicability of the Act to cost-plus-a-fixed-fee contractors followed:

Under this statute an employee is deemed engaged in "production" if he is employed in "any process of occupation necessary to the production" of goods. *The interpretation of this definition is,* at the present time, *so broad as to include virtually all employees of Cost-plus-a-fixed fee Contractors except those specifically exempted by the terms of the statute.* [Italics supplied; Section XI (I)(1), Appendix B, *infra*, p. 169.]

The Fair Labor Standards Act specifically exempts certain employees from its provisions. Of general application to Cost-plus-a-fixed-fee Contracts are those exemptions for employees employed in a bona fide executive, administrative or professional capacity as these terms have been defined by regulations issued under the Act. Contracting Officer's Representatives should consider the employees of the Contracting Officer subject to the provisions of the Fair Labor Standards Act unless and until it is demonstrated with reasonable conclusiveness that a given employee is within one of the several specific exemptions set forth in the statute. [Section XI (I)(4), Appendix B, *infra*, p. 171.]

The Army Manual also specifically recognized that the Walsh-Healey and the Fair Labor Standards Act standards might overlap, and therefore included detailed instructions for resolving "the overlap":

[XI] H. *Determining the Status of Individual Employees Under the Walsh-Healey Act and Fair Labor Standards Act.*

1. In resolving the overlap of the Walsh-Healey Act and the Fair Labor Standards Act for the purpose of determining their respective application, the full circumstances pertaining to the employment of each *individual* employee is controlling. Under both statutes determining coverage is an *individual* matter as to the nature of the employment of the par-

ticular employee and the classification or title which the employer may have is immaterial. * * *. [Appendix B, *infra*, p. 166; see also Ordnance Procurement Instructions, Appendix D, *infra*, p. 178.]

In describing various possible situations, the Army Manual pointed out that under certain circumstances "*either the Walsh-Healey Act or the Fair Labor Standards Act or both may be applicable*" (italics supplied):

> If * * * no applicable minimum wage determination had been made prior to the award of the Contract, the Walsh-Healey stipulation with respect to minimum wages is inoperative for the life of the contract, with the result that either the Walsh-Healey Act or the Fair Labor Standards Act or both may be applicable. In such case, the regulations issued under the Walsh-Healey Act require the Contractor to pay to each employee covered by the Act who works for a part of a day of a given work week, one and one-half times the "basic hourly rate" or piece rate for hours worked over eight that day or over eight upon any day that week or for all hours he works over 40 during that week, whichever is greater. The employee, however, may also be covered by the Fair Labor Standards Act, which prescribes a minimum wage of 30¢ an hour, an overtime compensation for hours worked in excess of 40 per work week at "not less than one and one-half times the regular rate at which he is employed". Official interpretations under each Statute furnish formulas for satisfying their

respective overtime requirements and calculating the wages or salaries due employees. These rulings are included in the Field Kit (see Section II) and should be consulted. That statute will apply which results in the greater yield to the employee. [Section XI (H) (2) (c), Appendix B, *infra*, pp. 167-168].

In "A Word of Warning," the Manual stressed that "The Contractor is an independent Contractor, not an agent or employee of the Government" (Section I (G) (3), Appendix B, *infra*, p. 158). This was again particularly emphasized in the sections on "Labor Relations" and "Labor Laws," which provided:

> Section X (A) (1). Under the provisions of Ordnance Department Cost-plus-a-fixed-fee Contracts the Contractor is responsible for the hiring, firing, and working conditions of employees on the project and, subject to the approval of the Contracting Officer, the determination of their wages and hours. The Contractor must furnish and supervise all labor required for the performance of the work and the employees thus furnished are those of the Contractor and in no sense those of the Government. The Contractor is responsible for its relations with its employees. [Appendix B, *infra*, pp. 159-160. See also Ordnance Procurement Instructions, Appendix D, *infra*, p. 176.]

Section XI (A). *Contractor's Responsibility for Compliance with Labor Laws*

> The Ordnance Department's Cost-plus-a-fixed-fee Contracts and the various Federal Labor Laws make it abundantly clear that the responsibility for compliance with the provisions of such laws is entirely the Contractor's. The Contracting Officer or his Representative may be consulted from time to time as to the details of such compliance and, indeed, in connection with his proper functions he may not ignore such violations of labor laws as come to his attention, but he has absolutely no responsibility in connection with the Contractor's compliance therewith. This responsibility is solely the Contractor's and the Contracting Officer's Representative's function in this connection is merely advisory.* * * [Appendix B, *infra*, pp. 162-163.]

Moreover, the Ordnance Procurement Instructions specifically provided that "representatives of the Wage and Hour Division of the United States Department of Labor will be accorded access to facilities and to records of cost-plus-a-fixed-fee contractors for the purpose of making investigations to determine applicability of and compliance with the Fair Labor Standards Act" [OPI 9,160, reprinted in Appendix D, *infra*, p. 179].

The applicability of the Fair Labor Standards Act was again reaffirmed, with express reference to cost-plus-a-fixed-fee contractors, in a memorandum dated September 30, 1941, from the office of the Under-Secretary of War, Director of Pur-

chases and Contracts, to the Quartermaster General. After quoting the Advisory Commission's labor policy statement, this memorandum stated:

> It is the opinion of this office that this policy was intended to apply to employees of cost-plus-a-fixed-fee contractors whenever applicable to employees of similar lump sum contractors [See 22 Comp. Gen. Dec. 277, 278].

The Secretary of War reiterated the opinion that the Fair Labor Standards Act was applicable to cost-plus-a-fixed-fee contractors in a letter to the Comptroller General dated August 25, 1942, inquiring as to the reimbursability of amounts paid by a contractor to claimants under the Fair Labor Standards Act (*ibid.*).

The applicability of the Act to war production contracts generally was again recognized in the President's Executive Order 9301, issued on February 9, 1943, which prescribed a minimum workweek of 48 hours but specified expressly that "Nothing in this order shall be construed * * * as suspending or modifying any provision of the Fair Labor Standards Act * * *" (8 F.R. 1825).

The respondents in the instant cases themselves recognized that the persons working under these contracts came within the general coverage of the Act. Thus, the United States Cartridge Co. specifically informed its employees that they would be paid in conformity with the Act's overtime provisions (R. 206). All three respondents classified each employee as either exempt or non-exempt

under the Section 13(a)(1) "executive" and "administrative" exemption (*Powell*, R. 321-327, 689, 692; *Aaron*, 2 R. 128, 144; *Creel*, R. 251, 270-275, 278)—a classification that would have been unnecessary if the Act was inapplicable. The files of the Wage and Hour Division are replete with inquiries from respondents and Ordnance Department officials regarding the status of particular employees under the Act—e.g., whether time spent in certain described activities should be included as time worked under the Act, whether particular employees were exempt "administrative" or "executive" employees, and whether certain deductions from employees' wages were permissible under Section 3(m) of the Act (See, for example, the letter from the Administrator to Lt. Col. William J. Brennan, Jr., with respect to time worked by firemen at the Ford, Bacon and Davis plant, which is reprinted in *Aaron* record at 2 R. 169-170). All of these inquiries were obviously made on the assumption that respondents were within the general coverage of the Act.

2. *Numerous proposals in Congress to suspend the statutory labor standards were unanimously opposed by the responsible Government agencies and were rejected by Congress.*

Following the entry of this Country into the War in December 1941, the War Department, along with the Navy and Labor Departments and the War Production Board, continued adherence to the view that the statutory labor standards were

applicable to war contractors. Throughout the period of agitation for legislation to suspend the overtime statutes, the War Department, along with all the other Government agencies concerned, persisted in the recognition of the applicability of the statutory standards, and agreed that adherence to such statutes had a positive stabilizing influence on war production. Some twenty-odd bills were introduced in Congress proposing the suspension or restriction of the overtime compensation laws,[10] and none of them was enacted into law. Some of these proposals called for blanket suspension of the statutory overtime provisions and some particularly specified contractors with the Navy and Army Departments for performance of labor essential to the war effort. All of the proposals unquestionably were directed primarily at Government war contracts, obviously on the assumption that the statutes in question required overtime compensation to employees working under those contracts.

One of the bills (H. R. 6790, known as the Smith Bill, "a bill to permit performance of essential labor on naval contracts without regard to laws and contracts limiting hours of employment, etc.")

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[10] House Bills Nos. 6616, 6689, 6790, 6792, 6795, 6796, 6814, 6823, 6826, 6835, 7054 and 7731, and Senate Bills Nos. 2232, 2373 and 2884 of the 77th Cong, 2d sess.; Smith Amendment in the House to S. 2208, 88 Cong. Rec. 1708, and O'Daniel amendments in the Senate to S. 2250 and S. 2748, 77th Cong., 2d sess.; 88 Cong. Rec. 3242-3243, 8653; House Bills Nos. 992; 1804 and 2071 and Senate Bills Nos. 190 and 237, 78th Cong., 1st sess.

was the subject of extensive hearings, at which the officials of the War, Navy and Labor Departments and of the War Production Board unanimously testified that war production might be harmed rather than helped by suspension of the overtime provisions of the Act. House Hearings before the Committee on Naval Affairs on H. R. 6790, 77th Cong., 2d sess. Similar testimony was also given before a Senate Committee investigating generally the progress of the war production program. See Senate Hearings before the Subcommittee of the Committee on Appropriations on H. R. 6736, Part II (on "Progress of the War Production Program"), 77th Cong., 2d sess.[11] Under-Secretary of War Patterson stated that suspension of the overtime provisions might cause such a "Violent change in the basis on which labor relations have been conducted" and consequently such "deterioration of labor relations" as actually to "result in decrease of production" (Senate Hearings, *supra*, p. 20; House Hearings, *supra*, p. 2476). He unqualifiedly asserted that "There is no occasion for their suspension" (House Hearings, *supra*, at p. 2477). To like effect, see statements of Assistant Secretary of Navy Bard, Senate Hearings, *supra*, at p. 38,

[11] One of the primary purposes for which these Senate hearings were held was to determine whether the overtime compensation statutes were deterring the war production program and therefore should be repealed or suspended (See letter sent by Committee Chairman Thomas to various Government officials and representatives of labor, Senate Hearings, *supra*, pp. 1-3).

House Hearings, *supra*, at 2541; by War Production Board Chairman Nelson, Senate Hearings, *supra*, pp. 48, 56; by William S. Knudsen, Director of Production, War Department, Senate Hearings, *supra*, at p. 43; by Secretary of Labor Perkins, Senate Hearings, *supra*, pp. 80-81, 92-93, House Hearings, *supra*, pp. 2626-2632. The testimony of these officials leaves no doubt that during the war all Government agencies were agreed that adherence to the statutory overtime standards had a stabilizing influence in that it reduced demands for increases in basic wages and prevented the agitation attendant upon such demands, and also afforded incentive for the necessary longer hours. And clearly they did not think this conclusion would operate "to fasten shackles on the nation's feet while it marches to war," or "otherwise to hinder the Government in the exercise of the sovereign function of providing for the common defense." See opinion of Fifth Circuit in *Silas Mason*, 164 F. 2d 1016 at 1019; cf. dissenting opinion of Judge Hutcheson, *ibid.*

Nor was the contention that adherence to the statutory standards might greatly increase the financial cost of the war overlooked. It was recognized that payment of statutory overtime compensation might cost the Government as much as 4 billion dollars on 56 billion dollars worth of war contracts then outstanding (in March 1942) (see House Hearings, *supra*, at p. 2553). But a careful and comprehensive consideration of the probable

effects of abandoning the statutory standards led to the unanimous agreement by the above officials that overtime compensation would in the long run be less costly and that abandonment of the statutory standards would be a very short-sighted move.[12] Indeed, even the National Association of

[12] The following statement of War Production Board Chairman Nelson represents the gist of the testimony of all of the Government officials (House Hearings, *supra*, p. 2576):

"To abolish the 40-hour week law would not in my opinion bring any greater production or more sustained effort in war industry. On the contrary, I believe that such action would have a harmful effect on war production.

"The average war worker has, of course, been getting time and one-half for all hours worked per week in excess of 40. Our national wage structure has been adjusted to that fact. Most war contracts are drawn with that fact in mind—and where they are not, the use of escalator clauses prevents the time-and-one-half rate from operating as a drag on extension of the workweek.

"If we now abolish the 40-hour week by law, we do not gain 1 hour of additional work in our war industries; but, naturally, we create a widespread demand for increases in wage rates, throw the entire wage structure out of adjustment, and remove an important incentive for labor to shift from nonessential industries into war-production jobs. In addition, we would, in my opinion, make labor relations in general worse rather than better."

See also statement of Secretary of Labor Perkins, Senate Hearings, *supra*, p. 93: "Premium rates for overtime encourage the use of second and third shifts of workers and thus promote the complete use of existing plant and equipment, with a resulting reduction of the unit cost to the Government. * * * the Government would not be the recipient of any saving in the field of lump-sum contracts, which comprise a large proportion of the total. Even in the case of cost-plus contracts any substantial saving to the Government through the suspension or lengthening of the statutory workweek is problematical. If the war industries surveyed by the Bureau

Manufacturers agreed that there would be "few practical benefits in the elimination of overtime", since any economies that might thereby be effected "would be more than offset, because it would have the additional effect of raising the wage costs even in plants which are now producing their maximum output without very much overtime" (House Hearings, *supra*, at 2844).[13] The incalculable ex-

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of Labor Statistics in January 1942 had worked the same hours but had paid straight-time wage rates, without any increase, to their labor (an impossible assumption) they would have decreased their wage bill about 7 percent. The saving in total cost, however, would have been less than 3 percent and no saving to the Government would have resulted under lump-sum contracts."

[13] "For many months employees in many industries have been used to weekly pay checks considerably higher than before, primarily because of high overtime rates. To decrease this weekly pay check by the amount of overtime in it—without simultaneously freezing wage rates at their existing levels—would have one definite tendency. In all probability, there would be a widespread demand by unions throughout the country for an increase in basic hourly rates to a point offsetting the loss of overtime. This would normally stimulate increased labor difficulties and even if it did not increase strikes, it would increase the time which management would be forced to take from our all-important projection [sic] job in order to sit around the negotiation table. I cannot believe that this would help production. * * * Consequently, for the immediate future, such companies see few practical benefits in the elimination of overtime. They believe that a primary effect on them of such action would probably be that of forcing an increase in basic wage rates for reasons outlined previously and a potentially disturbing upset in existing labor relationships." Statement of National Association of Manufacturers President William P. Witherow, House Hearings, *supra*, p. 2844.

pense and economic disruption that might result from the substantial reduction of take-home pay and the consequent demands for increases in basic wage rates, if overtime compensation were suspended, was an important consideration.[14]

[14] "The extra money earned by the worker in war industries through the time and one-half provision has done much to counterbalance the increase in living costs. If we suddenly should abolish that extra earning we would create confusion, disrupt our present wage structure, and inevitably create very strong demand for a general upward revision in wage rates so that the weekly rate can be kept." Statement of Donald Nelson, Senate Hearings, *supra*, p. 48.

"It has been the 40-hour week with the time and a half penalty for overtime after 40 hours which has proven to be a stabilizing influence in this period, just as it is anticipated that in the peacetime demobilization industry it will be a stabilizing influence. * * * You remember in the last war, one of the constant complaints was that nobody stayed on his job. Everybody went out and looked for a better job where he could make a little more money. In this particular recent period the key industries of shipbuilding, machine tool making, and of engine making, which are the items without which we would be paralyzed, have been relatively stable in their employment. The men have not gone out looking for other work, because as they say, 'With my overtime, I can make out very well here.' * * * Turn-over is one of the greatest possible reducers of production. It interferes with production more than any one thing, if you get a high turn-over rate, and the men leave. It always takes time to teach new men." Statement of Secretary of Labor Frances Perkins, Senate Hearings, *supra*, p. 80.

"* * * It is inconceivable that war plants would be able to reduce the weekly earnings of laborers by eliminating presently paid overtime premiums and still employ workers for existing hours without loss of efficiency. Elimination of overtime pay might precipitate a demand for increased basic wage rates to restore the former level of weekly earnings. As a re-

There were other highly important, more positive, gains that it was feared would be lost by suspension of the statutory overtime standards. It was repeatedly emphasized that overtime compensation had not only encouraged workers to shift from non-essential work to war production or to remain in their war production jobs, but that it also induced employers with war contracts to train second and third shifts, thus securing maximum use of war plants and equipment and building up a much needed pool of trained workers.[15] It was pointed out that the greatest need was for the con-

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sult the net cost of the Government would be at least as great as before, and the country would be left with a rigid structure of high wage rates in place of the flexible system which now exists." Statement of Secretary of Labor Frances Perkins, *id.* at 93.

[15] "The overtime pay which goes with the 40-hour week—time and one-half pay, usually—probably has a good deal of value as an incentive to labor to put in the extra hours which are so necessary at this time. * * * War industries today are working longer hours per week than are civilian industries; obviously, the overtime provision provides an incentive to the worker to shift from the latter to the former group." Statement of Donald Nelson, Senate Hearings, *supra*, p. 48.

"The elimination of all premium rates for overtime would remove one of the existing incentives in training new workers on the job. The existing overtime premiums assist in promoting the maximum use of the existing labor supply and in preparing the additional trained labor for the expansion of plant and machine facilities so necessary to meet the war needs." Secretary of Labor Frances Perkins, House Hearings, *supra*, p. 2632.

tinuous utilization of the productive machinery at the most efficient level, and that this could better be achieved by several shifts than by forcing the workers to put in long hours with no added incentive.[16] The officials concluded that the unstabilizing effects of labor dissatisfaction and turnover in war production industries, which suspension of the statutory standards would entail, could easily increase the cost of production far beyond the cost of overtime compensation, to say nothing of the demoralizing effect generally of abandoning the recently acquired social gains.

Neither the Smith Bill, nor any of the other numerous similar bills, were ever reported out of committee. However, the blanket suspension provisions of the Smith Bill were rejected by an overwhelming vote when proposed as an amendment to the Second War Powers Bill of 1942 (88 Cong. Rec., 77th Cong., 2d sess., p. 1708 ff., 1758). Two other attempts to attach similar amendments to other legislation were likewise rejected.[17]

At the same session at which the numerous un-

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[16] "What we are after is round-the-clock use of all available machinery, attained through the operation of three 8-hour shifts." Donald M. Nelson, House Hearings, *supra*, at 2577.

[17] O'Daniel proposed amendment to S. 2250 (on mobilization of small business for war production) (88 Cong. Rec., 77th Cong., 2d sess. 3242-43); and O'Daniel proposed amendment to S. 2748 (to amend the Selective Training and Service Act of 1940) (*id.* at 8653).

successful attempts were made to suspend the Fair Labor Standards Act, Congress adopted the War Labor Disputes Act of 1942, 57 Stat. 163, 50 U. S. C. App. 1501 *et seq.* The provisions of that statute clearly indicated that employees who worked in plants, mines and other facilities producing war materials under Government contract were to have the benefits of existing labor standards, including those of the Fair Labor Standards Act. Section 7(a) of the Act, in authorizing the War Labor Board to settle disputes that "may lead to substantial interference with the war effort" and to "provide by order the wages and hours and all other terms and conditions * * * governing the relations between the parties," specifically directed that such decisions of the Board "shall conform to the provisions of the Fair Labor Standards Act of 1938." And the Stabilization Act of 1942, 56 Stat 765, 50 U. S. C. App. 961 *et seq.*, expressly preserved the overtime provisions of the Fair Labor Standards Act as a part of the Country's wage stabilization program. Section 1 of that Act authorized and directed the President to stabilize the prices, wages and salaries affecting the cost of living "that he finds necessary to aid in the effective prosecution of the war or to correct gross inequities." However, "No action shall be taken under authority of this Act with respect to wages or salaries * * * which is inconsistent with the provi-

sions of the Fair Labor Standards Act of 1938." [18] (Section 4.)

If there were any remaining doubt as to the Government's views with respect to the applicability of these statutes to war production contracts, it is completely dispelled by the "Joint Agreement of the War Department, the Navy Department, the War Production Board, the Maritime Commission, the Department of Labor, the National Labor Relations Board, and the War Manpower Commission, on the Desirability of Retaining Existing Federal Legislation Relating to Overtime Pay," issued January 25, 1943, and reprinted in Appendix C to the brief, *infra*, pp. 172-175. The agreement, after referring generally to the effect of the overtime provisions on the prosecution of the war, stated that "It is the best judgment of these departments and agencies, based on their individual and collective experience, that the abolition of existing overtime pay provisions of Federal legislation would hamper the war effort."

C. Government's Policy in Employees' Suits Against Contractors.

In line with this consistent position, the Department of Justice, in establishing the policy for defending suits brought by individual em-

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[18] Senator Brown, sponsor of the Stabilization Act in the Senate, explained during the course of debates that this provision "preserves for labor the provisions of the Fair Labor Standards Act relating to minimum wages, hours, and so forth" (88 Cong. Rec. 7207).

ployees against cost-plus contractors under the Fair Labor Standards Act, instructed the United States Attorneys not to assert, in cases in which they represented the contractors, the defenses going to the general applicability of the Act to cost-plus contractors, since it was the Department's opinion that such defenses lacked substantial merit and were not in the interests of the United States. For a time the Department also instructed the United States Attorneys to advise private counsel for the contractors that it was the Department's opinion that such defenses lacked substantial merit. A memorandum of agreement was entered into on December 23, 1943, signed by representatives of the War, Navy, Labor and Justice Departments, incorporating this policy.[19] This agreement was predicated, of course, on the basic assumption that the cost-plus contracts were within the scope of the Act. Nevertheless private counsel for the contractors raised such defenses in a number of cases, with the apparent approval of the Department of the Army and some of the other contracting agencies. It was at this juncture for the first time that there appeared any divergence of opinion in the government concerning the applicability of the Act. The Department of the Army, concerned

[19] See Hearings, Subcommittee No. 4 of the House Committee on Education and Labor on proposed Amendments of the Fair Labor Standards Act of 1938 (80th Cong., 1st sess., pp. 2728-2729).

with the cost of paying claims or defending numerous suits for wages claimed to be due under the Act, then took the view that the defenses had merit and should be asserted. At the instance of the Department of the Army, and of other contracting agencies, the above-described inter-agency agreement was abandoned and the policy adopted of permitting private counsel for the contractor to defend the suits with complete freedom to assert any defenses. However, the official Government position never changed, and the Department of Justice and the Department of Labor have consistently maintained the Government's position that these cost-plus contractors are subjects to the Fair Labor Standards and Walsh-Healey Acts.

We now turn to the specific contentions, firstly to the argument urged for the first time in this Court on behalf of the contractor in the *Silas Mason* case that the Act of July 2, 1940, superseded the Fair Labor Standards Act for employees of the cost-plus-contractors. Before doing so, however, we wish to reiterate that the general administrative and legislative understanding to which we have referred shows that in 1940 and for years thereafter it was assumed by everyone that such employees were subject to the Act. This understanding, which, we submit, reflects the congressional interpretation of the statute, is inconsistent with the contention that the Act is inapplicable for any of the reasons advanced by respondents or the courts below.

I

The Act of July 2, 1940, Did Not Prescribe a Complete System of Labor Relations Which Superseded or Was Intended to Preclude the Operation of the Fair Labor Standards Act.

A. The language and history of the Act of July 2, 1940, show no intent to supersede the Fair Labor Standards Act, but the contrary.

In the opinion in the *Silas Mason* case, this Court pointed out that the contention that the Act of July 2, 1940, prescribed a complete system of labor relations which superseded the Fair Labor Standards Act was "fully presented for the first time in the reply brief in this Court." 334 U. S. at 256. As shown by the above record of legislative and administrative conduct, this supposed legislative intent was thus discovered "for the first time" almost eight years after the enactment of the 1940 Act.

That Act—"to expedite the strengthening of the national defense"—authorized the Secretary of War to provide for the necessary construction of military plants and facilities and the production of munitions and war materials either by negotiating contracts "with or without advertising" or by constructing the plants and operating them with War Department personnel (Section 1(b), Appendix A, *infra*, pp. 148-156, where the entire Act is printed). Insofar as authority was granted to use "the unique hybrid relationship" (concurring opinion in the *Powell* case, R. 999) (i.e., Government-owned but privately operated), the

statute was concerned mainly with relieving the Secretary of War of the need to advertise and of the limitations of other *specifically enumerated* statutes, such as the monetary limitation on any individual construction project and the limitations with respect to the number of airplanes, airships and balloons that might be equipped and maintained. Concededly, the 1940 Act did not expressly suspend or refer to the Fair Labor Standards Act, although, as noted in detail below, a number of other laws were suspended in express terms. The only references to labor standards in the 1940 Act were in Sections 1(a), 4(b) and 5. Section 4(b) provides:

> Notwithstanding the provisions of any other law, the regular working hours of laborers and mechanics *employed by the War Department*, who are engaged in the manufacture or production of military equipment, munitions, or supplies shall be eight hours per day or forty hours per week during the period of any national emergency declared by the President to exist: *Provided*, That under such regulations as the Secretary of War may prescribe, such hours may be exceeded, but compensation for employment in excess of forty hours in any workweek, computed at a rate not less than one and one-half times the regular rate, shall be paid to such laborers and mechanics. [Italics supplied; Appendix A, *infra*, pp. 153-154.]

This provision on its face applies only to persons "employed by the War Department." If, as we

contend (Point III, *infra*, pp. 88-117), and as was conceded in the *Powell* case, petitioners are not employees of the War Department but of the respondents, the above quoted provision can have no application. If they were employees of the War Department they would have been exempt from the Fair Labor Standards Act as Government employees. Section 3(d).

Sections 1(a) and 5 contain a proviso that contracts made with manufacturers under the new law which would otherwise be subject to the Walsh-Healey Public Contracts Act shall not be exempt from that Act solely because the contracts are made without advertising. This proviso reads as follows:

> *Provided further*, That no contract entered into pursuant to the provisions of this section which would otherwise be subject to the provisions of the Act entitled "An Act to provide conditions for the purchase of supplies and the making of contracts by the United States, and for other purposes," approved June 30, 1936 (49 Stat. 2036; U. S. C., Supp. V, title 41, secs. 35-45) [the Walsh-Healey Act], shall be exempt from the provisions of such Act solely because of being entered into without advertising pursuant to the provisions of this section; [Appendix A, *infra*, pp. 150, 155.]

This provision obviously does not exempt anyone from the Fair Labor Standards Act. If the intent of the 1940 Act were as far-reaching as now contended, not only was such intent unex-

pressed in the statute or in any of the debates and discussions preceding its enactment, but it was completely overlooked by all Government agencies that might be concerned with it, including the War Department which (according to the reply brief in *Silas Mason*, p. 5) "drafted and presented to Congress the legislation which later became the Act of July 2, 1940." As already noted, the contention that the Act of July 2, 1940, created "a novel and revolutionary set-up" (see concurring opinion below in *Powell* case, R. 998) was suggested for the first time when the *Silas Mason* case was reached for argument in this Court in April 1948. It was there advanced, as a completely novel defense, in the reply brief of private counsel for the contractor. It had not theretofore been urged in any of the courts below and was not made in the main brief of respondent in this Court.

As indicated by the above-described record of the Government's uniform labor policy with respect to defense and war contracts, nothing either in the legislative history or in the administrative behavior gave any hint that either the so-called GOPO (Government-owned, privately operated) contracts or the cost-plus-a-fixed-fee contracts were regarded as a special class subject to different labor provisions from all other war production contracts. On the contrary, all of the evidence strongly indicates that no such distinction was intended. It is clear that prior to the enactment of

the 1940 Act, the labor policy for Government contracts applied without distinction to national defense production. The announcement of labor policy by the President in May 1940 (quoted *supra*, p. 33) was general and all-inclusive in its scope and drew no distinctions between kinds of war production contracts. Nor did anything in the Congressional debates and legislative history preceding the enactment of the July 1940 Act refer to any such distinction or suggest that any modification of, or exception from, the announced labor policy was contemplated by the proposed legislation.

The course of events subsequent to the enactment of the 1940 Act corroborates the conclusion that no such exception was contemplated. Barely a week after the 1940 Act was enacted, the President made public a letter from the Administrator of the Wage and Hour Division, which indicated clearly that the Fair Labor Standards Act was regarded as applicable to war contracts generally, and, particularly to "key defense" work such as was performed under the contracts in the instant cases (86 Cong. Rec. App. 4659-4660). Referring to the question raised in the newspapers "whether in the light of the national defense emergency it will be necessary to raise the ceiling for hours, above which time and one-half must be paid" (See Annual Report, Wage and Hour Division, 1940, Introduction, pp. XII to XIII), the Administrator's letter pointed out that, unlike the flat 40-hour week in effect in France from 1936 to 1938, there was no

rigid limitation on our "ceiling for hours," and concluded that it had not been demonstrated that in "the key defense industries * * * the payment of time and a half for overtime is making difficult their operation." Similarly, the National Defense Advisory Commission's Statement of Labor Policy (see *supra*, p. 34) on September 1, 1940—barely two months after the enactment of the 1940 Act—confirms the conclusion that there was no thought that the 1940 Act provided any broad exception from the labor standards. Indeed, since the July 1940 Act was enacted in the midst of persistent official emphasis upon preservation of the labor standards during the defense program, the clear presumption is that the intent was to incorporate that policy, in the absence of express or unmistakable evidence to the contrary. Such evidence is wholly lacking here. The present suggestion to the contrary is plainly a belated afterthought, not in accordance with the original intent.

B. The Fair Labor Standards Act is not among statutes specifically suspended by the 1940 Act.

Those statutes which the 1940 Act was intended to supersede were suspended in express terms. Thus, Section 1(a) provided for the suspension of Sections 1136 and 3734 of the Revised Statutes and of "any statutory limitation with respect to the cost of any individual project of construction." Section 2(a) suspended all "existing limitations" on the number of certain air corps personnel, and Section 3 suspended "all existing limitations"

with respect to the number of aircraft. Further, Section 1(b) authorized the Secretary of War to provide for the operation and maintenance of plants or facilities and to sell or lease such plants or facilities "without regard to the provisions of section 321 of the Act of June 30, 1932." Also, Section 2(b) permitted the President to assign enlisted men and officers "irrespective" of the provisions of the National Defense Act of June 3, 1916. Under Section 4(a) the Secretary of War was authorized to remove from the classified civil service any employee of the Military Establishment "notwithstanding the provisions of section 6 of the Act of August 24, 1912," and certain other employees could be hired "without regard to the requirements of civil-service laws, rules, or regulations." Further, in Section 1(a) Congress provided that "the cost-plus-a-percentage-of-cost system of contracting shall not be used under this section" by the Secretary of War, thereby suspending certain statutes which had permitted purchases by means of that system.[20]

The fact that the 1940 Act did not specifically provide for the suspension of such a well known statute as the Fair Labor Standards Act, together

[20] In *Muschany* v. *United States*, 324 U. S. 49, 60-61, this Court indicated that the specific prohibition against the cost-plus-a-percentage-of-cost system in the Act of July 2, 1940, limited the scope of the Act of July 2, 1917, 40 Stat. 241, 518, insofar as the latter statute authorized the use of that system in the purchase of land, because the 1917 Act was in direct conflict with the 1940 Act.

with the express suspension of other statutes, clearly indicates that the suspension of the Act was not intended. This conclusion is reinforced by the legislative consideration of the 1940 Act. A major portion of the report which the House Committee on Military Affairs submitted with the bill consisted of a listing and explanation of the statutes which would be suspended by the new Act. H. Rept. 2261, 76th Cong., 3d Sess. (1940). Likewise, Representative Andrews, a member of the committee, enumerated on the House floor the measures to be suspended. 86 Cong. Rec. 6826. In neither case was the Fair Labor Standards Act mentioned. It must be presumed that if the committee had intended such an important and familiar statute to be suspended, some mention of it, along with the other statutes proposed for suspension, would have been made at some time in the course of the legislative discussion.

It is too well settled to require argument that repeal or suspension of a statute by implication is not favored. Since the 1940 Act contained no express repealing clause, it is not to be construed as repealing a prior law unless the two are so clearly repugnant that no other conclusion can reasonably be drawn.[21] There is no "irreconcilable conflict"

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[21] *Posadas* v. *National City Bank*, 296 U. S. 497; *West India Oil Co.* v. *Domenech*, 311 U. S. 20; *United States* v. *Borden Co.*, 308 U. S. 188; *United States* v. *Jackson*, 302 U. S. 628; *United States* v. *Burroughs*, 289 U. S. 159; *General Motors Corp.* v. *United States*, 286 U. S. 49; *Indiana Mfg. Co.* v.

between the Fair Labor Standards Act and the July 2, 1940, Act; indeed, as a mere reading of the latter statute indicates, there is no conflict whatever. Nor can it be said that "the later act covers the whole subject of the earlier one and is clearly intended as a substitute" (*Posadas* v. *National City Bank*, 296 U. S. at 503). The later act, in this case the Act of 1940, is restricted to War Department procurement of military supplies in the national emergency, enacted under the war power of the Congress, whereas the earlier act, in this case the Fair Labor Standards Act, is broader legislation of general and permanent application in the field of labor relations enacted under the interstate commerce power of the Congress.

As noted above (pp. 33-51), the Government agencies that were directly concerned with the operation of the July 2, 1940, Act, during the years

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Kochne, 188 U. S. 681; *United States* v. *Hommer*, 241 U. S. 379; *United States* v. *Noce*, 268 U. S. 613; *Cope* v. *Cope*, 137 U. S. 682; *Wilmot* v. *Mudge*, 103 U. S. 217; *Red Rock* v. *Henry*, 106 U. S. 596. The rule was stated as follows in the *Posadas* case (296 U. S. at 503): "The cardinal rule is that repeals by implication are not favored. Where there are two acts upon the same subject, effect should be given to both if possible. There are two well-settled categories of repeals by implication (1) where provisions in the two acts are in irreconcilable conflict, the later act to the extent of the conflict constitutes an implied repeal of the earlier one; and (2) if the later act covers the whole subject of the earlier one and is clearly intended as a substitute, it will operate similarly as a repeal of the earlier act. ***But, in either case, the intention of the legislature to repeal must be clear and manifest.***" [Emphasis supplied.]

of active warfare, proceeded on the assumption that it did not suspend the Fair Labor Standards Act. Thus, as pointed out above (p. 41), the Secretary of War in September 1941 expressed the opinion that employees working at Army ordnance plants operated by cost-plus contractors (such as the plants operated by respondents in the instant cases) were covered by the Fair Labor Standards Act. In his letter to the Comptroller General, dated August 25, 1942, the Secretary of War, referring to this opinion stated that "It seems to be generally conceded by the Ordnance Department * * * that the Act is applicable." 22 Comp. Gen. 277, 278. He inquired whether "the Ordnance Department [was] right in considering the Fair Labor Standards Act applicable to cost-plus-a-fixed-fee contractors engaged in operation of other Ordnance phases of cost-plus-a-fixed-fee contracts" and whether reimbursement would be allowed to the contractor for accrued overtime paid pursuant to the Act. (*id.* at 279).[22] The Comptroller General responded that his office would approve reimbursement by the War Department of overtime payments made by cost-plus contractors pursuant to the Fair Labor Standards Act (*id.* at 281). To the same effect, see 23 Comp. Gen. 439, 444. This approval was apparently given on the assumption

[22] The pertinent portions of the Secretary of War's letter are printed in the Opinion of the Comptroller General, 22 Comp. Gen. Dec. 277, 278.

that only the statutes specifically suspended by the 1940 Act should be regarded as superseded. Previously, the Comptroller General, in considering the suspension by the July 2, 1940, Act of certain statutory limitations on public expenditures, had concluded that "it cannot be said that in the enactment of Public, No. 703 [the July 2, 1940, Act], the Congress suspended, either expressly or impliedly, any existing statutory limitations on the expenditure of public moneys *except those limitations expressly mentioned therein.*" (21 Comp. Gen. 273, 279; emphasis supplied.) This position, we submit, is the only reasonable construction of the terms of the Act of 1940, and as shown below, the legislative history confirms its soundness.

C. The proviso concerning the Walsh-Healey Act carries no implication of intent to suspend the Fair Labor Standards Act.

Respondents here, like defendant in the *Silas Mason* case, place heavy reliance on the clause in Sections 1(a) and 5 of the 1940 Act, specifically preserving the applicability of the Walsh-Healey Act. They infer that the omission of a similar provision with respect to the Fair Labor Standards Act indicates an intent to exclude the application of the latter act. The legislative history of that clause, however, plainly and completely refutes any such inference. On the contrary, the continued application of the Fair Labor Standards Act was explicitly assumed by Senator Wagner, who introduced the Walsh-Healey proviso. Since the 1940

Act would not conflict in any way with the operation of the Fair Labor Standards Act, there was no need to provide specifically for the continued operation of the latter Act. On the other hand, the 1940 Act by permitting negotiated contracts would have taken certain previously covered Government contracts outside the terms of the Walsh-Healey Act unless specific provision was made for their continued coverage by that Act. The legislative history reveals that the Walsh-Healey provisos were added solely in order to prevent such possible curtailment of the application of that Act ("simply to remove the ambiguity"). Senator Wagner [23] explained its purpose as follows:

> A question has arisen—*and the amendment is simply to remove the ambiguity*—as to whether the Walsh-Healey Act, which is now definitely applicable to a contract for the purchase of supplies as a result of advertising, will also apply to a negotiated contract. * * * Unless this amendment is adopted we would have this anomalous situation: Under a contract entered into with the Government as the result of public bidding one set of minimum wages,

[23] The Wagner Amendment, as introduced and passed by the Senate (86 Cong. Rec. 7839-43, 7924), was slightly modified in conference. H. Rept. 2685, 76th Cong., 3d sess. (1940). The original Wagner Amendment provided that "contracts entered into pursuant to the provisions of this section shall not be deemed to be contracts for the purchase of such materials, supplies, articles, or equipment as may usually be bought in the open market within the meaning of section 9", of the Walsh-Healey Act. 86 Cong. Rec. 7924.

> that is, the prevailing wages [under the Walsh-Healey Act], would be applied, whereas under another contract entered into as a result of negotiations, *a much lower minimum wage would be paid, that is, the flat minimum under the Wage and Hour Act* [the Fair Labor Standards Act]. This situation would present an opportunity for exploitation, since a contractor under a negotiated contract might be paying wages in some instances 25 percent or 75 percent below those required under the Healey-Walsh Act. I am sure that we would not want to invite any such exploitation. [86 Cong. Rec. 7924; italics supplied.]

Senator Wagner's explanation thus plainly refutes appellant's interpretation of the reference in the July 2, 1940, Act to the Walsh-Healey Act. The 1940 Act suspended certain statutes requiring advertising for Government contracts, and inasmuch as the Walsh-Healey Act contains an exemption for certain purchases made without advertising,[24] Senator Wagner feared that negotiated contracts made under the 1940 Act would be outside the scope of the former Act. He indicated that it was the purpose of his amendment to make clear that such contracts would remain within the scope of the Walsh-Healey Act. His amendment was *not* of-

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[24] Section 9 of the Walsh-Healey Act provides an exemption for purchases of supplies "as may usually be bought in the open market" (i.e., purchases made without advertising for bids). Section 11 only provides for application of the Act to "contracts entered into pursuant to invitations for bids."

fered with the intent of suspending, with respect to employees of cost-plus contractors, the minimum wage and overtime provisions of all statutes other than the Walsh-Healey Act. On the contrary, his statement reveals specifically that he regarded such employees as covered by the Fair Labor Standards Act. This view was in accord with the general objective, expressed in messages of the President and throughout the legislative debates, to preserve, not curtail, existing legislation for the benefit of labor.

D. Legislative background of July 2, 1940, Act plainly reveals the objective was to preserve, not to curtail, existing legislation beneficial to labor.

The circumstances surrounding the enactment of the July 2, 1940, Act clearly indicate that it was not intended to curtail in any way the application of any existing legislation enacted for the benefit of labor. The bill was introduced in Congress to carry out the President's plea for a tremendous increase in the nation's capacity to produce military equipment and supplies. H. Rept. 2261, 76th Cong., 3d sess. (1940), p. 1. In the President's National Defense Address of May 26, 1940, given over a nation-wide radio hook-up, he stated that in carrying out the defense program, "We are calling upon the resources, the efficiency, and the ingenuity of American manufacturers of war matériel of all kinds—airplanes, tanks, guns, ships, and the hundreds of products that go into this matériel." He indicated that "the Government of the United States stands

ready to advance the necessary money to help provide for the enlargement of factories, the establishment of new plants, the employment of thousands of necessary workers." In the same address, however, he cautioned that in the Nation's rearmament program, it must protect its labor standards. See *supra*, p. 33. He stated specifically that: "There is nothing in our present emergency to justify making the workers of our Nation toil for longer hours than now limited by statute. * * * There is nothing in our present emergency to justify a lowering of the standards of employment. Minimum wages should not be reduced." 86 Cong. Rec. App. 3243, 3244.

From the President's message, therefore, there is strong affirmative evidence of an intent, in executing the national defense measures, to preserve, and not to curtail in any degree, the gains secured by labor under existing social legislation. As the President's message indicates, it was the intent to preserve not only the minimum wage and overtime benefits of existing social legislation, but also to maintain old-age pensions, unemployment insurance and collective bargaining. Certainly respondants would not claim that "the complete system of labor relations," which it is asserted was prescribed by the July 2, 1940, Act, included a system of collective bargaining, social security and unemployment insurance superseding existing law. This Court has held the National Labor Relations Act applicable to war contractors. *National Labor*

Relations v. *Atkins & Co.*, 331 U. S. 398, rehearing denied, 331 U. S. 868; *National Labor Relations Board* v. *Jones & Laughlin Steel Corp.*, 331 U.S. 416, rehearing denied, 331 U.S. 868; see also *Wilson & Co.* v. *National Labor Relations Board*, 162 F. 2d 310 (C. A. 8); *Newport News S. and Dry Dock Co.* v. *National Labor Relations Board*, 101 F. 2d 841 (C. A. 4); *United States* v. *Carbide & Carbon Chemicals Corp.*, 21 L. R. R. M. 2525 (E. D. Tenn., 1948).

Indeed, the legislative history of the July 2, 1940 Act shows a clear desire on the part of Congress not only to preserve, but even to extend, the overtime benefits of labor legislation to employees producing military equipment under the provisions of that Act. Thus, as explained above, the Wagner amendment was enacted as a precaution against a possible limitation on the scope of the Walsh-Healey Act. Further, in Section 4(b) of the 1940 Act Congress extended overtime benefits to employees of the War Department who would otherwise not be entitled to overtime compensation. 86 Cong. Rec. 7925, 8902.

The manner in which the Act of July 1940 was applied from the start confirms the conclusion that no special or exceptional treatment of any war contracts was contemplated so far as labor standards were concerned. In short, the whole background and surrounding circumstances belie the suggestion that such a far-reaching exception from the labor policy was contemplated, or would have been

adopted so quietly and unobtrusively as to have been overlooked by everyone and completely ignored throughout the war years, when it would have had most practical significance.[25] How far-reaching an exception the exclusion from the Act of war production contracts would have been is indicated by the high proportion of the Nation's employees who worked under such contracts.[26] As noted above (p. 6, fn. 2), approximately 211 billions of dollars in war contracts were awarded during the war period, over 58 billions of which were in cost-plus contracts. Thus, the exclusion of war contracts from the Act would have been tantamount to a blanket suspension of the Act—a move which was unqualifiedly opposed by all the responsible administrative officials in the Government and which Congress after extensive hearings and consideration deliberately refrained from taking.

There thus appears no tenable basis for the contention that the 1940 Act suspended, by implication, the operation of the Fair Labor Standards Act.

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[25] See "Labor Policies of the National Defense Advisory Commission of the Office of Production Management" (May 1940 to April 1942) (Historical Reports of War Administration: War Production Board, Special Study No. 23). This study reveals that the war agency most concerned with labor policies under war production contracts had not the slightest indication that any such exception was contemplated.

[26] Out of a total of 17,600,000 employees engaged in manufacturing at the peak of the war production program, 10,200,000, or almost sixty per cent, were engaged in war work. "Manpower Statistics," No. 13, page 1 (December 1944), issued by the War Manpower Commission.

II

The Fair Labor Standards Act and the Walsh-Healey Public Contracts Act Are Not Mutually Exclusive

The Eighth Circuit's decision that contractors subject to the Walsh-Healey Act are exempt from the Fair Labor Standards Act is even more novel, and of more serious consequence to the administration of the Fair Labor Standards Act, than any of the other defenses advanced by respondents. For this ruling applies not only to cost-plus war contractors, but apparently to all peace-time contractors with the Government as well. Not only is there no such exclusion in the terms of either statute, but this ruling is contrary to the clear legislative intent and to the consistent construction of these statutes throughout the more than ten years of their existence, not only by the Administrator, but by the courts, and indeed by all governmental agencies concerned.[27] This is illustrated by the explicit notice to all employees in the *Powell* case that they would be paid in accordance with the Fair Labor Standards Act and the Walsh-Healey Act. (See *supra*, p. 12, and *Powell* opinion, 174 F. 2d 718 at 722.)[28]

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[27] The absence of other litigation on this point indicates that this has been the general understanding of employers as well.

[28] The Eighth Circuit itself pointed out in its opinion in *Powell* that "These plaintiffs, as well as all other employees of defendant, were notified in a booklet given them at the commencement of their employment that overtime would be compensated for at the rate provided under the Walsh-Healey Act and the Fair Labor Standards Act." 174 F. 2d at 721-722.

The Walsh-Healey Act, enacted in June 1936, applies only to Government contracts "for the purchase of supplies" in any amount exceeding $10,000. Contractors from whom such supplies are purchased by the Government must agree to pay their employees engaged "in the manufacture or furnishing" of such goods "not less than the minimum wages as determined by the Secretary of Labor to be the *prevailing* minimum wages for persons employed on similar work or in the particular or similar industries or groups of industries *currently* operating *in the locality* in which * * * the supplies * * * are to be manufactured or furnished under said contract" (Section 1(b); italics supplied). The contractors must also agree that such employees shall not be permitted to work "in excess of eight hours in any one day or in excess of forty hours in any one week" (Section 1(c)). However, the Secretary of Labor is authorized under specified circumstances to "modify the terms of an existing contract respecting minimum rates of pay and maximum hours of labor" where found "necessary and proper in the public interest or to prevent injustice and undue hardship" and to allow "reasonable variations, tolerances, and exemptions" from the minimum rates and maximum hours (Section 6).

This Act, which preceded the Fair Labor Standards Act by two years, was passed in the session of Congress following the demise of the National In-

dustrial Recovery Act.[29] 80 Cong.Rec. 10537-38, 74th Cong., 2d sess. This was at the time when the idea of regulating wages and hours had just suffered severe reverses and when it seemed that any comprehensive regulation of wages and hours could not meet Constitutional tests. The scope of the Act therefore was not only confined within comparatively narrow limits, but also the standards prescribed were flexible with considerable latitude allowed for modifying, relaxing or suspending them. While remedies by way of administrative hearings and by withholding funds or by court action to collect liquidated damages for violation (Sections 2, 4 and 5) were provided, there was no provision for criminal sanction or the injunction remedy or the employees' right to sue for double damages, such as were provided in the subsequent Fair Labor Standards Act.

In the Fair Labor Standards Act, enacted in June 1938, Congress undertook, in the exercise of its broad "power to regulate commerce," to establish nation-wide and comprehensive *minimum* labor standards "necessary for health, efficiency and general well-being of workers" (Section 2). In contrast to the variable "prevailing" wage standard of the Walsh-Healey Act and the broad authority for administrative relaxation of standards, Congress

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[29]Act of June 16, 1933, c. 90, 48 Stat. 195. See Senate Report No. 1157 on S. 3055 (Public Contracts bill), 74th Cong., 1st sess.; *Schechter Corp.* v. *United States*, 295 U. S. 495, decided May 27, 1935.

in the Fair Labor Standards Act prescribed the rudimentary "*minimum*" standards which were made applicable broadly to all employees "engaged in [interstate] commerce or in the production of goods for commerce," and which could not be administratively relaxed or suspended, except pursuant to specific exemptions. The terms "commerce," "employer," "employee," "employ," "produced," and "goods" were all defined in broadest terms to insure as comprehensive coverage as practicable.[30] Correspondingly, the exemptions were delineated in such detail as to negate unexpressed or implied exemptions. In particular, since Congress was very explicit when it wished to exclude employees because they were regulated by other possibly overlapping Federal statutes (see Section 13(a)(4) exempting employees subject to regulation under the Railway Labor Act, and Section 13(b)(1) and (2) exempting employees subject to regulation by the Interstate Commerce Commission), or because they were Government employees (see Section 3(d)), the absence of an express exemption for employees subject to the Walsh-Healey Act indicates clearly that no such exemption was intended.

Affirmative and conclusive evidence that employees subject to other Federal or State statutes are not excluded from the Fair Labor Standards Act (except where expressly exempted) is found in

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[30] See Section 3 on definitions.

Section 18 of the Act. Section 18 provides that nothing in the Act "shall excuse noncompliance with any Federal or State law or municipal ordinance establishing * * * a higher standard than the standard established under this Act;" this would clearly seem to cover the Walsh-Healey Act.

The statutory language and purposes, as well as the ten years of experience in administering the statutes, completely refute the view of the court below that "the two Acts are sufficiently divergent that both may not apply at one and the same time." (174 F. 2d at 725.) While, as the Eighth Circuit pointed out in its opinion (p. 725), both Acts to some extent had as a purpose "the improvement of living conditions and labor standards," neither Act "covers the whole ground occupied by" the other or was "clearly intended as a substitute" for the other. See *Red Rock* v. *Henry*, 106 U. S. 596, 601-602; *Posadas* v. *National City Bank*, 296 U. S. 497, 504. Contrary to the assumptions by the court below, the Walsh-Healey Act does not so thoroughly cover the subject of wages and hours and labor standards for workers employed under Government contracts as to make "unnecessary" or superfluous the application of the lower minimum standards of the Fair Labor Standards Act. The very differences in the standards and the purposes of the two Acts demonstrate that there is sound reason for their concurrent application and that such was the Congressional intent.

The court below itself recognized that the Walsh-Healey Act, unlike the Fair Labor Standards Act, provided "no minimum wage fixed at a figure comparatively low if compared with wages actually being paid in manufacturing industries" (*Powell* opinion, R. 993-994). The standard under the Walsh-Healey Act was the "prevailing" standard which ordinarily, as the court observed, "was more favorable to labor than the later Fair Labor Standards Act" (*ibid.*). This was in accord with the purpose of that Act to prevent the Government's "vast orders for supplies and construction" from being utilized as an instrument to break down prevailing labor standards. The objective was essentially a negative one—to prevent the Government's purchases from causing existing standards in any locality to deteriorate—rather than an affirmative measure to establish and regulate minimum labor standards generally. Accordingly, this Act was concerned with higher standards than the rock-bottom, rudimentary standards, and for this reason a wider latitude for relaxation and variation was allowed and less stringent enforcement measures were provided.

In contrast, the Fair Labor Standards Act prescribed the *minimum* standards which, because they were rudimentary and the minimum deemed necessary for health and decent living, were to be uniform nationwide standards, "of which we may properly ask general and widespread observance" (See Message from President of the United

States on wages and hours, H. Doc. 255, 75th Cong., 1st sess., p. 3). As the President's Message stated, in the Fair Labor Standards Act the purpose was to prescribe a "few rudimentary standards," the failure to observe which "must be regarded as * * * unwarranted under almost any circumstance" (*ibid.*).

Thus, while there might be a leeway for relaxation and waiver of the higher "prevailing" standards, the subsequent statute set the barrier below which the standards and the sanctions could not be relaxed in the absence of express exemption. In this way the statutes can operate consistently, and without repugnance, at one and the same time. The suggestion by the court below that the simultaneous operation of both Acts would cause "confusion in computing wages and the collection of claims therefor" (174 F. 2d at 725) is simply not borne out by the more than ten years of experience during which both Acts have been simultaneously enforced without difficulty or confusion.[31]

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[31] Indeed, untold confusion would attend adoption of the Eighth Circuit's mutually exclusive construction. Under the present method of administration the standards prescribed in the Fair Labor Standards Act are applied with continuity, with adjustments for employees affected when the employer makes a contract with the Government. The employee knows that he is continuously entitled to the minimum benefits of the Fair Labor Standards Act and that he has his remedies under that Act. If the statutes were mutually exclusive there would be constant vacillation respecting the application of the minimum standards and the remedies of the employees, and, as pointed out, *infra*, pp. 83-84, many employees might find

The coverage of the Fair Labor Standards Act and the Walsh-Healey Act may overlap in some instances, but there is nothing inconsistent in the application of both statutes, where both are applicable by their terms. There is nothing in either statute "which provides for exclusiveness of remedy" or "for an election of remedies." Cf. *Brooks v. United States*, 337 U. S. 49, 53. On the contrary, "the language, framework and legislative history" (*ibid.*, at p. 54) require the conclusion that the acts were not intended to be mutually exclusive but rather mutually reenforcing.

The fact that the two acts would overlap in certain circumstances was appreciated from the outset. Prior to the enactment of the Fair Labor Standards Act, the Secretary of Labor drew the attention of Congress to the fact that the bill (Fair Labor Standards) "overlaps to some extent the administrative functions performed with respect to Government contracts under the Walsh-Healey Act" (81 Cong. Rec. Appendix 1484, 75th Cong., 1st sess., June 15, 1937). The Secretary recommended that the Walsh-Healey Act nevertheless "should be continued in full force and effect" for the reason, but obviously only for the reason, of taking advantage of the Walsh-Healey Act to the extent that it covered certain businesses which it was thought could not

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themselves in a "no-man's-land" outside the protection of either statute whenever they were assigned to work under a Government contract.

constitutionally be regulated under the commerce power (e. g., it might be applied to "certain distributive concerns engaged in intrastate business"), and to the extent that its labor standards might in some cases be higher (*ibid.*).

There was no suggestion that the retention of the Walsh-Healey Act would operate to exclude employees working under Government contract from the broader coverage and the basic minimum standards or from the more effective remedies provided in the Fair Labor Standards Act. No evidence of any such Congressional intent appears in the legislative history. On the contrary, Section 18 appears to have been incorporated in the Act to insure against any such result. Where an employee comes within the scope of both Acts, there is nothing inconsistent in the application of both. In *Walling* v. *Patton-Tulley Transp. Co.*, 134 F. 2d 945, 948 (C. A. 6), where similar contention was made concerning the Fair Labor Standards Act and the Eight Hour Law,[32] which is also applicable to employees working on Government contracts, the court stated, "No difficulty will be perceived in complying with both statutes." This is equally true of the Fair Labor Standards Act and the Walsh-Healey Act. As to employees entitled to the benefits of one of the Acts but not the other, the employer should have no difficulty in observing the requirements of the applicable one.

[32] 54 Stat. 884, 40 U. S. C. 325a.

As to employees coming within the protection of both Acts, observance of the highest minimum wage, overtime and child labor standards provided in either Act automatically satisfies the requirements of the other Act. In this way the different standards provided in the two Acts may be reconciled. As noted above (pp. 38-40), the Army's Manual of Instructions recognized that compliance with both Acts was required and also was entirely feasible, describing in detail how to determine the applicable standards when there appeared to be an "overlap." There is no area of repugnance between them where compliance with one necessarily results in violation of the other.

While, as noted in the Eighth Circuit's opinion, the Walsh-Healey Act provides other sanctions, and in some respects is more favorable to labor than the minimum standards of the Fair Labor Standards Act, the Walsh-Healey standards and sanctions are by no means substitutes for the more definite and unalterable standards or for the criminal sanction and the employee remedy of the Fair Labor Standards Act. As pointed out earlier, the Fair Labor Standards Act fixes definite minimum standards which cannot be relaxed or waived administratively as can the Walsh-Healey standards. Similarly, the direct employee remedy and the criminal sanction of the Fair Labor Standards Act afford greater assurance of enforcement than the more cumbersome administrative enforcement procedure of the Walsh-Healey Act. As this

Court has pointed out, one of the important features of the Section 16(b) remedy is that it has the "virtue of minimizing the cost of enforcement by the Government. It is both a common-sense and economical method of regulation" which "puts directly into the hands of the employees who are affected by violation the means and ability to assert and enforce their own rights, thus avoiding the assumption by Government of the sole responsibility to enforce the act." *Brooklyn Savings Bank* v. *O'Neil*, 324 U. S. 697 at 706, n. 16.[33]

Even in the event that there is adequate administrative machinery for prompt action by the Administrator, the instant cases illustrate that the

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[33] There is clearly no merit in the argument made by the contractors in the court below that the liquidated damages provision of the Fair Labor Standards Act supports the conclusion that the statutes are mutually exclusive since Congress should not be presumed to have intended to impose a "penalty" against the Government. This argument overlooks the fact that the Walsh-Healey Act also applies to lump-sum contractors, who receive no reimbursement for wages or liquidated damages, and thus could not cause the imposition of any such "penalty" against the Government if the Fair Labor Standards Act applied. Furthermore, the assumption that liquidated damages assessed under Section 16(b) constitute a penalty is a misconception of their nature. As this Court stated in *Overnight Motor Co.* v. *Missel*, 316 U. S. 572, 583, such damages "are compensation, not a penalty or punishment by the Government." Accordingly, the Government, in reimbursing a cost-plus contractor for liquidated damages under Section 16(b) is not assessing a penalty against itself. In any event, the Portal-to-Portal Act of 1947 provides ample protection against any possible inequitable imposition of liquidated damages in cases like the instant ones. (See Sections 9 and 11.)

employee may be confronted with further obstacles and problems apparently overlooked by the Eighth Circuit. For example, the Walsh-Healey Act has never been interpreted or administered to extend its benefits to employees engaged only in processes and occupations "necessary to" the manufacture or production, as distinguished from employees engaged directly in productive processes, whereas, the Fair Labor Standards Act, by its terms and as construed by the courts, applied broadly to employees "employed in producing, manufacture, mining, handling, transporting, or in any other manner working on such goods, or in any process or occupation necessary to the production thereof, in any State" (Section 3(j)).[34] Thus, the decision below might have the anomalous result of excluding altogether from the Federal labor standards employees who would clearly be within the scope of the Fair Labor Standards Act if they were not engaged in work on Government contracts (see petitioners' briefs in *Powell*).

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[34] Section 3(j) was amended by the Act of October 26, 1949 (c. 736, Public 393, 81st Cong., 1st sess.) to read as follows: "'Produced' means produced, manufactured, mined, handled, or in any other manner worked on in any State; and for the purposes of this Act an employee shall be deemed to have been engaged in the production of goods if such employee was employed in producing, manufacturing, mining, handling, transporting, or in any other manner working on such goods, or in any closely related process or occupation directly essential to the production thereof, in any State." This amendment, which becomes effective on January 25, 1949, has no significance with respect to the instant cases.

Such a result would be in direct conflict with the letter and purpose of Section 18 of the Fair Labor Standards Act.

Since the original enactment of the Fair Labor Standards Act, Congress has frequently recognized that both Acts were applicable to Government cost-plus contracts. Each annual report since 1942 had expressly brought to the attention of the Congress the Administrator's view that most employers subject to the Public Contracts Act are also subject to the Fair Labor Standards Act as well,[35] and detailed schedules of the Administrator's inspection activities showing the enforcement of that view.[36] Further, the Administrator and the Secretary of Labor, in testifying before Congressional appropriation committees with respect to the annual appropriations for the Wage and Hour and Public Contracts Divisions, have repeatedly informed the committees that the two Acts are being enforced and administered on the assumption that they overlap.[37] The Administra-

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[35] 1943 Annual Report, p. 9; 1944 Annual Report, p. 10; 1945 Annual Report, p. 2; 1946 Annual Report, p. 14; 1948 Annual Report, p. 5.

[36] 1943 Annual Report, p. 2; 1944 Annual Report, p. 37; 1945 Annual Report, p. 17; 1946 Annual Report, pp. 18, 20; 1947 Annual Report, p. 69; 1948 Annual Report, p. 31.

[37] Hearings before Subcommittee of the House Committee on Appropriations for the 1944 Labor Department Appropriation (78th Cong., 1st sess.) pp. 105, 144; Hearings before Subcommittee of the Senate Committee on Appropriations for

tor's annual reports also show that in a number of cases administrative proceedings under the Walsh-Healey Act have been accompanied by criminal prosecutions under Section 16(a) of the Fair Labor Standards Act.[38] On the basis of these reports and testimony, Congress each year has voted appropriations for such enforcement without the slightest hint of criticism that the money was being expended in enforcement activities not contemplated in the basic statutes. In analogous situations such "repeated appropriations" have been held to constitute Congressional "confirmation and ratification" of an administrative interpretation of long-standing and consistent application. *Brooks* v. *Dewar,* 313 U. S. 354, 361; *Fleming* v. *Mohawk Co.,* 331 U. S. 111, 116; see also *Wells* v. *Nickles,* 104 U. S. 444, 447; *Isbrandtsen-Moller Co.* v. *United States,* 300 U. S. 139, 147; *Alaska Steamship Co.* v. *United States,* 290 U. S. 256.

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the 1944 Labor Department Appropriation (78th Cong., 1st sess.) pp. 28, 33; Hearings before the Subcommittee of the House Committee on Appropriations for the 1945 Labor Department Appropriation (78th Cong., 2d sess.), pp. 404, 413, 432-433, 435; Hearings before Subcommittee of the House Committee on Appropriations for 1946 Labor Department Appropriation (79th Cong., 1st sess.) pp. 195, 223, 235.

[38] See Administrator's Annual Report for 1948, p. 9. The records of the United States District Courts show at least 20 criminal cases in which defendants have been convicted and fined for violations under the Fair Labor Standards Act where those same defendants were found liable in administrative proceedings under the Walsh-Healey Act.

Finally, the Portal-to-Portal Act of 1947 (61 Stat. 84, 29 U. S. C., Supp. II, 251) also shows that Congress believed that the Fair Labor Standards Act applied to Government contractors. One of the stated purposes of the Portal Act was to invalidate portal-to-portal claims by employees under the Fair Labor Standards Act because of the "increased cost of war contracts" by virtue of liabilities to cost-plus contractors from such claims. (Section 1, "Findings and Policy"). This statement would have been meaningless if all Government contractors were exempt from the Act, as appears to follow from the decision of the Eighth Circuit in these cases.

As already noted it has been the consistent administrative construction of these statutes throughout the more than ten years of their existence, by the Department of Justice and by the Wage and Hour Administrator, that both statutes may apply to employees of Government contractors. Before and throughout the War, the Secretary of War was apparently of the same opinion (see *supra*, pp. 38-41). And it is to be observed that in the *Silas Mason* case the Department of the Army did not suggest even the possibility of a defense based upon the Walsh-Healey Act. See also opinion of the Comptroller General dated September 28, 1942, 22 Comp. Gen. Dec. 277. We think it plain that everyone concerned has assumed correctly for years that both statutes apply to employees of government contractors, and that

the contrary decision of the court below is as wrong as it is novel.

III

Petitioners Were Employees of Respondents, Not of the United States

Section 3(d) defines the term "employer" to include "any person acting directly or indirectly in the interest of an employer in relation to an employee but shall not include the United States or any State or political subdivision of a State * * *." Respondent in the *Powell* case conceded that it was the employer of petitioners, but respondent in the *Aaron* case contended that it was acting as the "agent of the Government" in the employment of petitioners and was therefore exempt from the Fair Labor Standards Act under Section 3(d). The Court of Appeals for the Eighth Circuit, in concluding that the Walsh-Healey Act was applicable in both the *Powell* and *Aaron* cases, necessarily held that the contractors and not the Government were the employers, since the Walsh-Healey Act does not apply to employees of the United States but only to those "employed by the contractor" (41 U. S. C. 35). Although respondent in the *Creel* case also conceded that the petitioners were its employees (R. 16, 251, 252, 266, 268, 279), nevertheless, the Court of Appeals for the Fifth Circuit held that respondent was simply the agent of the United States, and that therefore petitioners were

employees of the United States within the exclusion of Section 3(d) of the Act (R. 236).

The Fifth Circuit decision not only rests upon erroneous assumptions regarding the terms of the contract between the Government and respondent, but disregards the clear understanding between the contractor and the Government contracting agency and ignores entirely the relationship between the contractor and petitioners. The ruling is contrary to the express terms of the contract, to the consistent previously expressed view of the Secretary of War, and to the official position insisted upon by the Ordnance Department in its instructions relating to the administration of such contracts. It is also directly opposed to the representations made to the employees by the contractors and by the public pronouncements and conduct of the responsible Government officials.

It is settled under this Court's decisions that service performed by a private corporation "under a contract with the United States does not make it an instrumentality of the latter," ever though the service is performed on Government-owned property and under "supervisory" control by the Government. See *Buckstaff Co.* v. *McKinley*, 308 U. S. 358, 360-363 (holding the exemption in the Social Security Act for services performed "in the employ of the United States Government or of an instrumentality of the United States" inapplicable to employees of an Arkansas corporation organized for profit whose only business was the

operation of a bath house on the United States Government Reservation known as Hot Springs National Park). Although the Government contracting agency (Department of Interior) reserved control over such details as "the number of bath tubs which may be used, the charges to the public, the qualifications of employees, the maintenance and care of the premises, a prohibition of employment of agents to solicit patronage, and control over an assignment or transfer of the lease or any interest therein" (*id.* at 360), the Court held "That control, being wholly supervisory is not to be differentiated from the type of control which the United States may reserve over any independent contractor without transforming him into its instrumentality." *Id.* at 363. More recently, in *United States* v. *Silk*, 331 U.S. 704, 712, the Court stated that "Obviously the private contractor who undertakes to build at fixed price or on cost-plus a new plant on specifications is not an employee of the industry thus served nor are his employees." See also *Alabama* v. *King & Boozer*, 314 U. S. 1; *Curry* v. *United States*, 314 U. S. 14; *James* v. *Dravo Contracting Co.*, 302 U. S. 134, 149; *Metcalf & Eddy* v. *Mitchell*, 269 U. S. 514.

It may be noted that the language of the comparable exemption of the "United States" in Section 3(d) of the Fair Labor Standards Act is not as broad as the Social Security Act provision, in that Section 3(d) does not contain the

additional language "or of an instrumentality of the United States." It seems clear therefore that Congress in excluding "the United States" from the definition of "employer" did not intend any broader exemption than would be included under the term "instrumentality" of the United States.[39]

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[39] There is nothing in the debates or reports in the legislative history on the Section 3(d) exclusion; such an exemption for the United States is a common one in statutes of general application, and Section 3(d) apparently was not intended to have any effect different from such exemption in other statutes. The only evidence in the legislative history bearing on the meaning of Section 3(d) supports the conclusion that the exemption was not intended to apply to *contractors* with the Government. During the course of the Joint Hearings before the Senate Committee on Education and Labor and the House Committee on Labor on S. 2475 and H. R. 7200 (75th Cong., 1st sess.) the following exchange took place between Representative Smith and the then Attorney General [now Mr. Justice] Jackson (p. 82):

> Representative Smith. Does the bill apply to municipally hired employees?
>
> Mr. Jackson. I think not. There is a specific exemption, page 3, section 6, that an employer shall not include the United States or any State or political subdivision thereof.
>
> . . . . . .
>
> Representative Smith. Is there anything to cover employees working under contracts for municipalities?
>
> Mr. Jackson. You mean where the contract is let and the contractor employs the help?
>
> Representative Smith. The contractor takes a contract of a town or a city or a State.
>
> Mr. Jackson. The question whether his help would be included?
>
> Representative Smith. Yes.

The controlling decisions of this Court make it clear that the determination of the question whether the contractor under such Government contracts is acting as an agent or instrumentality of the United States "turns on the terms of the contract and the rights and obligations of the parties under it" (*Alabama* v. *King & Boozer*, 314 U. S. 1 at 9), and upon "the actual conduct of the parties" under the agreement (*Cosmopolitan Shipping Co.* v. *McAllister*, 337 U. S. 783, 795). In particular, in determining whether the contractor or the United States is the employer under such a contract, "No single phrase can be said to determine the employer." *Ibid.* Thus, the fact that the contracts in the instant cases were made pursuant to the authorization in the July 1940 Act for the construction and operation of facilities "through the agency" of private manufacturers "under contracts entered into with them" (on which phrase some of respondents have placed great emphasis),[40] is no more decisive than are "such words as employer, agent, independent con-

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Mr. Jackson. I don't see any reason why his help would be exempted.

The Chairman. If they were engaged in interstate commerce?

Mr. Jackson. Yes, if they were engaged in interstate commerce.

[40] But see *Alabama* v. *King & Boozer*, *supra*, which also involved a contract made pursuant to this provision of the July 1940 Act.

tractor" in the contract terminology. "One must look at the venture as a whole" (337 U. S. at 795), including dealings between the contractor and the employees on the one hand as well as those between the contractor and the United States on the other. *Kennedy* v. *Silas Mason Co.*, 334 U. S. 249, 255; *Cosmopolitan Shipping Co.* v. *McAllister*, *supra*, at 790. When all of these factors are considered, we believe the contention that the contractor in the instant cases was simply the agent of the United States in the employment of petitioners is clearly contrary to the above controlling decisions.

A. Contract terms and relationship between the contractor and the Government.

As pointed out in the Statement (*supra*, p. 10), each contract specifically provided that the contractor would hire the employees and that they "shall be subject to the control and constitute employees of the contractor." The contract in the *Powell* case, in addition, explicitly stated that "The Government desires to have the Contractor, as an independent contractor on a cost-plus-a-fixed-fee basis, make all necessary preparations for the operation of said plant, including the training of operating personnel [other than exceptions not relevant here] * * * and operate said plant." (R. 764). The contract further provided "It is expressly understood and agreed by the Contractor and the Government that in the performance of

the work provided for in this contract, the Contractor is an independent contractor and in no wise an agent of the Government" (R. 780).

The statement in the opinion of the court of appeals in the *Creel* case that the contract "provided that appellee was operating the plant as a Government agency" (R. 236) is incorrect. The contract contains no such provision. While the contracts in the *Creel* and *Aaron* cases did not include the additional above quoted provisions of the *Powell* contract, they did specifically provide that the contractor should be responsible for "the employment of all persons engaged in the work hereunder (who shall be subject to the control and constitute employees of the Contractor)" *Aaron*, 2 R. 41; *Creel*, R. 300, 351-352. The contracts in all three cases, also, referred throughout and repeatedly to "employees of the contractor," and "persons employed by the contractor" (e. g., see *Powell* R. 771, 772, 773, 783, 811; *Creel*, R. 293, 294, 298, 300, 302, 305, 351-352; *Aaron*, 2 R. 34, 36, 41, 42, 46, 49, 50). All three contracts specifically provided that the contractor was to "design, construct and equip * * * and *operate*" the plant (italics supplied; *Creel*, R. 288; *Aaron*, 2 R. 24; *Powell*, R. 764; see also *Powell*, R. 766; *Aaron*, 2 R. 40; *Creel*, R. 299, 373, 384, 387). And in all three cases, the contractor agreed to "do all things necessary or convenient in and about the operating and closing down of the Plant, or any part thereof, including (but not limited to) the employment

of all persons engaged in the work hereunder (*who shall be subject to the control and constitute employees of the Contractor*)" (*Powell*, R. 770-771; *Aaron*, 2 R. 41; *Creel*, R. 300, 351-352; emphasis supplied).

Each contract made clear the fact that the contractor had possession of the plant for the purpose of operating it. Provision was made that the contracting officer was to be afforded "access to the premises" (*Powell*, R. 788; *Aaron*, 2 R. 64; *Creel*, R. 320), and if the contract were terminated as the result of the contractor's fault, the contracting officer had authority to "enter upon the premises and take possession" (*Powell*, R. 781; *Aaron*, 2 R. 59; *Creel*, R. 316), thereby indicating that possession of the plant was otherwise in the contractor. Supplemental contracts specifically stated, "It is recognized that property (including without limitation machine tools and processing equipment, manufacturing aids, raw, manufactured scrap and waste materials) title of which is or may be hereafter become vested in the Government, * * * will be in the care, custody, or possession of the Contractor in connection with his performance of this contract" (*Powell*, R. 833, 834; *Creel*, R. 343, 352).

Numerous other provisions of the contracts were wholly inconsistent with the theory that the contractor was the Government's agent. Thus the contracts recognized that employees of the contractor might be engaged both in work under the Govern-

ment contract and in other work for the contractor not related to the Government contract (*Powell*, R. 772-775, 791; *Creel*, R. 305-307, 335, 357; *Aaron*, 2 R. 46-47, 49). If the contractor failed to meet his payroll promptly the Government was authorized under the contract to meet the payroll and to deduct a penalty from the contractor's fee. In addition, the contract provided for the applicability of the Walsh-Healey Act (*Powell*, R. 783, 825; *Aaron* 2 R. 43; *Creel*, R. 301-302, 331), the Eight Hour Law of June 19, 1912 (40 U. S. C. 324) (*Aaron*, 2 R. 36, 39; *Creel*, R. 297), State workmen's compensation insurance laws (*Powell*, R. 790; *Aaron*, 2 R. 66; *Creel*, R. 322), and the Social Security Act (*Powell*, R. 773; *Creel*, R. 306), none of which are applicable to Government employees. Furthermore, the contract prescribed fines and penalties payable to the Government for violations of the Eight Hour Law (*Aaron*, 2 R. 36, 39; *Creel*, R. 297) and Walsh-Healey Act (*Powell*, R. 784; *Aaron*, 2 R. 44; *Creel*, R. 303), provisions inconsistent with the theory that respondent was the Government's agent and not a private contractor. *United States* v. *Driscoll*, 96 U. S. 421, 423-424. Other stipulations in the contract inconsistent with such a theory are the provisions (*Powell*, R. 827; *Creel*, R. 334, 360), for scaling down excessive profits as required by Section 403 of the Sixth Supplemental National Defense Act of 1942 (the Government pays no profits to its agencies), the provision that wage costs higher than those authorized by the

Government would be borne by the respondent (*Powell*, R. 774; *Aaron*, 2 R. 48; *Creel*, R. 306, 356), and the representation by each respondent that it was "a manufacturer of or a regular dealer in the materials * * * to be manufactured * * * in the performance of the contract" (*Powell*, R. 783; *Aaron*, 2 R. 43; *Creel*, R. 302).

All of these facts show that the explicit pronouncement in the contracts that the persons employed shall "constitute employees of the Contractor" was an accurate description of the actual employment relationship.

While it is recognized that the contract terminology in and of itself is not necessarily decisive (*Rutherford Food Corp.* v. *McComb*, 331 U.S. 722; *Bartels* v. *Birmingham*, 332 U.S. 126; *Cosmopolitan Shipping Co.* v. *McAllister*, 337 U.S. 783 at 795), there is no indication in the records in these cases that these contract provisions did not accurately describe the actual employment relationship and "the actual conduct of the parties" (*Cosmopolitan* opinion, *ibid.*). The "Manual of Instructions for the Administration of Contracts" (Appendix B, *infra*, pp. 157-171), which was in effect during most, if not all, of the period of these contracts, emphatically and repeatedly instructed the Government contracting officer that "the contractor is an independent contractor, not an agent or employee of the Government" (Section I(G)(3)); that "the contractor must furnish and supervise

all labor required for the performance of the work and the employees thus furnished are those of the contractor and in no sense those of the Government" (Section X(A)(1)); that "the contractor is responsible for the hiring, firing, and working conditions of employees on the project, and, subject to the approval of the contracting officer, the determination of their wages and hours" (Section I(G)(3)); that the Government contracting officer or other representatives of the War Department "will not participate in the arbitration, conciliation or mediation of existing or threatened labor disputes or any negotiations in connection therewith" and "shall exercise the utmost care to carry out the intent of this principle" (Section X(B)(2)); that the responsibility for compliance with the various Federal labor laws "is entirely the contractor's" and that while the contracting officer "may be consulted from time to time as to the details of such compliance * * * he has absolutely no responsibility in connection with the contractor's compliance therewith," that this responsibility "is solely the Contractor's and the Contracting Officer's Representative's function in this connection is merely advisory" (Section XI (A)).[41]

In the dealings between the contractor and the Ordnance Department in each of the instant cases, both parties treated the petitioners as employees

[41] These provisions are quoted in full in Appendix A, *infra*, pp. 157-171. To the same effect, see the Ordnance Procurement Instructions, Appendix D, *infra*, pp. 176-178, 180-182.

of the contractor within the meaning of the Fair Labor Standards Act. The "Manual of Instructions for the Administration of Contracts" pointed out that "The Ordnance Department's Cost-plus-a-fixed-fee contracts and the various Federal Labor Laws make it abundantly clear that the responsibility for compliance with the provisions of such laws is entirely the Contractor's" (Section XI(A)). Moreover, the Manual explained that "The Fair Labor Standards Act (Wage-Hours Law) must * * * be considered applicable to Ordnance C.P.F.F. Contracts. * * * The interpretation of this definition [of "commerce" and "produced" in the Act] is, at the present time, so broad as to include virtually all employees of Cost-plus-a-fixed-fee Contractors except those specifically exempted by the terms of the statute." (Sections XI(G)(1), XI(I)(1)). The Procurement Regulations provided that overtime payments made "in accordance with the [Fair Labor Standards] Act are reimbursable to cost-plus-a-fixed-fee contractors as labor costs" (PR 9, par. 934; 10 CFR (1945) Sec. 809.934).

In each of the instant cases, the contractor's personnel records specifically indicated whether each employee was regarded as exempt or nonexempt under the Act (*Powell*, R. 321-325, 327, 940-941, 943; *Aaron*, 1 R. 46, 49; *Creel*, R. 270, 273-275). The wages paid to the employees depended in part upon their exempt or nonexempt classification, and in order to secure reimbursement for such wages, the contractor submitted

these personnel records to Ordnance Department representatives for approval (*Powell*, R. 937-941, 943, 951; *Aaron*, 2 R. 14, 143-144; *Creel*, R. 83, 267-268, 323-324).

B. Relations between the contractor and the employees.

As shown above, the dealings between the contractor and the Ordnance Department in each of the instant cases all point to the fact that the employees were employees of the contractor and not of the United States. The relations between the contractor and the employees—a second element to be considered under this Court's opinions in the *Silas Mason* and *McAllister* cases— confirm and support this conclusion. The *Powell* record presents a complete picture of this relationship. The evidence clearly shows that in actual practice the contractor hired, promoted and discharged the employees, that it solely directed and controlled their work, and that it handled all labor relations with the employees. Ordnance Department officials, on the other hand, exercised no direct or personal supervision over the employees' work.

In the *Powell* and *Aaron* cases, the contractor handed each new employee a manual explaining his employment status (*Powell* R. 40, 50, 63-64; *Aaron*, 1 R. 44, 53, 2 R. 128). The *Aaron* manual was not introduced into evidence, but the complete *Powell* manual is reprinted in the record (R. 189-213). This manual informed the employee that he was an employee of the contractor (R. 189,

191-192, 194, 196, 198, 200), and that "The Company * * * is responsible to the United States Government for ammunition production * * * and to our employees, for the establishment of working conditions" (R. 191). The company's employment department "has the final authority to hire" (R. 202). The employee was informed that the company "pays you your wages but is immediately repaid by the United States Government" (R. 204). Deductions were to be made from the employee's wages for workmen's compensation, unemployment compensation and social security, and the contractor would contribute an equal amount as its share (R. 190, 202, 207, 209, 210). The manual stated that "it is the policy of the Company to promote from within the organization" (R. 209). It was indicated that the company's department of industrial relations handled the employee's grievances (R. 195) and supervised any necessary disciplining of employees (R. 201).

The *Powell* record reveals that in actual practice the contractor did the hiring, promoting, discharging and paying of employees (R. 190, 202, 207, 209, 210, 940). Further, it clearly shows that the contractor minutely supervised petitioners' duties. The manuals issued by the contractor to petitioners described in great detail their duties and how they were to be performed (R. 69-109, 217-283, 466-583). Likewise, in the *Aaron* and *Creel* cases, the employees were hired, paid and discharged by the contractor and not by the Govern-

ment (*Aaron*, 1 R. 43, 46, 2 R. 17; *Creel*, R. 85, 259, 269). They worked exclusively under the supervision and direction of the contractor's personnel (*Aaron*, 1 R. 45-49), and their activities were governed by the latter's rules, regulations and bulletins (*Aaron*, 1 R. 45-49; *Creel*, R. 268). At no time did Ordnance Department personnel attempt to supervise the employee's work (*Aaron*, 1 R. 48-51). The records in the *Aaron* and *Powell* cases show that the notices of employment, time cards, applications for pay during absences, payrolls and other records pertaining to petitioners' employment were issued under the contractor's name (*Powell*, R. 321-327, 589, 597, 601, 611, 623, 625; *Aaron*, 2 R. 155-161).

Further evidence in the instant cases that petitioners were employees of the contractor rather than of the United States is apparent from the clear distinction drawn between "employees of the contractor" and "Government personnel." The July 1940 Act, by its terms, of course, draws this distinction (Section 4(b)). In addition, the Ordnance Department, in its supervision of the contractor's operation of the plant and of its expenditures, employed a number of civilians at each plant (*Powell*, R. 349, 353, 359, 635, 815; *Aaron*, 1 R. 62, 2 R. 9, 12; *Creel*, R. 266). At the *Powell* plant, there were about 2,000 such employees (R. 635) and at the *Aaron* and *Creel* plants there was "a large number" (*Aaron*, 2 R. 12; *Creel*, R. 266). This Government personnel was paid di-

rectly by the Ordnance Department (*Aaron*, 2 R. 74), but petitioners received their pay from the contractor and were on the contractor's payroll (*Powell*, R. 206, 940; *Aaron*, 2 R. 73, 146; *Creel*, R. 309). The Ordnance employees were under the supervision of Ordnance's contracting officer or his representatives at the plant (see "Manual of Instructions for Administration of Contracts, Section II(D); Ordnance Procurement Instructions, par. 50,002.12; 2 War Labor Service par. 25,203), whereas the contractor's employees, as indicated *supra* (pp. 101-102), worked exclusively under the direction and control of the contractor and received no supervision from Ordnance officials. An incident which occurred in the *Powell* case aptly illustrates the distinction which the Government and the contractor maintained between the two groups of employees. When the Ordnance Department dissolved its shipping department at the plant and the functions of that department were taken over by the contractor's shipping department, the Ordnance Department employees remaining at the plant were transferred to the contractor's payroll as its employees and no longer retained their civil service status (R. 353-354, 359, 362).

C. The controlling court decisions.

Concededly, the cost-plus contracts in these cases reserved to the Government a considerable degree of supervisory control. This was necessary not only because of the Government's financial respon-

sibility to reimburse for all expenses but also because of the dangers inherent in handling munitions and high explosives. But this supervisory control was precisely of the same nature as the control exercised under the contracts involved in *Alabama* v. *King & Boozer*, 314 U.S. 1, and *Buckstaff* v. *McKinley*, 308 U. S. 358, and "neither the reservation nor the exercise of that power gave to the contractors the status of agents of the Government" to hire employees and prescribe their working conditions (cf. *Alabama* v. *King & Boozer*, *supra* at 13). On the contrary, as aptly stated by dissenting Judge Hutcheson in the *Creel* case, "The whole elaborate system was designed and operated so that the United States should *not* be the employer" (Italics supplied).

That the contractors in the instant cases were not agents or instrumentalities of the United States in the employment of petitioners is graphically and conclusively demonstrated by comparing the basic factual considerations in the instant cases with the facts in *Alabama* v. *King* & *Boozer* and *Curry* v. *United States*, on the one hand, and with those in *Cosmopolitan Shipping Co.* v. *McAllister* on the other. The marked similarity of the instant cases to the *King* & *Boozer* and *Curry* cases is paralleled by the equally marked contrast between these cases and *Cosmopolitan Shipping Co.* v. *McAllister*.

1. *Alabama* v. *King & Boozer conclusively establishes that respondents were not Government agents or instrumentalities in the employment of petitioners.*

Although the *King & Boozer* case dealt with a somewhat different problem (the taxability by a State of purchases of material by a cost-plus contractor), the legal issue there, as here, was whether the contractors were acting as agents of the United States, rather than as independent contractors, with respect to the functions in question. The conclusion in the *Curry* case that the contractors "were not agents or instrumentalities of the Government" (314 U.S. 14, 17-18) in making the purchases would seem *a fortiori* to require the conclusion that the contractors in the instant cases were not acting simply as agents of the United States in the employment of petitioners. As noted more fully below (pp. 110-112), the Secretary of War and the Ordnance Department, and the Seventh Circuit in *Bell* v. *Porter*, 159 F. 2d 117, certiorari denied, 330 U.S. 813, were of the opinion that the *King & Boozer* decision established that the United States was not the employer under such contracts within the meaning of Section 3(d) of the Fair Labor Standards Act.

In the *King & Boozer* and *Curry* cases, the Government retained an even greater degree of control over the purchases of materials than was reserved in the instant cases over the employment qualifications and work of employees. The contract in the *King & Boozer* and *Curry* cases (for the construction of an Army camp and other military facilities on a military reservation of the United States), like the contracts here, was a cost-plus-a-fixed-fee con-

tract, made pursuant to the Act of July 2, 1940. As pointed out in the Government's brief in the *King & Boozer* case (p. 83), the contract there expressly provided that the performance of the contract was "subject in every detail to [the] supervision, direction, and instructions" of the contracting officer (*King & Boozer* record, p. 50)—a blanket provision not included in the contracts in the instant cases. Particularly with regard to the furnishing and purchase of materials and supplies, the Government retained complete and detailed control. Under that contract, as under the contracts in the instant cases, the Government reserved "the right to furnish any and all materials * * * necessary" for the completion of the work, with the contractor authorized to provide the materials, supplies, etc. "not furnished by the Government" (314 U.S. at 10; cf. *Powell*, R. 768, 771; *Creel*, R. 299-300; *Aaron*, 2 R. 41). As under the contracts in the instant cases, "the title to all work completed or in the course of construction or manufacture" was vested in the Government, and title to all purchased materials, tools, equipment, etc. passed to the Government "upon delivery at the site of the work or at an approved storage site" (cf. *King & Boozer* R. 51 with *Powell* R. 786; *Aaron*, 2 R. 63; *Creel*, R. 390).[42]

[42] In the King & Boozer contract, as here, it was provided that such vesting of title "shall not operate to relieve the Contractor from any duties imposed" upon it by the contract (cf. *King & Boozer* R. 51 with *Powell* R. 786, and *Aaron*, 2 R. 63).

In addition to furnishing the contractor with detailed specifications, and requiring that extensive books and records be kept and always be open to Government inspection, the Government reserved the right "to pay directly to the persons concerned all sums due from the contractor for labor, materials or other charges" (314 U.S. at 10; cf. *Powell* R. 775 with *King & Boozer* R. 56). One of the "special requirements" in the *King & Boozer* contract stipulated that the contractors should reduce to writing every contract in excess of $2,000, made by him for services, materials and supplies and insert a provision therein that the contract was assignable to the Government (314 U.S. at 11). Significantly a comparable provision in the contracts in the instant cases excepted "contracts for employment" from this requirement, thus indicating the greater degree of independence allowed the contractors in the instant cases in employment matters (*Powell*, R. 787; *Creel*, R. 321; *Aaron*, 2R. 65). Moreover, while in the instant contracts, as in *King & Boozer*, the Government reserved the right to require the contractor to dismiss from the work any employee the contracting officer deems "incompetent or to be not in the public interest," the right in the instant cases was further "subject, however, to appeal" by the contractor (cf. *Powell*, R. 782; *Creel*, R. 321; *Aaron*, 2 R. 65 with *King & Boozer*, R. 60).[43] If the United States itself were the em-

[43] The right of dismissal reserved in the *King & Boozer* contract was considerably broader, providing that the contracting

ployer, the contractor would have no interest in appealing from a discharge by the Government of one of its own employees. In addition, the contract in *King & Boozer*, "reserves to Government officers the decision of whether to buy and what to buy; that purchases of materials of $500 or over could be made by the contractors only when approved in advance by the contracting officer; that the Government reserved the right to approve the price, to furnish the materials itself, if it so elected; and that in the case of the lumber presently involved, the Government inspected and approved the lumber before shipment" (314 U.S. at 13).

The contractor in *King & Boozer* was required to submit to the contracting officer, in advance, a proposal in writing of the supplies to be purchased, specifying the prices and the description, and to secure approval of the contracting officer before placing the order (314 U.S. at 11). Just as in the instant cases, the job classification and wage rates schedule had to be approved by the Government contracting officer, so in the *King & Boozer* case

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officer might require dismissal of any employee he deemed "incompetent, careless, insubordinate, or otherwise objectionable" (*King & Boozer*, R. 60). Cf. quotation in text of corresponding provision in *Powell* record.

The Contracting Officer's right to require the Contractor to dismiss employees deemed incompetent or whose retention was not deemed in the public interest does not make the Government the employer, as *National Labor Relations Board* v. *Atkins & Co.*, 331 U.S. 398, 407, which involved much stronger provisions for governmental control, attests.

the contractor was required to submit to the contracting officer charts of his personnel showing "the duties and rates of pay of each person" and the procedure proposed to be followed by the contractor for the accomplishment of the work (cf. Government's brief amicus in *King & Boozer* case, p. 83, with *Powell*, R. 792; *Creel*, R. 324; *Aaron*, 2 R. 69). Similarly, in the *King & Boozer* cases, as in the instant cases, the qualifications of certain types of employees had to be approved in advance by the contracting officer (cf. *King & Boozer*, R. 53 with *Powell*, R. 791, 938; *Creel*, R. 83; *Aaron*, 1 R. 55). As in the instant cases, the contract in *King & Boozer* contained detailed provision for full Government control over the amount of every expenditure. The contractor was to be reimbursed for no item until approval of the invoice by the contracting officer (see Government's brief in *King & Boozer*, p. 88). And, as in the instant cases, shipments were made to the construction quartermaster at the site "for account of" the contractors (314 U.S. at 11). The invoice was approved by the construction quartermaster before payment was made by the contractor and the Government later reimbursed the contractor (*id.* at 12).

In short, every element of control relied upon by any of the respondents as evidencing a mere agency agreement was also present in the contract in the *King & Boozer* and *Curry* cases, and indeed the extent of control reserved by the Government in the *King & Boozer* situation was even greater. Despite

this extensive control "in every detail" over the purchases, the contractor was held not to have the status of agent of the Government since the contract contemplated that they should "obligate themselves for the purchase of material ordered" and not "bind the Government to pay for" it (314 U.S. at 13). The fact that the Government owned the plant under construction in its entirety and acquired title to the purchased materials immediately upon their delivery, as well as the fact that the Government was obliged to reimburse the contractors for all such expenditures, was held insufficient to constitute the contractor the agent of the Government.

In view of the remarkable parallel between the facts and the issues in the *King & Boozer* case and in these cases under the Fair Labor Standards Act, it is not surprising that the Seventh Circuit in *Bell v. Porter* considered the citation of the *King & Boozer* and *Curry* decisions "enough to say that cost-plus-a-fixed-fee contractors with the Government, engaged in war production, are not agents of the Government and do not share the Government's sovereign immunities." 159 F.2d 117 at 118; see also in accord on the employment issue: *Walling v. Patton-Tulley Transp. Co.*, 134 F.2d 945, 949 (C.A. 6); *Walling v. McCrady Construction Co.*, 156 F.2d 932, 934 (C.A. 3); *Kelly v. Bord, Bacon & Davis*, 162 F.2d 555, 557, n. 4 (C.A. 3); *Ritch v. Puget Sound Bridge & Dredging Co.*, 156 F.2d 334 (C.A. 9); *Divins v. Hazeltine Electronics*

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Corp., 163 F.2d 100 (C.A. 2). Cf. *National Labor Relations Board* v. *Carroll*, 120 F.2d 457 (C.A. 1). *Contra*: *Selby* v. *J. A. Jones Construction Company*, 175 F.2d. 143 (C.A. 6).

Nor is it surprising to find that the Secretary of War and the Ordnance Department also expressed the same opinion and considered the *King & Boozer* decision decisive of the employment question under Section 3(d) of the Fair Labor Standards Act. In a letter dated August 25, 1942, the Secretary of War wrote to the Comptroller General in part as follows (22 Comp.Gen.Dec. 277, 278):

> The Ordnance Department is aware, of course, of the fact that the United States is not an *employer* as that term is defined in Section 3(d) of the Fair Labor Standards Act, and is, therefore, specifically excluded from its requirements. See also 20 Comp.Gen. 24. This exclusion would not, however, cover Ordnance cost-plus-a-fixed-fee contractors as operating employers since such Ordnance Contractors have been designated in Title VIII, Article VIII-A-6 of the instant contract, and generally in other Ordnance contracts, to be independent contractors. The Supreme Court, in the case of *Alabama* v. *King & Boozer, et al*, decided November 10, 1941, 314 U.S. , and the Comptroller General in his decisions B-19726, B-19652, 21 Comp. Gen. 682, and B-23012, dated February 9, 1942, expressed the same opinion. As independent contractors, they would be employers, as that term is defined in the Fair Labor Standards Act, and, if engaged in

interstate commerce, as they appear to be, then their employees are entitled to the overtime provided for in the Act.

Indeed, the most forceful argument made in support of the agency contention in the *King & Boozer* case—i.e., that the financial and economic burden must be borne by the Government—is even less persuasive in the instant cases. For, whatever intent may be attributed to the Government to avoid State taxation, there can be no doubt whatsoever of the Government's understanding and indeed deliberate policy to accept the financial burden that might be occasioned by the contractor's compliance with the Fair Labor Standards Act. The legislative and administrative background reviewed in the introduction to the Argument (see particularly pp. 44-51) conclusively refutes any suggestion that Congress intended to avoid this financial burden. As pointed out in the above discussion (pp. 46-47), Congress was fully aware of the financial burden and deliberately rejected proposals to avoid it.[*]

[*] Contrary to the contention made by respondent in the *Aaron* case in the court below (brief for appellee, p. 37), the decision in *United States* v. *Allegheny County*, 322 U.S. 174, did not recede from the views expressed in the *King & Boozer* case, at least insofar as the employment and agency issues are concerned. While holding that a State tax could not be imposed directly upon Government-owned property in the hands of a contractor-bailee, the Court was careful to differentiate the *King & Boozer* case (see 322 U.S. at 177, n. 2, 186 n. 7).

So generally accepted was the opinion that the Act applied to employees of Government contractors that employees working under contracts similar to those in the instant cases were held entitled to recover wages in numerous employee suits under the Act (a number of which reached this Court) without the employment question ever being raised. *Bay Ridge Operating Co.* v. *Aaron*, 334 U. S. 446; *Vermilya-Brown Co.* v. *Connell*, 335 U.S. 377; see also *Rutherford Food Corp.* v. *McComb*, 331 U.S. 722; *Armour & Co.* v. *Wantock*, 323 U.S. 126; *Skidmore* v. *Swift & Co.*, 323 U.S. 134.[45]

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[45] For similar cases in the courts of appeals holding or assuming the Act to be applicable, see: *Walling* v. *Haile Gold Mines*, 136 F.2d 102 (C.A. 4); *Fox* v. *Summit King Mines*, 143 F.2d 926 (C.A. 9); *Landreth* v. *Ford, Bacon & Davis*, 147 F.2d 446 (C.A. 8); *Bell* v. *Porter*, 159 F.2d 117 (C.A. 7), certiorari denied, 330 U.S. 813; *Ritch* v. *Puget Sound Bridge & Dredging Co.*, 156 F.2d 334 (C.A. 9); *Lewis* v. *Florida Power & Light Co.*, 154 F.2d 751 (C.A. 5); *Divins* v. *Hazeltine Electronics Corp.*, 163 F.2d 100 (C.A. 2); *Laudadio* v. *White Construction Co.*, 163 F.2d 383 (C.A. 2); *Bennett* v. *V. P. Loftis Co.*, 167 F.2d 286 (C.A. 4); *Day and Zimmermann* v. *Reid*, 168 F.2d 356 (C.A. 8); *Joshua Hendy Corp.* v. *Mills*, 169 F.2d 898 (C.A. 9); *Walling* v. *McCrady Construction Co.*, 156 F.2d 932 (C.A. 3), certiorari denied, 329 U.S. 785; *Clyde* v. *Broderick*, 144 F.2d 348 (C.A. 10); *Basik* v. *General Motors Corp.*, 311 Mich. 705; *Katchel* v. *Northern Engraving and Manufacturing Co.*, 249 Wis. 578; *George Lawley & Son Corp.* v. *South*, 140 F.2d 439 (C.A. 1), certiorari denied, 322 U.S. 746; *Frank* v. *Wilson & Co.*, 172 F.2nd 712 (C.A. 7), certiorari denied, 337 U.S. 918.

2. *Cosmopolitan Shipping Co.* v. *McAllister*, 337 *U.S.* 783 *shows that the relationships are quite different when Government employment is contemplated.*

In contrast to the instant cases where "the whole elaborate system was designed and operated so that the United States should not be the employer" (see *supra*, p. 104), the whole system of the standard form agency agreement in the *Cosmopolitan* case was designed and operated so that the United States would be the employer. The status of the "general agent" who was held in that case not to be the employer, and the relationships between the various parties concerned, differed in virtually every basic respect from the status of the contractors and the relationships in the instant cases. In the first place, contrary to the terms of the contracts in the instant cases (under which the contractor was "an independent contractor and in no-wise an agent of the Government"), the contract between the "general agent" and the United States in the *Cosmopolitan* case expressly designated the general agent "as its agent and not as an independent contractor, to manage and conduct the business of vessels assigned to it" (337 U.S. at 795). Secondly, "neither the possession nor management of the vessel" was conferred on the agent (*id.* at 798). Whereas in the instant cases the contractors had possession of the plants and full responsibility for their management and operation, the general

agent in the *Cosmopolitan* case had "no part in the actual management * * * of the vessel" (*id.* at 796), his duties being limited to the shoreside business of the Government-owned vessel.

Even more importantly, in contrast to the broad responsibility "for the hiring, firing, and working conditions of employees" placed upon the contractors in the instant cases, the general agent in the *Cosmopolitan* case had no such authority and responsibility with respect to the crew of the vessel. These employees "were to be hired by the master of the ship and were to be subject to his orders only" (*id.* at 799) and the master of the ship was expressly "designated by the contract as an agent and employee of the United States" (*id.* at 785). Under the terms of the agreement in the *Cosmopolitan* case, "The responsibility of employing the officers, so the Regulations show, was vested exclusively in the master, and the men so hired became employees of the United States and not of the general agent" (*id.* at 799). The shipping articles signed by the employees upon employment in the *Cosmopolitan* case were stamped at the top with the statement "You Are Being Employed By the United States" (*id.* at 785-786)—exactly the reverse of the representation made to employees in the instant cases. In the actual dealings with the employees in the *Cosmopolitan* case, the master and not the general agent hired them, supervised their work and paid their wages, whereas these functions

were all performed by the contractors in the instant cases.

3. United States v. *United Mine Workers*, 330 *U. S. 258, involved a wholly different issue. To the extent applicable, it supports the position here advanced by the Government.*

The case of *United States* v. *United Mine Workers*, which respondent in the *Aaron* case has asserted "is so clearly in point" (see brief *amici* filed by Owens, McHaney & Lofton in *Silas Mason* case, Supreme Court, October Term 1947, p. 9), dealt with an entirely different issue, since it involved Government operation of the mines in substitution for the private employers and in accordance with the terms of a labor agreement between the Government itself and the union. To the extent that the opinion can have any application to the instant cases, it appears clearly to confirm the conclusion that the contractor rather than the Government, had the requisite possession and control of the plant and its operation characteristic of the employer. The factors which the majority opinion in the *United Mine Workers* case emphasized as indicative of an employment relationship were that the Government had "seized actual possession of the mines" and was "operating them" (330 U.S. at 289) and had entered into direct negotiations and agreement over the terms and conditions of employment, which agreement "was one solely between the Government and the union" to which the private operators were not parties (*id.* at 286-287). The ownership of the facilities and the ultimate

financial responsibility were held to "have little persuasive weight in determining the nature of the relation existing between the Government and the mine workers" (*id.* at 288). In the instant cases the Government is more in the position of the mine owners in that it owns the facilities and has the ultimate financial responsibility, but it has not seized and it is not in possession of and is not operating the facilities, and has not assumed any of the attributes or functions of an employer which it had assumed over the coal mines.

IV

The Munitions Were Produced for "Commerce" Within The Meaning of the Fair Labor Standards Act

Respondents concede that almost all of the munitions produced by petitioners in the instant cases were shipped out of the State. Nevertheless, the contention is made that such munitions were not produced for "commerce," and the Fifth Circuit so held in the *Creel* case (R. 241).[46] The Court of Appeals for the Eighth Circuit in the *Aaron* and

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[46] See also *Kennedy* v. *Silas Mason Co.*, 164 F.2d 1016; *St. Johns River Shipbuilding Co.* v. *Adams*, 164 F.2d 1012, and *Reed* v. *Murphey*, 168 F.2d 257. Compare, however, the latest "cost-plus" decision of the Fifth Circuit, *McDonald* v. *Kershaw, Butler, Engineers, Ltd.*, 172 F.2d 798, where the court refused to rule on the merits but remanded the cause "for retrial and resubmission." Upon remand, the district court entered a compromise judgment on behalf of plaintiffs for claimed unpaid compensation but not for liquidated damages (Decree of the District Court for the Northern District of Alabama, Southern Division, dated October 5, 1949, in Civil Action No. 6057).

Powell opinions did not rule on the "commerce" question.

"Commerce" is defined in the Fair Labor Standards Act to mean "trade, commerce, transportation, transmission, or communication among the several States or from any State to any place outside thereof." Section 3(h). This definition on its face is as broad as the constitutional phrase. *Walling* v. *Jacksonville Paper Co.*, 317 U.S. 564, 567; *Overstreet* v. *North Shore Corp.*, 318 U.S. 125, 128; *McLeod* v. *Threlkeld*, 319 U.S. 491, 493-494. Since the munitions in the instant cases were produced for "transportation" from the State where they were produced to a "place outside thereof," they were produced for "commerce" within the literal terms of the statutory definition.

The only reason suggested by respondents or by the Fifth Circuit for the contrary view is that the munitions "were not manufactured for sale, nor were they ever intended or used for commercial purposes" (164 F.2d at 1017). But this Court has established in numerous decisions that the movement of goods or persons across State lines is "commerce," even though no sale or commercial transaction or purpose is involved. *United States* v. *Hill*, 248 U.S. 420, 423-424 (transportation of whiskey for personal consumption); *Edwards* v. *California*, 314 U. S. 160, 172 (exclusion of paupers); *Thornton* v. *United States*, 271 U.S. 414, 425 (unrestrained ranging of cattle); *Caminetti* v. *United States*, 242 U.S. 470 (transportation of a woman for an immoral purpose but not for com-

mercial vice); *Gooch* v. *United States*, 297 U.S. 124 (transportation of a kidnapped person); *Brooks* v. *United States*, 267 U.S. 432 (transportation of a stolen automobile). See also *United States* v. *Darby*, 312 U.S. 100, 113, where the Fair Labor Standards Act was upheld as a regulation of commerce on the authority of several of the "non-commercial" cases. And see *United States* v. *Southern-Eastern Underwriters Assn.*, 322 U.S. 533, 549), where this Court, after reviewing the above line of decisions, concluded, "Not only, then, may transactions be commerce though non-commercial; they may be commerce though illegal and sporadic. * * * ."

It has thus long been settled that "commerce" as used in the Constitution includes "the transportation of persons and property no less than the purchase, sale and exchange of commodities" (*United States* v. *Hill*, 248 U.S. 420, at 423), and that "It is immaterial whether or not the transportation is commercial in character" (*Edwards* v. *California*, *supra* at 172, fn. 1). There can be no question, therefore, that interstate commerce includes the interstate transportation of Government-owned goods irrespective of whether such transportation be commercial in the strict business sense.

The issue here is whether Congress intended to create an exception from the "commerce" regulated by the Fair Labor Standards Act for the transportation of Government-owned goods, which literally come within the statutory definition. This question, in view of the exemption in Section 3(d)

for the Government as an employer, arises only with respect to the employees of private employers producing materials for the Government. Clearly, no such limitation appears in the broad statutory definition of "commerce," which includes the language of the Constitution. Nor is there anything in the legislative history of the Act which indicates a Congressional intent to narrow the definition so as to except the transportation of Government-owned goods produced by private employers. On the contrary, this Court has recognized that it was clearly the purpose of the Act to extend its control "throughout the farthest reaches of the channels of interstate commerce." *Walling* v. *Jacksonville Paper Co.*, 317 U.S. 564, 567.[47] "Nowhere in the Act is it suggested that Congress intended that transportation effected by the Government or of Government goods be treated differently from all other transportation." *Bell* v. *Porter*, 159 F.2d 117, 119 (C.A. 7), certiorari denied, 330 U.S. 813.[48] This Court, speaking of an-

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[47] Citing the following statement by Senator Borah: "• • • if the business is such as to occupy the channels of interstate commerce, any of the employees who are a necessary part of carrying on that business are within the terms of this bill, and, in my opinion, are under the Constitution of the United States." 83 Cong. Rec., 75th Cong., 2d sess., part 8, p. 9170.

[48] See also *Clyde* v. *Broderick*, 144 F.2d 348, 351 (C.A. 10); *Ware* v. *Goodyear Engineering Co.*, 6 W. H. Cases 160 (S.D. Ind., 1946); *Umthun* v. *Day & Zimmerman, Inc.*, 235 Iowa 293, 16 N.W. 2d 258; *Timberlake* v. *Day & Zimmerman, Inc.*, 49 F.Supp. 28 (S.D.Iowa).

other statute, made the following comment, which is equally applicable here: "The statute makes no distinction between different modes of transportation and we think it was intended to include them all, that being the natural import of its words." *United States* v. *Simpson*, 252 U.S. 465, 466-467. See also *Santa Cruz Co.* v. *National Labor Relations Board*, 303 U.S. 453, 463.

There would thus appear to be no valid reason or authority for confining the scope of this Act to transportation for "commercial" purposes. Nor is the fact that the transportation is for war purposes a valid basis for divergence from the established concept of "commerce." Certainly transportation by rail of Government-owned war materials is interstate commerce for purposes of the Interstate Commerce Act. Cf. *United States* v. *Powell*, 330 U.S. 238; *Northern Pacific R. Co.* v. *United States*, 330 U. S. 248. The powers granted to Congress under the Constitution are not mutually exclusive. Thus, the Government has in the past acted simultaneously under the "war" and "commerce" powers (see *Ashwander* v. *Tennessee Valley Authority*, 297 U.S. 288, 326-330); as it also frequently proceeds simultaneously under its power over "commerce" and over the mails. *Pensacola Telegraph Co.* v. *Western Union Telegraph Co.*, 96 U.S. 1, 11; *Electric Bond & Share Co.* v. *Securities & Exchange Comm.*, 303 U.S. 419, 432-433. The courts have consistently held that contractors carrying mail for the Government in the

exercise of the postal power are within the scope of statutes regulating labor relations and standards under the commerce power. *National Labor Relations Board* v. *Carroll*, 120 F.2d 457 (C.A. 1); *Fleming* v. *Gregory*, 36 F.Supp. 776 (E.D.La.); *Thompson* v. *Daugherty*, 40 F.Supp. 279 (D.Md.); *Magann* v. *Long's Baggage Transfer Co.*, 39 F.Supp. 742 (W.D.Va.). No reason has been advanced for reaching a different result with respect to contracts entered into under the war power.

The contention that transportation of Government-owned materials by the United States or under governmental supervision is a mere administrative act of the Government and therefore not "commerce" is equally untenable; it too apparently derives from the "commercial" misconception of commerce. See *National Labor Relations Board* v. *Idaho-Maryland Mines Corp.*, 98 F. 2d 129 (C.A. 9), holding the National Labor Relations Act inapplicable to the mining and sale of gold, which was produced in California and sold to the United States Mint in that State, and after being commingled with the products of other producers, was transported by the Government to a mint in another State. The court stated that the interstate shipments were made "not as commercial transactions, but as administrative acts of Government." But the court then went on to say, "If, however, such acts may be said to constitute commerce, it is a commerce to which respondent's activities are not closely, intimately or substantially related."

Thus, it is not entirely clear to what extent, if at all, the *Idaho-Maryland* decision actually rested on the proposition that shipment of goods by the Government does not constitute "commerce." Subsequent decisions of the Ninth Circuit, however, make it evident that the *Idaho-Maryland* holding has been limited strictly to the facts of that particular case. Cf. *National Labor Relations Board* v. *Sunshine Mining Co.*, 110 F. 2d 780 (C.A. 9), certiorari denied, 312 U.S. 678; *Fox* v. *Summit King Mines*, 143 F. 2d 926 (C.A. 9).[49] And in the recent case of *Joshua Hendy Corp.* v. *Mills*, 169 F. 2d 898 (C.A. 9), which involved a factual situation closely resembling the instant one, the Ninth Circuit held that the construction of ships under a cost-plus contract with the Maritime Commission which "were sent by the Maritime Commission to points outside the state of their origin" (*id.* at 901), constituted "production of goods for commerce" within the meaning of the Fair Labor Standards Act.

Many other courts have held factual situations closely resembling the one presented here to be subject to the Fair Labor Standards Act. *Bell* v. *Porter*, *supra*, 159 F. 2d 117 (C.A. 7), certiorari

[49] See also *Canyon Corp.* v. *National Labor Relations Board*, 128 F. 2d 953 (C.A. 8); *Walling* v. *Haile Gold Mines*, 136 F. 2d 102 (C.A. 4); *Umthun* v. *Day & Zimmerman*, 235 Iowa 293, 16 N.W. 2d 258; *Timberlake* v. *Day & Zimmerman*, 49 F. Supp. 28, 33; *National Labor Relations Board* v. *Cleveland Cliffs Iron Co.*, 133 F. 2d 295, 300 (C.A. 6).

denied, 330 U.S. 813; *Ware* v. *Goodyear Engineering Corp.*, 6 W.H. Cases 160 (S.D.Ind.) (not officially reported); *Umthun* v. *Day & Zimmerman*, 235 Iowa 293, 16 N.W. 2d 258; *Timberlake* v. *Day & Zimmerman*, 49 F. Supp. 28 (S.D.Iowa); *Brown* v. *Consolidated Vultee Aircraft Corp.*, 80 F. Supp. 257 (W.D.Ky.); *Burke* v. *Mesta Mach. Co.*, 79 F. Supp. 588 (W.D.Pa.); *Jackson* v. *Northwest Airlines*, 75 F. Supp. 32 (D.Minn.) (pending on appeal in C.A. 8); *Bailey* v. *Porter*, 83 F. Supp. 988 (N.D.Ill.); *Moehl* v. *E. I. DuPont de Nemours & Co.*, 84 F. Supp. 427 (N.D.Ill.); *Roland* v. *United Airlines*, 75 F. Supp. 25 (N.D.Ill.); *O'Riordan* v. *Helmers, Inc.*, 6 W.H.Cases 961 (N.Y.C.Ct., 1947); *Belanger* v. *Hopeman Bros.*, 6 W.H.Cases 616 (D.Maine, 1947); *McCumsky* v. *Norden, Inc.*, 7 W.H.Cases 142 (N.Y.S.Ct., 1947); *Simkins* v. *Elmhurst Contracting Co.*, 181 Misc. 791, affirmed, 181 Misc. 793, affirmed, 268 App. Div. 858; *Henderson* v. *Bechtel-McCone Corp.*, 7 W.H.Cases 107 (N.D.Ala., 1947).[50] In each of these cases war

[50] See also *Swettman* v. *Remington Rand*, 65 F. Supp. 940 (S. D. Ill); *Bauler* v. *Pressed Steel Co.*, 81 F. Supp. 172 (N. D. Ill.); *Bumpus* v. *Remington Arms Co.*, 77 F. Supp. 94 (W. D. Mo.); *Tiller* v. *Anchor Optical Corp.*, 6 W. H. Cases 655 (S. D. N. Y., 1947). These cases, similar to those listed above, hold that the production of war materials under Government cost-plus contracts constitutes "production of goods for commerce" within the coverage of the Act. It is not clear, however, from the opinions in this group of cases whether the out-of-State transportation was actually conducted by the Government itself. *Contra*: *Selby* v. *J. A. Jones Construction*

materials owned by the Government were processed under a Government cost-plus contract, with the United States taking possession of the finished products at the processing plant and transporting them across State lines. In each case, it was held, contrary to the position advanced by respondents here, that the processing constituted production of goods for commerce within the coverage of the Act.

The unsoundness of the restrictive interpretation of "commerce" is well illustrated by the inconsistencies in the opinions adopting it. Thus, in *Kennedy* v. *Silas Mason Co.*, 164 F. 2d 1016, 1017, the court, in holding that such materials were not produced for "commerce," pointed to the fact that they were not intended "for commercial purposes," and in *Reed* v. *Murphey*, 168 F. 2d 257, 262, the court stated "War is not commerce. There can be no commerce in war equipment." Yet in *St. Johns River Shipbuilding Co.* v. *Adams*, 164 F. 2d 1012, 1015, the same court conceded that "There can be commerce in war equipment," and in its *Silas Mason* opinion (164 F. 2d at 1017), it

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Co., 175 F. 2d 143 (C. A. 6); *Ackerman* v. *Republic Aviation Corp.*, 8 W. H. Cases 518 (E. D. N. Y.); *Barksdale* v. *Ford, Bacon & Davis*, 70 F. Supp. 690 (E. D. Ark.); *H. B. Deal & Co.* v. *Leonard*, 196 S. W. 2d 991 (S. Ct. Ark.); *Kruger* v. *Los Angeles S. & D. Corp.*, 6 W. H. Cases 831 (S. D. Calif.); *Stewart* v. *Kaiser Co*, 71 F. Supp. 551 (D. Oregon); *Anderson* v. *Federal Cartridge Corp.*, 72 F. Supp. 644 (D. Minn.); *Lynch* v. *Embry-Riddle Co.*, 63 F. Supp. 992 (S. D. Fla.); *Trefs* v. *Foley Bros.*, 7 Lab. Cas. par. 61,743 (W D. Mo.).

specifically states that a manufacturer, who as an independent contractor "engaged under its contract in the business of manufacturing munitions of war" for sale to the Government, would be covered by the Fair Labor Standards Act. To the same effect, see *Reed* v. *Murphey*, 168 F. 2d at 263. Further, in the *St. Johns River Shipbuildi.* case, 164 F. 2d at 1014, the same court held that the production of Liberty ships under a cost-plus contract with the Government was for "commerce," in spite of the fact that the Government received delivery at the shipyards and itself transported the ships out of the State. It relied on *Divins* v. *Hazeltine Electronics Corp.*, 163 F. 2d 100 (C.A. 2) for the proposition that "transportation by the Government of Government owned munitions" is not "commerce" (*Silas Mason*, 164 F. 2d at 1017), although the Second Circuit specifically stated that the transportation of munitions and supplies by the Government during war was "commerce" within the meaning of the Fair Labor Standards Act (163 F. 2d at 102).[51]

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[51] In the *Divins* case, the Second Circuit drew a distinction between aircraft carriers, battleships and submarines, on the one hand, which it regarded as "instrumentalities of war, not of commerce," and armed cargo transports and armed transports, on the other, which it regarded as engaged in commerce, "even though the goods or persons they transport will be devoted to the war effort after arrival at destination." 163 F. 2d at 102. See also *Laudadio* v. *White Construction Co.*, 163 F. 2d 383 (C. A. 2).

Thus, the Fifth Circuit's opinions indicate that neither the Government ownership nor the war use, standing alone, would suffice to exclude the transportation of munitions from the scope of the statutory definition of "commerce." There would seem no greater reason for concluding that the two factors combined have that effect. The Fifth Circuit, like the Second Circuit in *Divins* v. *Hazeltine Electronics Corp.*, 163 F. 2d 100, appears to have been particularly influenced by the view that something produced and transported solely for war (noncommercial) purposes could not be "commerce" in the constitutional or statutory sense. But, as pointed out *supra*, pp. 118-119, this view would appear to be precluded by the long line of decisions of this Court holding that any transportation of goods across State lines is "commerce" whether or not "commercial" in character. We know of no precedents of the Supreme Court to the contrary.

The result reached by the Fifth Circuit appears to have been influenced not by valid legal reasoning, but by the court's belief that the national interest would not be served by holding the Act applicable to employees in munitions factories. (See *Kennedy* v. *Silas Mason Co.*, 164 F. 2d 1016, at 1019; *St. Johns River Shipbuilding Co.* v. *Adams*, 164 F. 2d 1012, at 1015; *Reed* v. *Murphey*, 168 F. 2d 257, at 263). This consideration would seem to be more properly addressed to the legislative than to the judicial branch of the Government. Con-

gress was fully advised of the fact that the Fair Labor Standards Act was being applied to employees of contractors engaged on the Government war contracts,[52] and as previously indicated (pp. 49-53), it gave extensive consideration to the question of whether such employees should continue to be covered by the Act. After Congressional committees had been informed by those in charge of the war production program that the suspension of the overtime provisions would hamper, rather than aid, war production, both Houses rejected proposed amendments which would have suspended those provisions. See p. 51, *supra*. This legislative background conclusively shows, first, that Congress regarded the production of munitions for the Government as production "for commerce" within the meaning of the Act, and secondly, that it intended such employees to remain within the coverage of the Act.

As pointed out in the introduction to the Argument, throughout the course of the war, all of the Government agencies concerned proceeded on the assumption that production of munitions and other

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[52] House Hearings before the Committee on Naval Affairs, 77th Cong., 2d sess., on H. R. 6790; Senate Hearings before the Subcommittee of the Committee on Appropriations, 77th Cong., 2d sess., on H. R. 6736, Part II (on "Progress of the War Production Program"); Annual Report of the Secretary of Labor for the Fiscal Year Ended June 30, 1942, pp. 2-3. See also Annual Report of the Administrator of the Wage and Hour Division to Congress for the years ending June 30, 1944, p. 11, and June 30, 1946, pp. 1-2.

goods to be shipped across State lines for use by the Government in the prosecution of the war, was for "commerce" within the scope of the Federal statutes regulating labor standards and relations? As pointed out above, *supra,* p. 37, the Army Ordnance's "Manual of Instructions" specifically stated:

> The Fair Labor Standards Act applies to every employee (except those specifically exempted thereunder) engaged in interstate commerce or in the production of goods for such commerce. Under this statute an employee is deemed engaged in "production" if he is employed in "any process or occupation necessary to the production" of goods. The interpretation of this definition is, at the present time, so broad as to include virtually all employees of Cost-plus-a-fixed-fee Contractors except those specifically exempted by the terms of the statute.

And the Secretary of War in his letter to the Comptroller General of August 25, 1942 (*supra,* pp. 111-112), expressed the opinion that "As independent contractors, they [the cost-plus-a-fixed-fee war production contractors] would be employers, as that term is defined in the Fair Labor Standards Act, and, *if engaged in interstate commerce, as they appear to be,* then their employees are entitled to the overtime provided for in the Act." (Italics supplied.) The Administrator of the Fair

Labor Standards Act[53] and the National Labor Relations Board[54] have both consistently so ruled, and the great weight of judicial authority has supported this position.[55]

Thus, it appears that the position advanced in the instant cases—that the munitions were not produced for "commerce"—rests on a misconception of "commerce" which is contrary to the controlling decisions of this Court as well as the clear terms of the statutory definition, and it is inconsistent with the intent and understanding of Congress and of the agencies directly involved.

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[53] Quoted in 22 Comp. Gen. Dec. 277, 281.

[54] *In re Reynolds Corp.*, 74 N. L. R. B. 1622; *In re Monsanto Chemical Co.*, 76 N. L. R. B. 767; *In re Carbide and Carbon Chemical Corp.*, 73 N. L. R. B. 134; *In re Roane-Anderson Co.*, 71 N. L. R. B. 266; *In re Brown Shipbuilding Co.*, 57 N. L. R. B. 326; *In re Houston Shipbuilding Corp.*, 46 N. L. R. B. 161; *In re Copolymer Corp.*, 52 N. L. R. B. 578; *In re War Hemp Industries*, 57 N. L. R. B. 1709; *In re United States Cartridge Co.* 42 N. L. R. B. 191; *In re Lukas-Harold Corp.*, 44 N. L. R. B. 730; *In re Certain-Teed Products Co.*, 48 N. L. R. B. 43; *In re Sinclair Rubber Inc.*, 57 N. L. R. B. 800; *In re Lone Star Defense Corp.*, 63 N. L. R. B. 579.

[55] *Bell* v. *Porter*, 159 F. 2d 117 (C. A. 7), certiorari denied 330 U. S. 813; *Joshua Hendy Corp.* v. *Mills*, 169 F. 2d 898 (C. A. 9); *Divins* v. *Hazeltine Electronics Corp.*, 163 F. 2d 100 (C. A. 2) (as indicated *supra*, p. 126, fn. 51, the Second Circuit, while holding the Act inapplicable to production of warships, specifically stated that transportation of munitions constituted "commerce" within the coverage of the Act); *Umthun* v. *Day & Zimmerman*, 235 Iowa 293, 16 N. W. 2d 258. See also the trial court decisions listed on p. 124, *supra*.

V.

Section 3 (i) Does Not Exclude Respondents From the Scope of the Act.

Section 3(i) of the Fair Labor Standards Act defines "goods" as used in the Act as meaning all commodities, excepting "goods after their delivery into the actual physical possession of the ultimate consumer thereof other than a producer, manufacturer, or processor thereof." The position has been taken that even if the munitions were produced for "commerce" and the United States is the producer, the Fair Labor Standards Act is nevertheless inapplicable because of the above definition of the term "goods." The Court of Appeals for the Fifth Circuit so held in *Kennedy* v. *Silas Mason Co.*, 164 F. 2d 1016, 1018, and respondents urge this view here.

Plainly, Section 3(i) was not intended to exempt from the Act employees working on the goods during the course of production, manufacture or processing. In the instant cases, the employees of the contractors were not working on the goods after their delivery to the United States *as ultimate consumer* but while the goods were being manufactured or processed. Thus they plainly do not come within the language of the exempting clause, which relates only to "goods after their delivery into the actual physical possession of the ultimate consumer".[56]

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[56] The records in the instant cases do not indicate that the Government, *before* the munitions were produced by petition-

The Fifth Circuit in the *Silas Mason* case apparently was of the view that if the ultimate consumer took delivery within the state in which the goods were manufactured or produced, the subsequent interstate transportation by the consumer could not be taken into account in determining whether the goods were produced for commerce. Such a construction has the effect of extending the exemption to the producer and manufacturer. The result would be that if an ultimate consumer takes delivery within the state, the producer's operations are exempt, but if the consumer takes delivery after interstate transportation the producer's operations would be covered—although in each instance it was known that the goods were destined for interstate shipment. Furthermore, since the exempting clause itself excludes the ultimate consumer who is also a "producer, manufacturer or processor," the result of the construction adopted by the Fifth Circuit and urged by respondents here

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ers, had physical possession, as distinguished from title, of any of the materials. But, assuming that some of the raw materials may have previously been in the hands of the United States, the "goods" which petitioners were producing, the munitions, were not delivered into the "actual physical possession" of the United States until *after* petitioners had produced them. In any event it seems clear that the delivery referred to in Section 3 (i) is delivery to the ultimate consumer for use in consumption and not for further processing, so that it is immaterial whether the raw materials had previously been in the "actual physical possession" of the Government.

would be to bring within the Act the manufacturing operations of an ultimate consumer who himself carries the goods across state lines, but to exempt the same operations if carried on by an independent manufacturer who is not himself the consumer but who sells to the ultimate consumer within the state for interstate shipment.

It is only necessary to give Section 3(i) a literal sensible reading to avoid these anomalous and capricious results. Such an interpretation of the exempting clause as not affecting the status of the goods while they are being produced (whether by the consumer or before delivery to him) is in accord not only with the terms of the statute, but with its purpose and history. Furthermore it has been the interpretation consistently adopted by the Government—Wage and Hour Administrator[37]

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[37] Administrator, Wage and Hour Division, Department of Labor, Interpretative Bulletin, No. 5 (Revision of November 1939), par. 6, 1940 Wage and Hour Manual 131, 133. This paragraph was readopted without change in the July 1947 revision of the Administrative Interpretations. See 29 C. F. R. Part 776.7(h), 12 Fed. Reg. 4583, 4585. The paragraph reads in part as follows:

"The fact that products lose their character as 'goods' when they come into the actual physical possession of the ultimate consumer does not affect the coverage of the act as far as the employees producing the products are concerned. The facts at the time that the products are being produced determine whether an employee is engaged in the production of goods for commerce, and at the time of the production of the containers they were clearly 'goods' within the meaning of the statute since they were not, at that point of time, in the actual physical possession of the ultimate consumer. All that the

and Department of Justice[58]—and accepted by the

term 'goods' quoted above is intended to accomplish is to protect ultimate consumers, other than producers, manufacturers, or processors of the goods in question from the 'hot goods' provision of section 15 (a) (1). This seems clear from the language of the statute. Thus section 15 (a) (1) makes it unlawful for any person 'to transport * * * (or) * * * ship * * * in commerce * * * any goods' produced in violation of the labor standards set up by the act. By defining 'goods' in section 3 (i) so as to exclude goods 'after their delivery into the actual physical possession of the ultimate consumer thereof other than a producer, manufacturer, or processor thereof,' the Congress made it clear that it did not intend to hold the ultimate consumer as a violator of section 15 (a) (1) if he should transport 'hot goods' across a State line. Thus, if a person purchases a pair of shoes from a retail store and carries the shoes across a State line, the purchaser is not, in our opinion, guilty of a violation of section 15 (a) (1) if the shoes were produced in violation of the wage or hours provisions of the statute. But Congress clearly did not intend to permit an employer to avoid the minimum wage and maximum hours standards of the act by making delivery within the State into the actual physical possession of the ultimate consumer who transports or ships the goods outside the State. Thus, it is our opinion that employees engaged in building a boat for delivery to the purchaser at the boatyard are within the coverage of the act if the employer, at the time the boat is being built, intends, hopes or has reason to believe that the purchaser will sail it outside the State."

[58] See the following briefs filed by the Solicitor General in this Court: brief in opposition, *Hamlet Ice Co.* v. *Fleming*, 317 U. S. 634, 1942 Term, No. 104; brief in opposition, *Enterprise Box Co.* v. *Walling*, 316 U. S. 704, 1941 Term, No. 1275, p. 6; petition for certiorari (pp. 8-9), and brief on the merits, pp. 13-17, *Walling* v. *Reuter, Inc.*, 321 U. S. 671, 1943 Term, No. 436; brief on the merits, p. 17, in *Roland Electrical Co.* v. *Walling*, 326 U. S. 657, 1945 Term, No. 45; brief on the merits, *Kennedy* v. *Silas Mason Co.*, 334 U. S. 249, 1947 Term, No. 590.

Circuit Courts of Appeals, including the Fifth Circuit, except in the *Silas Mason* case and one other decision in which this Court granted certiorari on this question, *inter alia*, but subsequently vacated the Fifth Circuit's decision on another ground. *Hamlet Ice Co.* v. *Fleming*, 127 F. 2d 165, 170-171 (C.A. 4), certiorari denied, 317 U.S. 634; *Chapman* v. *Home Ice Co.*, 136 F. 2d 353, 355 (C.A. 6), certiorari denied, 320 U.S. 761; *Enterprise Box Co.* v. *Walling*, 125 F. 2d 897 (C.A. 5), certiorari denied, 316 U.S. 704; *Atlantic Co.* v. *Walling*, 131 F. 2d 518, 521 (C.A. 5). Contra: *Walling* v. *Reuter, Inc.*, 137 F. 2d 315 (C.A. 5), judgment vacated, 321 U.S. 671.[59] Many other decisions which contain

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[59] *Divins* v. *Hazeltine Electronics Corp.*, 163 F. 2d 100 (C.A. 2), is not to the contrary. The employees of the contractor there held not subject to the Act were installing, servicing, and maintaining equipment on war vessels owned by the United States. After having held, we think erroneously, that the subsequent movements of the vessels could not be regarded as interstate or foreign commerce (as to which see Point IV, *supra*, pp. 117-130), the court concluded (163 F. 2d at 103-104) that the employees were working on the goods after their delivery to the possession of the ultimate consumer, and not in the course of production for subsequent commerce. In that case, the court found that the work was performed after the equipment had "been delivered into [the] actual physical possession" of the United States "prior to the time when the plaintiffs did any work upon it", and that there was no commerce after this delivery to the United States. *Id.*, at 101-102. The opinion reaches the "opposite result" as to work on armed cargo transports which it found to be instruments of commerce and not of war. As to these the court found that the United States was a processor of the equipment for commerce (*id.*, at 104). The court was clearly

no specific reference to Section 3(i) hold the Act applicable to employees engaged in production for commerce in identical or similar circumstances, although the "goods" being worked on were owned by the "ultimate consumer."[60]

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therefore not misinterpreting Section 3 (i) as excepting the production of goods before their delivery to the ultimate consumer for interstate transportation; on its understanding of "commerce", it had no such case before it, and its opinion was not addressed to any such situation. See also *Phillips* v. *Star Overall Co.*, 149 F. 2d 416 (C. A. 2), certiorari denied, 327 U. S. 780.

[60] *Bell* v. *Porter*, 159 F. 2d 117 (C. A. 7), certiorari denied, 330 U. S. 813; *Landreth* v. *Ford, Bacon & Davis*, 147 F. 2d 446 (C. A. 8); *Joshua Hendy Corp.* v. *Mills*, 169 F. 2d 898 (C. A. 9); *Anderson* v. *Federal Cartridge Corp.*, 62 F. Supp. 775 (D. Minn.), affirmed, 156 F. 2d 681 (C. A. 8); *Anderson* v. *Federal Cartridge Corp.*, 72 F. Supp. 639 (D. Minn.); *Umthun* v. *Day & Zimmerman*, 235 Iowa 293, 16 N. W. 2d 258; *Timberlake* v. *Day & Zimmerman*, 49 F. Supp. 28 (S. D. Iowa); *Jackson* v. *Northwest Airlines*, 75 F. Supp. 32 (D. Minn.); *Roland* v. *United Airlines*, 75 F. Supp. 25 (N. D. Ill.); *Sweetman* v. *Remington Rand*, 65 F. Supp. 940 (S. D. Ill.); *Reid* v. *Day & Zimmerman*, 73 F. Supp. 892 (S. D. Iowa); *Lasater* v. *Hercules Powder Co.*, 73 F. Supp. 264 (E. D. Tenn.); *Bailey* v. *Porter*, 83 F. Supp. 988 (N. D. Ill.); *Ware* v. *Goodyear Engineering Corp.*, 6 W. H. Cases 160 (S. D. Ind., 1946); *Mochl* v. *E. I. DuPont De Nemours & Co.*, 84 F. Supp. 427 (N. D. Ill.); *Brown* v. *Consolidated Vultee Aircraft Corp.*, 80 F. Supp. 257 (W. D. Ky.); *Burke* v. *Mesta Machine Co.*, 79 F. Supp. 588 (W. D. Pa.); *Bauler* v. *Pressed Steel Car Co.*, 81 F. Supp. 172 (N. D. Ill.); *Bumpus* v. *Remington Arms Co.*, 77 F. Supp. 94 (W. D. Mo.); *Belanger* v. *Hopeman Bros.*, 6 W. H. Cases 616 (D. Maine 1947); *McCumsky* v. *Norden, Inc.*, 7 W. H. Cases 142 (N. Y. S. Ct. 1947); *Simkins* v. *Elmhurst Contracting Co.*, 181 Misc. 791, affirmed, 181 Misc. 793, affirmed 268 App. Div. 858; *Hen-*

The *Hamlet Ice*, *Home Ice*, and *Atlantic* cases each involved manufacturers of ice who sold it within the state to interstate railroads for consumption in refrigerating railroad cars. Judge Soper's opinion for the Fourth Circuit in the *Hamlet* case, which was followed in the other two cases, rejects the argument that delivery to the consumer exempts the producer; his opinion states (127 F. 2d at 170-171):

> The appellant claims in addition that its activities are outside the statutory scheme on the particular ground that all the goods it produces are delivered to the ultimate consumer and are therefore excluded by the definition of goods set out in § 3 (i) of the Act. * * *
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> The contention is that the word "goods" is subject to the exception wherever it occurs in the Act, and therefore the Ice Company produces nothing and sells nothing within the intendment of the Act. We do not think this argument is sound. It disregards the precise terms of the section that the goods excluded are not those in the possession of the maker but "goods *after* their delivery into the actual physical possession of the ultimate consumer". Goods in the course of production are

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derson v. *Bechtel-McCone Corp.*, 7 W. H. Cases 107 (N. D. Ala., 1947); *O'Riordan* v. *Helmers, Inc.*, 6 W. H. Cases 961 (N. Y. C. Ct., 1947); *Tiller* v. *Anchor Optical Corp.*, 6 W. H. Cases 655 (S. D. N. Y., 1947)

> therefore not expressly excluded and exclusion, we think, should not be implied. * * * It seems clear that the exclusion clause was intended to apply only to goods which, having come into the hands of the ultimate consumer, have been withdrawn from further traffic and sale, so that interstate transportation of the goods may take place without responsibility for a prior production in violation of the standards of the Act. This narrow purpose is evidenced by limiting the exclusion to "the ultimate consumer * * * other than a producer, manufacturer, or processor thereof".

Under the terms of the exclusionary clause, the applicability of the exemption necessarily depends upon two conditions: (1) that the United States was not "a producer, manufacturer, or processor" of the goods, and (2) that the goods were in "the actual physical possession" of the United States as an "ultimate consumer." If, as respondents contend, the United States were the real employer here and at all times in control of the operations, then the United States would clearly be "a producer, manufacturer, or processor" of the goods in question and condition (1) would not have been met. Thus, Section 3 (i) can be relied upon only as an alternative defense in the event that the respondents, and not the United States, are held to be the employer-producers. But in this event, condition (2) could not be met, for the goods while being worked on were obviously in "the actual physical possession" of the producer, not the consumer.

The use of the words "actual physical possession" negates the idea that mere title or ownership suffices. The terms of the contract between respondent and the United States in each of the instant cases make it clear that only title, and not physical possession, was retained by the United States during the performance of the contract. Thus, the contract provided that the contracting officer (representing the Government) "shall at all times have access to the premises, work and materials" and "shall at all times be afforded proper facilities for inspection of the work" (*Powell*, R. 788; *Aaron*, 2 R. 64; *Creel*, R. 320); it further provides that if the contract is terminated due to the contractor's fault, the contracting officer "may enter upon the premises and take possession" of the plant, the equipment and materials (*Powell*, R. 781; *Aaron*, 2 R. 59; *Creel*, R. 316). These provisions are inconsistent with the contention that the Government retained "actual physical possession" of the materials and goods during the performance of the contract. Supplemental contracts specifically stated, "It is recognized that property (including without limitation machine tools and processing equipment, manufacturing aids, raw, manufactured scrap and waste materials) title of which is or may be hereafter become vested in the Government, * * * will be in the care, custody, or possession of the Contractor in connection with the performance of the contract" (*Powell*, R. 833, 834; *Creel*, R. 343, 352). These facts were

recognized by the Eighth Circuit, which expressly found in its opinion in the *Powell* case that there was "no serious dispute" that the Cartridge Company, and not the Government, "had the actual physical possession of the material and products thereof" (174 F. 2d at 720). In the *Aaron* case, the respondent indicated, in response to plaintiffs' interrogations, that after raw materials shipped to the plant had been inspected and accepted and after the Ordnance Department had certified the contractor's receiving and inspection report, "the contractor stored the materials for use in accordance with the contract" (2 R. 141).

Therefore, it seems clear that during the course of production the materials being worked on were in the "actual physical possession" of the respondents. Under the literal language of the exclusionary provision, materials worked on remain "goods" as long as they are in the actual physical possession of a producer even if the producer be the ultimate consumer. Therefore it would seem to follow from the literal statutory language that the materials in the instant case were "goods."

This conclusion is confirmed by other provisions and the general framework of the Act, by the legislative history, and by the judicial decisions construing Section 3 (i).

There seems ample evidence on the face of the statute itself that there was no intent to exclude the productive process or the producer from the statutory standards. First, there is the explicit

provision in Section 3 (i) itself that the exclusion does not apply to a producer even if he be the ultimate consumer. There is also the comparable provision in Section 15 (a) (1), which protects a common carrier from liability for transportation of "hot" goods, and limits this protection to "goods *not produced by such common carrier.*" [Italics supplied.] Furthermore, while the constitutional authority for the statute rested primarily on the Congressional power directly to regulate or prohibit movement across State lines of tainted or "hot" goods, the basic policy of the Act, as expressed in the findings and declaration of policy (Section 2 (a)), was to eliminate the substandard labor conditions at their source—*in the factory or plant of the producer* for interstate shipment. See *United States* v. *Darby*, 312 U. S. 100, 117. While there are obvious reasons justifying protection of the innocent consumer from liability for substandard conditions maintained by a producer, no reasonable basis has been suggested for relieving a producer from liability for the substandard conditions in his own plant. To imply such release of the producer is inconsistent with the whole policy of the Act.

The legislative history affords further evidence that Congress advisedly phrased the exclusionary clause so as to protect the ultimate consumer without curtailing the liability or responsibility of the producer. In the bill as originally introduced in the Senate, the definition of "goods" provided

that it "shall not mean goods in the possession of the ultimate consumer thereof" (S. 2475, introduced May 24, 1937, 75th Cong., 1st sess., Section 2 (a) (21)). The representatives of the National Association of Manufacturers and of the Chamber of Commerce criticized this bill as affording adequate protection only to the ultimate consumer and not to producers, distributors and other businessmen. See statement of James A. Emery, General Counsel, National Association of Manufacturers, and George H. Davis, President, Chamber of Commerce of the United States, Joint Hearings before the Senate Committee on Education and Labor and the House Committee on Labor, 75th Cong., 1st sess., on S. 2475 and H. R. 7200, pp. 639, 936-937. The President of the Chamber of Commerce objected specifically on the ground that if a producer of grain maintained substandard conditions, the grain "in the hands of mill purchasers, and possibly in the hands of bakers that bought flour made from the wheat" would "contain that taint" and "only the ultimate consumer, who bought the bread to use at home, would be safe from Federal prosecution" (*id.* at 937). The General Counsel of the National Association of Manufacturers also indicated his understanding that the exclusionary clause in the definition of the term "goods" only "exempts the ultimate consumer from any criminal liability for any part he might play in the interstate transportation of such unfair goods" (*id.* at 639). Thus although

the representatives of manufacturers and businessmen urged that the protection not be thus limited but be extended generally to "innocent purchasers without notice" (*id.* at 937), Congress not only failed to broaden the protection but on the contrary narrowed the scope of the exclusionary clause by prefacing the word "possession" with the phrase "after their delivery into the actual physical," and by making explicit its limitation to an ultimate consumer "*other than a* producer, manufacturer or processor thereof". [italics supplied]. At the same time Congress dropped the provisions of earlier bills which would have permitted the Board to extend the protection under certain specified circumstances.[61]

[61] The recent 1949 amendments (Acts of October 26, 1949, P. L. 393, 81st Cong., 1st Sess.), which become effective on January 25, 1950, do include in Section 15(a)(1) (the section prohibiting shipment of "hot goods") a provision protecting "transportation, offer, shipment, delivery, or sale of such goods by a purchaser who acquired them in good faith in reliance on written assurance from the producer that the goods were produced in compliance with the requirements of the Act, and who acquired such goods for value without notice of any such violation." It may be noted that even this provision does not protect such a purchaser in its manufacturing or processing activities.

The manufacturers had no success in securing even this limited protection under the Act as originally enacted. Section 21(d) of S. 2475 as originally introduced would have permitted the administrative board to relieve others from liability for transportation of goods upon a finding by the board that they "had no reason to believe that any substandard labor condition existed in the production of such goods" or that such relief was "necessary to prevent undue hardship or economic waste and is not detrimental to the pub-

The interpretation of the Fifth Circuit would have serious effects not only in cases involving Government contractors, but in the application of the Act generally. Under this theory, any producer of goods plainly intended for shipment across State lines might secure the exemption simply because the consumer-purchaser took title or delivery of the goods before the interstate shipment. Thus, contrary to the consistent ruling of the courts,[62] the producer of ice for use in icing railroad cars, although knowing that the ice was destined for interstate shipment, would be exempt because the railroad took delivery of the ice before it crossed State lines. Other anomalous effects

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lic interest," provided that adequate provision was made for reparation of underpayments to employees. The bill as reported to the Senate July 8, 1937, after the hearings, included, in addition to the above-quoted sections, a provision authorizing the Board to issue certificates of compliance which might be relied upon by any purchaser or transporter of goods to demonstrate that he had "no reason to believe any substandard labor condition existed in the production of such goods." S. 2475 accompanying S. Rept. No. 884, Section 14 (c). Similar provisions were in the bill as reported to the House on August 6, 1937 (S. 2475), accompanying H. Rept. No. 1452, section 2 (a) (14), 18 (c), 14 (b). None of them appeared in the bill as passed by the House on May 24, 1938.

[62] See *Hamlet Ice Co.* v. *Fleming*, 127 F. 2d 165, 170-171 (C.A. 4), certiorari denied, 317 U. S. 634; *Chapman* v. *Home Ice Co.*, 136 F. 2d 353, 355 (C.A. 6), certiorari denied, 320 U. S. 761; *Atlantic Co.* v. *Walling*, 131 F. 2d 518, 521 (C.A. 5); *Gordon* v. *Paducah Ice Mfg. Co.*, 41 F. Supp. 980, 986 (W.D.Ky.).

of this construction may be illustrated by reference to cases that have arisen under the Act. In *Slover* v. *Wathen*, 140 F. 2d 258 (C. A. 4), one company maintained a dock at which it repaired barges owned by an affiliated company. Employees repairing the barges were considered engaged in the production of goods for commerce. Since the court considered the two companies as one, the ultimate consumer of the barges was also the producer thereof, and the consumer clause was therefore inapplicable. But under the theory of the Fifth Circuit, if the company which operated the barges was deemed independent of the company which repaired them, the same employees performing the same work would no longer be engaged in the production of "goods" because "the ultimate consumer" was not a producer thereof. Similarly, in *Hertz Drivurself Stations* v. *United States*, 150 F. 2d 923 (C. A. 8), employees repairing trucks owned by their employer were held to be engaged in the production of goods for commerce because the trucks were used in interstate transportation. If the construction of the Fifth Circuit were adopted, employees working on such trucks would be working on "goods" if they were employed by the truck owner but not if they were employed by an independent contractor. This would make the exemption depend wholly upon "the capricious incidence of the act resulting from the accident of the industrial division of the whole process." See *Fleming* v. *Arsenal*

Building Corp., 125 F. 2d 278, 280 (C. A. 2), affirmed, 316 U. S. 517.

Section 3 (i) obviously was not calculated to achieve such capricious results. Such an interpretation, contrary to the established principle of strict construction of exemptions from this remedial Act (see *Phillips Co.* v. *Walling*, 324 U. S. 490, 493), would distort the simple restricted purpose of the exclusionary clause into far-reaching and irrational exemptions.

CONCLUSION

For the above reasons it is respectfully submitted that the decisions of the courts below are incorrect and that they cannot be sustained on any of the grounds here advanced by respondents.

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November 1949.

APPENDIX A

STATUTES INVOLVED

1. The pertinent provisions of the Fair Labor Standards Act of 1938, c. 676, 52 Stat. 1060, 29 U.S.C. Sec. 201, are as follows:

SEC. 3. As used in this Act—

* * * * * *

(b) "Commerce" means trade, commerce, transportation, transmission, or communication among the several States or from any State to any place outside thereof.

* * * * * *

(d) "Employer" includes any person acting directly or indirectly in the interest of an employer in relation to an employee but shall not include the United States or any State or political subdivision of a State, * * *.

(e) "Employee" includes any individual employed by an employer.

* * * * * *

(i) "Goods" means goods (including ships and marine equipment), wares, products, commodities, merchandise, or articles or subjects of commerce of any character, or any part or ingredient thereof, but does not include goods after their delivery into the actual physical possession of the ultimate consumer thereof other than a producer, manufacturer, or processor thereof.

2. The pertinent provisions of the Walsh-Healey Public Contracts Act (Act of June 30, 1936, 49 Stat. 2036, as amended by the Act of May 13, 1942, 56 Stat. 277, 41 U.S.C. 35) are as follows:

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That in any contract made and entered into by any executive department, independent establishment, or other agency or instrumentality of the United States, or by the District of Columbia, or by any corporation all the stock of which is beneficially owned by the United States (all the foregoing being hereinafter designated as agencies of the United States), for the manufacture or furnishing of materials, supplies, articles, and equipment in any amount exceeding $10,000, there shall be included the following representations and stipulations:

(a) That the contractor is the manufacturer of or a regular dealer in the materials, supplies, articles, or equipment to be manufactured or used in the performance of the contract;

(b) That all persons employed by the contractor in the manufacture or furnishing of the materials, supplies, articles, or equipment used in the performance of the contract will be paid, without subsequent deduction or rebate on any account, not less than the minimum wages as determined by the Secretary of Labor to be the prevailing minimum wages for persons employed on similar work or in the particular or similar industries or groups

of industries currently operating in the locality in which the materials, supplies, articles, or equipment are to be manufactured or furnished under said contract;

(c) That no person employed by the contractor in the manufacture or furnishing of the materials, supplies, articles, or equipment used in the performance of the contract shall be permitted to work in excess of eight hours in any one day or in excess of forty hours in any one week: *Provided*, That the provisions of this subsection shall not apply to any employer who shall have entered into an agreement with his employees pursuant to the provisions of paragraphs 1 or 2 of subsection (b) of section 7 of an Act entitled "Fair Labor Standards Act of 1938."

3. The complete text of the Act of July 2, 1940, 54 Stat. 712, 50 U.S.C.A. App. 1171, (an Act to expedite the strengthening of the national defense) is as follows:

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That (a) in order to expedite the building up of the national defense, the Secretary of War is authorized, out of the moneys appropriated for the War Department for national-defense purposes for the fiscal year ending June 30, 1941, with or without advertising, (1) to provide for the necessary construction, rehabilitation, conversion, and installation at military posts, depots, stations, or other localities, of

plants, buildings, facilities, utilities, and appurtenances thereto (including Government owned facilities at privately owned plants and the expansion of such plants, and the acquisition of such land, and the purchase or lease of such structures, as may be necessary), for the development, manufacture, maintenance, and storage of military equipment, munitions, and supplies, and for shelter; (2) to provide for the development, purchase, manufacture, shipment, maintenance, and storage of military equipment, munitions, and supplies, and for shelter, at such places and under such conditions as he may deem necessary; and (3) to enter into such contracts (including contracts for educational orders, and for the exchange of deteriorated, unserviceable, obsolescent, or surplus military equipment, munitions, and supplies for other military equipment, munitions, and supplies of which there is a shortage), and to amend or supplement such existing contracts, as he may deem necessary to carry out the purposes specified in this section: *Provided*, That the limitations contained in sections 1136 and 3734 of the Revised Statutes, as amended, and any statutory limitation with respect to the cost of any individual project of construction, shall be suspended until and including June 30, 1942, with respect to any construction authorized by this Act: *Provided further*, That no contract entered into pursuant to the provisions of this section which would otherwise be subject to the provisions of the Act entitled "An Act to

provide conditions for the purchase of supplies and the making of contracts by the United States, and for other purposes", approved June 30, 1936 (49 Stat. 2036; U.S.C., Supp. V, title 41, secs. 35-45) [the Walsh-Healey Act], shall be exempt from the provisions of such Act solely because of being entered into without advertising pursuant to the provisions of this section: *Provided further*, That the cost-plus-a-percentage-of-cost system of contracting shall not be used under this section; but this proviso shall not be construed to prohibit the use of the cost-plus-a-fixed-fee form of contract when such use is deemed necessary by the Secretary of War.

(b) The Secretary of War is further authorized, with or without advertising, to provide for the operation and maintenance of any plants, buildings, facilities, utilities, and appurtenances thereto constructed pursuant to the authorizations contained in this section and section 5, either by means of Government personnel or through the agency of selected qualified commercial manufacturers under contracts entered into with them, and, when he deems it necessary in the interest of the national defense, to lease, sell, or otherwise dispose of, any such plants, buildings, facilities, utilities, appurtenances thereto, and land, under such terms and conditions as he may deem advisable, and without regard to the provisions of section 321 of the Act of June 30, 1932 (47 Stat. 412).

(c) Whenever, prior to July 1, 1942, the Secretary of War deems it necessary in the interest of the national defense, he is authorized, from appropriations available therefor, to advance payments to contractors for supplies or construction for the War Department in amounts not exceeding 30 per centum of the contract price of such supplies or construction. Such advances shall be made upon such terms and conditions and with such adequate security as the Secretary of War shall prescribe.

SEC. 2 (a) During the fiscal year 1941, all existing limitations with respect to the number of flying cadets in the Army Air Corps, and with respect to the number and rank of Reserve Air Corps officers who may be ordered to extended active duty with the Air Corps, shall be suspended.

(b) The President may, during the fiscal year 1941, assign officers and enlisted men to the various branches of the Army in such numbers as he considers necessary, irrespective of the limitations on the strength of any particular branch of the Army set forth in the National Defense Act of June 3, 1916, as amended: *Provided*, That no Negro, because of race, shall be excluded from enlistment in the Army for service with colored military units now organized or to be organized for such service.

SEC. 3. All existing limitations with respect to the number of serviceable airplanes, air-

ships, and free and captive balloons that may be equipped and maintained shall be suspended during the fiscal year 1941.

SEC. 4. (a) The Secretary of War is further authorized to employ such additional personnel at the seat of government and elsewhere, and to provide for such printing and binding, communication service, supplies, and travel expenses, as he may deem necessary to carry out the purposes of this Act: *Provided,* That until December 31, 1941, the Secretary of War may, if he finds it to be necessary for national-defense purposes, authorize the employment of supervising or construction engineers without regard to the requirements of civil-service laws, rules, or regulations: *Provided further,* That notwithstanding the provisions of section 6 of the Act of August 24, 1912 (37 Stat. 555; U.S.C. title 5, sec. 652), the Secretary of War may remove from the classified civil service of the United States any employee of the Military Establishment forthwith upon a finding that such person has been guilty of conduct inimical to the public interest in the defense program of the United States and upon the giving of notice to such person of such charges: And *provided further,* That within thirty days after such removal such person shall have an opportunity personally to answer such charges in writing and to submit affidavits in support of such answer.

(b) Notwithstanding the provisions of any other law, the regular working hours of

laborers and mechanics employed by the War Department, who are engaged in the manufacture or production of military equipment, munitions, or supplies shall be eight hours per day or forty hours per week during the period of any national emergency declared by the President to exist: *Provided*, That under such regulations as the Secretary of War may prescribe, such hours may be exceeded, but compensation for employment in excess of forty hours in any workweek, computed at a rate not less than one and one-half times the regular rate, shall be paid to such laborers and mechanics.

SEC. 5. The President is authorized, with or without advertising, through the appropriate agencies of the Government (1) to provide for emergencies affecting the national security and defense and for each and every purpose connected therewith, including all of the objects and purposes specified under any appropriation available or to be made available to the War Department for the fiscal years 1940 and 1941; (2) to provide for the furnishing of Government-owned facilities at privately owned plants; (3) to provide for the procurement and training of civilian personnel necessary in connection with the protection of critical and essential items of equipment and material and the use or operation thereof; and (4) to provide for the procurement of strategic and critical materials in accordance with the Act of June 7, 1939, but the aggregate amount to be used by the Presi-

dent for all such purposes shall not exceed $66,000,000. The President is further authorized, through such agencies, to enter into contracts for such purposes in an aggregate amount not exceeding $66,000,000. An account shall be kept of all expenditures made or authorized under this section, and a report thereon shall be submitted to the Congress at the beginning of each session subsequent to the third session of the Seventy-sixth Congress: *Provided*, That no contract entered into pursuant to the provisions of this section which would otherwise be subject to the provisions of the Act entitled "An Act to provide conditions for the purchase of supplies and the making of contracts by the United States, and for other purposes", approved June 30, 1936 (49 Stat. 2036; U.S.C., Supp. V, title 41, secs. 35-45) [the Walsh-Healey Act], shall be exempt from the provisions of such Act solely because of being entered into without advertising pursuant to the provisions of this section.

SEC. 6. Whenever the President determines that it is necessary in the interest of national defense to prohibit or curtail the exportation of any military equipment or munitions, or component parts thereof, or machinery, tools, or material, or supplies necessary for the manufacture, servicing, or operation thereof, he may by proclamation prohibit or curtail such exportation, except under such rules and regulations as he shall prescribe. Any such proclamation shall describe the articles or

materials included in the prohibition or curtailment contained therein. In case of the violation of any provision of any proclamation, or of any rule or regulation, issued hereunder, such violator or violators, upon conviction, shall be punished by a fine of not more than $10,000, or by imprisonment for not more than two years, or by both such fine and imprisonment. The authority granted in this section shall terminate June 30, 1942, unless the Congress shall otherwise provide.

APPENDIX B

EXCERPTS FROM MANUAL OF INSTRUCTIONS FOR THE ADMINISTRATION OF CONTRACTS (WAR DEPARTMENT; OFFICE OF THE CHIEF OF ORDNANCE; 1941):

SECTION I (GENERAL)

* * *

G. *Contracting Officer's Representatives' Relations with the Prime Contractor*

1. The relations between the Contracting Officer's Representative (including all members of his field organization) and the Contractor *must be strictly official.* All personnel in the office of the Contracting Officer's Representative will be impressed with the fact that no gratuities of any description can be offered or accepted by them. No officer or employee of the Government on duty at a Contractor's plant or at the site of a new Ordnance Facility will be permitted to influence the hire of men by Contractors, except as may be provided by the contract or by specifications applicable thereto. Upon reporting to a New Ordnance Facility, the Contracting Officer's Representative will present himself to the highest official of the Contractor's organization present thereat. He will introduce himself and discuss with such officials his general plans for performing his part of the work. If he had not obtained one prior to his arrival at the plant, he will obtain from the Contractor an organization chart showing the Contractor's key personnel and have a definite understanding with the Contractor, (which understanding should be re-

duced to writing for the mutual protection of both parties) as to which of the Contractor's key personnel are in charge of the various aspects of the work. The Contracting Officer's Representative will at all times maintain a friendly but firm, just, and tactful attitude toward Contractors and will insist that his subordinates do likewise.

3. *A Word of Warning*: Without minimizing the importance of the duties of the Contracting Officer's Representative, it is deemed advisable to remind him that it is *not* his function to take charge of the Contractor's plant or attempt to prescribe methods of manufacture. The Contractor is an independent Contractor, not an agent or employee of the Government. His contract requires him to produce a result, and the selection of the means to be employed in producing it is his responsibility. The Contracting Officer's Representative is stationed at the Contractor's plant, *first*, to see to it that the produce delivered by the Contractor is in accordance with Government drawings and specifications, *second*, to make sure that the Government gets what it pays for, and *third*, to safeguard the interests of the Contracting Officer and the Chief of Ordnance by verifying and preauditing every item for which Government funds are disbursed.

SECTION II (PRELIMINARY PREPARATIONS)

* * *

D. *Procurement of Civilian Personnel.*

1. The Contracting Officer or his Representative will arrange with the Civilian Personnel Division of the Ordnance Department for inspection of its lists of available civilian personnel. The Civilian Personnel Division will arrange an interview with prospective civilian employees and aid the Contracting Officer or his Representative in engaging selected applicants. A copy of "Civilian Personnel Regulations for Field Employees, Ordnance Dept., U. S. Army" No. 1294, as revised, is an essential part of the Contracting Officer's Representative's equipment. The present limited facilities of the Ordnance Department in Washington will preclude the securing of any but key civilians in the above-mentioned manner. The augmentation of the Contracting Officer's Representative's operating force will be made after the key personnel has arrived at its field station.

* * *

SECTION X (LABOR RELATIONS)

A. *In General.*

1. Under the provisions of Ordnance Department Cost-plus-a-fixed-fee Contracts the Contractor is responsible for the hiring, firing, and working conditions of employees on the project and, subject to the approval of the Contracting Officer, the determination of their wages and hours. The

Contractor must furnish and supervise all labor required for the performance of the work and the employees thus furnished are those of the Contractor and in no sense those of the Government. The Contractor is responsible for its relations with its employees.

2. It should be noted, however, that under a usual provision of Ordnance Department Cost-plus-a-fixed-fee Contracts, the Government reserves the right to require the Contractor to dismiss from the work any employee the Contracting Officer deems incompetent or whose retention he deems not in the public interest.

B. *War Department Representatives Not to Participate in Labor Disputes.*

1. No contracting Officer's Representative nor subordinate will be permitted to influence in any way the hire of employees by Contractors except as may be provided in the contract or the specifications applicable thereto.

2. Contracting Officer's Representatives or other representatives of the War Department will not participate in the arbitration, conciliation or mediation of existing or threatened labor disputes or any negotiations in connection therewith. Representatives of Contracting Officers shall exercise the utmost care to carry out the intent of this principle. He may take no action which may possibly be construed as prejudicial to or favoring the in-

terests of any party to an actual or potential labor dispute.

3. No Contracting Officer's Representative nor a subordinate of his will treat directly with any other Government department or agency in any matter affecting labor policy. All such matters will be referred to the Labor Section, Production Division, Industrial Service, Office of the Chief of Ordnance.

4. Contracting Officer's Representatives shall not fail to encourage sound and healthy relationships between Contractors and sub-contractors and their employees with respect to wages, hours, and other conditions of employment.

C. *War Department Agreement Regarding Labor on Defense Construction Projects.*

1. "Memorandum of Agreement between the Representatives of Government Agencies engaged in Defense Construction and the Building and Construction Trades Departments of the American Federation of Labor" pertaining to the labor policy should be followed in defense construction. This agreement is the result of conference between representatives of the Office of Production Management, the American Federation of Labor, the Maritime Commission, The Quartermaster Corps, the Corps of Engineers of the Army, Federal Works Agency, the Bureau of Yards and Docks of the Navy Department. It was approved by the

Council of Office of Production Management on July 22, 1941.

2. The agreement referred to has been announced as the policy of the War Department. The labor policy embodied in this agreement will be the guide in the formulation and awarding of all contracts for defense construction thereafter advertised or negotiated and will also be the guide in the administration and performance of existing Cost-plus-a-fixed-fee, Construction Contracts beginning with the first practicable pay period after it comes to attention of Contracting Officer's Representative.

3. Contracting Officer's Representatives will take all steps necessary to bring the subject agreement to the attention of Contractors.

* * *

SECTION XI (LABOR LAWS).

A. *Contractor's Responsibility for Compliance with Labor Laws.*

The Ordnance Department's Cost-plus-a-fixed-fee Contracts and the various Federal Labor Laws make it abundantly clear that the responsibility for compliance with the provisions of such laws is entirely the Contractor's. The Contracting Officer or his Representative may be consulted from time to time as to the details of such compliance and, indeed, in connection with his proper functions he may not ignore such violations of labor laws as

come to his attention, but he has absolutely no responsibility in connection with the Contractor's compliance therewith. This responsibility is solely the Contractor's and the Contracting Officer's Representative's function in this connection is merely advisory. In the event that questions arise under such laws as to which the Contracting Officer's Representative has no authoritative information, he should refer them to the Legal Section, Fiscal Division.

* * *

D. *Wages and Hours Regulations.*

1. Inasmuch as the primary concern and responsibility of the Ordnance Department in connection with Cost-plus a fixed fee Contracts is the operating or manufacturing portions thereof, most Ordnance Contracting Officer's Representatives' problems with respect to Federal Labor Laws will relate to those statutes applicable to manufacturing operations instead of the construction portions of the contract. These statutes include not only the Walsh-Healey ("Public Contracts") Act referred to in sub-section C. *f.* above, but also various statutes not referred to in the contracts themselves such as the Fair Labor Standards Act of 1938, and where appropriate the National Labor Relations Act, the Norris-LaGuardia Anti-Injunction Act, etc. Certain problems of frequent occurrence arising under the wages and hours provisions of the two former Acts are of major importance and are considered below.

2. Various state and local laws and regulations governing the wages and hours of employees may likewise be applicable to the Cost-plus-a-fixed-fee project. Although, as with Federal laws, it is the Contractor's responsibility to comply with such statutes, the Contracting Officer's Representative should take such steps as may be necessary to acquaint himself with the pertinent provision of such local regulatory measures.

3. Insofar as the establishment of New Ordnance Facilities is concerned, a point will be reached where construction and manufacturing operations will proceed simultaneously. During this transition period, when part of the employees of the Contractor will be engaged in activities or functions relating to construction and part of the employees will be engaged in activities or functions relating to production and operation, different Federal Labor Laws requiring compliance with different labor standards will be applicable to each category of workers (e. g., the Bacon-Davis Act to construction employees, and the Walsh-Healey Act to production employees). It is extremely important that there be brought to the attention of the Contractors the desirability of complete segregation during this period of the respective categories of workers as to duties, functions, and particularly employment records. Only by such a complete segregation can Contractors be in a position to evidence full compliance with the different

labor laws which may be applicable to the employees employed under the different titles of the contract.

* * *

G. *Fair Labor Standard Act Applicable to Cost-Plus-A-Fixed-Fee Contracts.*

1. The Fair Labor Standards Act (Wage-Hours Law) must also be considered applicable to Ordnance C. P. F. F. Contracts. The Fair Labor Standards Act, as well as the Walsh-Healey Act prescribes minimum wage, maximum hours, and child labor employment standards. It does not, as does the Walsh-Healey Act, provide for the regulation of health and safety.

2. Under date of May 9, 1941, the Administrator of the Wage and Hour Division, Department of Labor, advised the Office Chief of Ordnance as to the status of manufacturers on the Cost-plus-a fixed-fee Contracts as follows:

> "It is our opinion that the employees of the private manufacturer are within the general coverage of the Fair Labor Standards Act if the manufacturer, at the time of production, had reason to believe the War Department after receiving the products would transport them into interstate commerce. It is also our opinion that the provision contained in Section 3 (d) of the Act, excluding the United States from the coverage of the Act as an employer, does not exclude from the provisions of the statute a private Contractor with the

War Department of the character described above."

3. Although no provision relative to the Fair Labor Standards Act is included in Government contracts, Contractors are nevertheless required to comply with it as well as the Walsh-Healey Act insofar as each may be applicable. However, the statutes overlap and insofar as minimum wage, maximum hour, and child labor standards established by both these laws conflict, the determination by the Contractor of the status of particular employees or classes of employees with reference to such standards may be difficult. Some aids to a determination of the applicability of these conflicting requirements are therefore set forth below.

II. *Determining the Status of Individual Employees Under the Walsh-Healey Act and Fair Labor Standards Act.*

1. In resolving the overlap of the Walsh-Healey Act and the Fair Labor Standards Act for the purpose of determining their respective application, the full circumstances pertaining to the employment of each *individual* employee is controlling. Under both statutes determining coverage is an *individual* matter as to the nature of the employment of the particular employee and the classification or title which the employer may have is immaterial. Contracting Officer's Representatives will find it advantageous to approach these problems from this viewpoint.

2. In order to determine the status of a particular employee under the conflicting standards relating to wages and hours of these two statutes, the following general considerations are pertinent:

a. Has a minimum wage determination under the Walsh-Healey Act which is applicable to the particular Cost-plus-a-fixed-fee Contract been promulgated prior to the award of the Contract? Reference to the chart set forth in sub-section E above should provide an answer to this question.

b. If the answer is in the affirmative and the employee is not one of those specifically exempted from the act (cf. Regulations issued under the Act where such exemptions are particularized), he is then subject to the Walsh-Healey Act. Inasmuch as the Walsh-Healey Act prescribes a higher wage and overtime compensation for work in excess of eight hours in any one day, its requirements will prevail over those of the Fair Labor Standards Act. Such an employee must then be paid not less than the minimum wage prescribed in the determination and may not be worked in excess of eight hours in one day or 40 hours in one week without the payment of time and a half overtime compensation.

c. If, however, the answer to *a* above is in the negative and no applicable minimum wage determination had been made prior to the award of the Contract, the Walsh-Healey Act stipulation with

respect to minimum wages is inoperative for the life of the contract, with the result that either the Walsh-Healey Act or the Fair Labor Standards Act or both may be applicable. In such case, the regulations issued under the Walsh-Healey Act require the Contractor to pay to each employee covered by the Act who works for a part of a day of a given work week, one and one-half times the "basic hourly rate" or piece rate for hours worked over eight that day or over eight upon any day that week or for all hours he works over 40 during that week, whichever is greater. The employee, however, may also be covered by the Fair Labor Standards Act, which prescribes a minimum wage of 30¢ an hour, an overtime compensation for hours worked in excess of 40 per work week at "not less than one and one-half times the regular rate at which he is employed". Official interpretations under each Statute furnish formulas for satisfying their respective overtime requirements and calculating the wages or salaries due employees. These rulings are included in the Field Kit (see Section II) and should be consulted. That statute will apply which results in the greater yield to the employee.

d. In the event that an employee is included among those employees specifically exempted from the Walsh-Healey Act by the regulations issued thereunder (i. e., office, supervisory, custodial, and maintenance employees as defined in the Regula-

tions), and whether or not a minimum wage determination is applicable, the Walsh-Healey Act has no application to him whatsoever. In such case, inasmuch as the Eight Hour Law has no application to him, the Fair Labor Standards Act alone may be applicable to him.

I. *Fair Labor Standards Act—Wages and Hours.*

1. The Fair Labor Standards Act applies to every employee (except those specifically exempted thereunder) engaged in interstate commerce or in the production of goods for such commerce. Under this statute an employee is deemed engaged in "production" if he is employed in "any process or occupation necessary to the production" of goods. The interpretation of this definition is, at the present time, so broad as to include virtually all employees of Cost-plus-a-fixed-fee Contractors except those specifically exempted by the terms of the statute.

2. The minimum hourly wage which must be paid to those employees covered by this law is fixed at the present time at 30¢ an hour. Although the statute permits the fixing by wage order of a separate minimum wage standard for particular industries which may be higher than 30¢ an hour but not in excess of 40¢ an hour no such minimum wage has been established at the present time which is generally applicable to Cost-plus-a-fixed-fee Contractors. Thus, where no minimum wage deter-

mination under the Walsh-Healey Act is applicable, the only specific minimum wage which a Cost-plus-a-fixed-fee Contractor is required to pay under Federal Law is 30¢ an hour. Insofar as the payment of overtime compensation is concerned, however, the rule of the Department of Labor under the Walsh-Healey Act and the Fair Labor Standards Act referred to above is sub-paragraph *c* of paragraph 2 of sub-section H must not be ignored.

3. The Walsh-Healey Act prescribes an eight-hour day and a 40-hour week with time and a half payable for all hours worked in excess thereof under all contracts subject to that law. Although the Fair Labor Standards Act prescribed a maximum work week of 40 hours before overtime compensation is required, it contains no general limitation on the number of hours that may be worked in a single day. Thus, for example, watchmen or guards, who are specifically exempted from the Walsh-Healey Act by the regulations issued thereunder but who are subject to the Fair Labor Standards Act inasmuch as they are engaged in an activity "necessary to the production" of goods for commerce, may be worked as much as a period of 40 consecutive hours without the payment of overtime compensation, whereas if they were subject to the Walsh-Healey Act they would have to be paid overtime for all hours in excess of eight in any consecutive twenty-four hour period.

4. The Fair Labor Standards Act specifically exempts certain employees from its provisions. Of general application to Cost-plus-a-fixed-fee Contracts are those exemptions for employees employed in a bona fide executive, administrative or professional capacity as these terms have been defined by regulations issued under the Act. Contracting Officer's Representatives should consider the employees of the Contracting Officer subject to the provisions of the Fair Labor Standards Act unless and until it is demonstrated with reasonable conclusiveness that a given employee is within one of the several specific exemptions set forth in the statute.

5. In connection with the matter of compliance with the Fair Labor Standards Act and the Walsh-Healey Act by the Contractor, particular attention is invited to the record-keeping requirements established by regulations issued under each of these statutes. Only by keeping accounts and records as required by these regulations and indeed as required by other applicable statutes such as the Social Security Law, the Unemployment Insurance Laws of the States, etc.) can the Contractor hope to be able to demonstrate his compliance with the various statutes regulating unemployment relations.

* * *

APPENDIX C

JOINT AGREEMENT OF THE WAR DEPARTMENT, THE NAVY DEPARTMENT, THE WAR PRODUCTION BOARD, THE MARITIME COMMISSION, THE DEPARTMENT OF LABOR, THE NATIONAL LABOR RELATIONS BOARD AND THE WAR MANPOWER COMMISSION, ON THE DESIRABILITY OF RETAINING EXISTING FEDERAL LEGISLATION RELATING TO OVERTIME PAY (JANUARY 25, 1943):

The War Department, Navy Department, War Production Board, Maritime Commission, Labor Department, National Labor Relations Board and the War Manpower Commission, being the agencies of the Federal Government most concerned with questions involving labor and production, have given continuous consideration to the problem raised by discussion to abolish the payment of overtime for work between 40 and 48 hours a week. The Senate Military Affairs Committee has called on a number of them to consider whether their experience indicates that such a measure would increase production. It is the best judgment of these departments and agencies, based on their individual and collective experience, that the abolition of existing overtime pay provisions of Federal legislation would hamper the war effort. These departments and agencies feel that what amounts to a wage cut as a result of the abolition of time and a half pay for overtime would not aid production or the war effort, would be contrary to the wage stabilization program, and would not relieve manpower shortage.

The following facts lead to this conclusion:

1. The war industries have almost universally scheduled shifts of 48 to 50 or 55 hours of work; in some industries 60 and even 70 hours are scheduled. The only significant exceptions are continuous-process industries like steel and smelting, which operate around the clock. Some plants do not receive sufficient raw materials to work their full force 48 hours regularly. In the major war industries man-hour production has increased and is one of the causes for the three-fold increase in our total monthly war production since Pearl Harbor.

2. The abolition of overtime pay would bring about terriffic pressure for an upward revision of basic wage rates to offset the loss of overtime pay. It would also probably cause dissatisfaction, a lowered morale and result in loss of production.

General wage increases in industries now working overtime would probably affect wage rates in most other industries as well. The cost of such general wage increases, therefore, would be much greater than the present cost of overtime, which is only paid for work beyond 40 hours. Such increased basic rates could only be reduced with great difficulty after the war, whereas overtime as now paid rises and falls with the need for production and will eliminate itself when the war demand is satisfied.

3. The effect of the increase in labor cost due to overtime premium payments is sometimes exaggerated. For example, the increase is about 8 percent in changing from a 40 to 48 hour week. This increase in labor cost is offset in whole or in part by the savings in overhead cost per unit of product that necessarily result from the increase in production made possible by longer hours of work. The increase in earnings resulting from overtime payments has also made it easier to introduce labor-saving devices that have been developed to handle the larger volumes of production.

4. Some non-war industries are now scheduling less than 40 hours of work a week. Obviously such short hours are not the result of legislative overtime requirements. Other non-war industries are working less than 48 hours a week.

To relieve growing shortages of manpower it is desirable in the interest of the conservation of manpower that workers in these industries be employed on 48-hour schedules as rapidly as practicable in order that any excess manpower may be transferred to war industries or the armed forces. Manpower shortages in tight labor market areas already are being met by the extension of work schedules in one establishment after another as the need arises.

The manpower problem in war production centers would not be relieved by requiring the instantaneous application of 48-hour schedules in areas

which have not been substantially affected by the war program. A simultaneous introduction of 48-hour schedules in all establishments would result in unemployment in many areas. While overtime is being rapidly extended to additional establishments, the opportunity for overtime work in vital war industries is, and is likely to remain, a significant natural economic force attracting manpower from non-war industries.

5. Pursuant to an Act of Congress wage stabilization is now a part of the national policy. Overtime pay was made a part of that policy by Congress. To remove the overtime pay would disrupt and break down the entire wage stabilization program and would lead to chaos.

APPENDIX D

EXCERPTS FROM THE ARMY ORDNANCE PROCUREMENT INSTRUCTIONS [2 WAR LAW SERVICE (C.C.H.)]

9,002. [24,843] *Ordnance Department representatives.*

9,002.1 *Hiring practices.*—While the responsibility for hiring is on the contractor exclusively, Ordnance Department representatives will urge contractors fully to utilize Ordnance and other governmental facilities for the solution of manpower and labor supply problems, and will assist contractors with respect thereto.

9,002.2. *Participation in labor disputes.*—Contractors have the primary responsibility for the handling of their own labor relations in such a manner as to avoid labor disputes and obtain maximum war production. Ordnance Department representatives will not participate in the arbitration, conciliation or mediation of labor disputes or any negotiations in connection therewith. However, without in any way taking a position as to the merits of a dispute, or any action which might be construed as prejudicial to or favoring the interests of any party, such representatives should:

a. Utilize all available sources of information with respect to a dispute, including interested labor and industry representatives.

b. Make known to all parties to the dispute the Ordnance interest in uninterrupted productions.

c. Suggest to all parties to the dispute the use of the facilities of the Federal and State conciliation and mediation agencies.

d. Maintain liaison with Federal and State agencies and supply such agencies with such information and assistance as such agencies may request in the discharge of their functions.

e. Where deemed advisable, contact appropriate Service Command Labor Branch officer for assistance in carrying out the functions outlined in (a) through (d) above. Where it is desired to refer a matter to a Service Command Labor Branch, referral of a case involving a particular plant should be to the Service Command within the geographical jurisdiction of which the plant is located. Where a problem of a general nature not involving a particular plant arises, referral should be to the Service Command within the geographical jurisdiction of which the Office of the Ordnance representative is located. Ordnance representatives shall exercise the utmost care to carry out the intent of this instruction and shall at all times consult with and keep fully advised the Labor Branch as regards their actions in compliance therewith.

[As amended March 1, 1943.]

9.002.3. *Relationship to contractors.*—Contracting officers' representatives shall encourage contractors to formulate sound and healthy labor relations policies with respect to wages, hours, and other

conditions of employment. They will, however, always recognize that prime responsibility for labor relations is the responsibility of the contractor.

* * * * *

9,104. [24,865] *The contractor.*

9,104.1. *Responsibility.*—Each operator is an independent contractor charged with final responsibility for safe and maximum production. Inasmuch as labor relations is a prime factor affecting production, it is the responsibility of the contractor to formulate such labor relations policy, of necessity conforming to the Statement of Labor Policy and applicable federal laws, as in its judgment best discharges this responsibility.

* * * * *

9,154. [24,882] *Relation of Walsh-Healey Act to other statutes.*

9,154.1. *Fair Labor Standards Act.*—Both the Fair Labor Standards Act and the Walsh-Healey Act prescribe minimum wage, maximum hours, and child labor employment standards. The Walsh-Healey Act, however, unlike the Fair Labor Standards Act, also provides for the regulation of health and safety. The statutes overlap in many cases and to the extent the wage, hour and child labor standards established by both conflict, the determination of the status of particular employees or classes of employees with reference to such standards may be difficult.

9,154.2. *Contract stipulations of Fair Labor Standards Act.*—Unlike the Walsh-Healey Act there is no requirement in the Fair Labor Standards Act for the inclusion of contract provisions.

* * * * *

9,160. [24,888]. *Investigations by wage and hour inspectors.*—Subject to existing security regulations governing admission of visitors to plants (See Headquarters, Army Service Forces, Circular No. 90, dated 28 November 1942, Subject: "Visits to Plants and Facilities Important to the War Effort," as amended by Headquarters, Army Service Forces, Circular No. 51, dated 20 July 1943, same subject) representatives of the Wage and Hour Division of the United States Department of Labor will be accorded access to facilities and to records of cost-plus-a-fixed-fee contractors for the purpose of making investigations to determine applicability of and compliance with the Fair Labor Standards Act. Access will be accorded such inspectors, as aforesaid, irrespective of whether claims have been asserted or litigation instituted by employees. Investigations by Wage and Hour Division inspectors will be conducted at such time and in such manner as to interrupt or interfere least with operations. They should be confined wherever possible to the inspection of records in the office of the contractor. Inspections of the areas in the facility where construction or production is in progress will be held to a minimum. Nec-

essary interviewing of employees should, wherever possible, be conducted outside work hours or at such other times as will interfere least with construction or production operations. [Added February 1, 1944.]

* * * * *

50,002 [25,203.] *Duties of Commanding Officers and Contracting Officer's Representative.*

* * * * *

50,002.11. In line with the above, it is important that the organization built up by the contracting officer's representative should be the minimum required to protect the interest of the Government. In general, the plant or depot managers and executives of the contractor should be men of considerable experience and have a well-trained staff at their disposal. The Government in entering into a contract with a particular company is paying for this experience and background, which should be utilized to the fullest extent. A cardinal principle to be observed is that the contractor is being paid a fee to perform the work, and while it is not intended that the Government do the job for which the contractor has been engaged, it is the responsibility of the contracting officer's representative to insure that the contractor does it well.

50,002.12. The relationship between the contracting officer's representative and the contractor's personnel is most delicate. The contracting officer's representative at all times should deal with the top

representative of the contractor at the particular plant, works or depot, in so far as the formulation of policies are concerned. Within the framework of the policies adopted as mutually agreed upon by the contracting officer's representative and the senior officer representing the contractor, it would be expected that key personnel on the staff of both maintain direct liaison with each other respectively in so far as the day to day problems of the plant or depot arise. The contracting officer's representative is the only Government official on the project who has any authority to criticize the contractor or any of his personnel and this he should do by direct contact, either verbally with, or in official written communication addressed to, the chief resident official of the contractor's organization. No restrictions should be placed by the staff of the contracting officer's representative upon the personnel of the contractor without the full knowledge and consent of the contracting officer's representative and then only in his name. Care is to be exercised by the staff of the contracting officer's representative in making suggestions lest they be considered as instructions except in those matters as occur in connection with day to day problems and which as a matter of policy have been agreed upon by the contracting officer's representative and the senior representative of the contractor at the particular plant, works, or depots. In case of differing opinions, the businesslike conference method

should be employed. It is preferred that the contracting officer's representative achieve the desired results not by peremptory orders, but by guidance and suggestions. It is highly important that the contracting officer's representative exercise the greatest care in seeing that neither he nor his staff assumes the responsibility of the contractor by making decisions which should be made by the contractor. The Storage Branch, Field Service Office, Chief of Ordnance—Detroit, products centers, the materiel branches, and the suboffices are equipped to be of special assistance in matters arising out of the foregoing relationship.

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No. 79

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, ~~1948~~ 1949

JULIA RHODA AARON AND ALL OTHER PLAINTIFFS AND INTERVENERS LISTED IN THE COMPLAINTS AND INTERVENTIONS IN THE DISTRICT COURT IN CIVIL ACTION No. L. R. 1584 CONSOLIDATED ..... *Petitioners*

v.

FORD, BACON & DAVIS, INCORPORATED ..... *Respondent*

PETITION FOR WRIT OF CERTIORARI TO UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT, AND SUPPORTING BRIEF

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No._____

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PETITION FOR WRIT OF CERTIORARI TO UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT, AND SUPPORTING BRIEF

PETITION FOR WRIT OF CERTIORARI

To the Honorable Supreme Court of the United States:

Your petitioners, applying for a writ of certiorari to the United States Court of Appeals, Eighth Circuit, respectfully show:

STATEMENT OF FACTS

Petitioners filed their complaints for overtime compensation, penalties and attorneys' fees due them under the Fair Labor Standards Act (29 U.S.C.A. s. 201) from respondent. That company had constructed the plant known as the Arkansas Ordnance Plant and thereafter operated it under a cost-plus-a-fixed-fee contract with the United States Government, and it was that plant wherein petitioners were employed (R.3-13).

Respondent filed a motion for summary judgment which in substance alleged that petitioners were not engaged in commerce or in the production of goods for commerce; that petitioners were employees of the United States and, therefore, exempt under the Wage and Hour Law (R.17).

The motion for summary judgment was sustained. The District Court adopted its former opinion in the case of *Barksdale* v. *Ford, Bacon & Davis, Inc.*, 70 F. Supp. 690, as a basis for its action in sustaining the motion (R.56-58).

The opinion held that "The goods in question were munitions of war and were manufactured for the purpose of being consumed by the United States in the prosecution of the war. Hence, the United States, in our opinion, was the ultimate consumer thereof within the meaning of the Act and the plaintiff was not engaged in the production of goods for commerce."

The opinion further held that the defendant in making shipments across State lines was performing an administrative act of the Government; that defendant was not engaged in the production of goods for commerce within the meaning of the Fair Labor Standards Act, that plaintiffs were not so engaged and, therefore, not within the coverage of the Act (R.58-79).

Although the issue was not raised by any of the pleadings, was not presented to or considered by the District Court, was not raised in the briefs of the respective parties in the Court of Appeals for the Eighth Circuit, that court in conjunction with the case of *The United States Cartridge Company, a corporation,* v. *R. M. Powell, et al.,* affirmed the ruling of the District Court in sustaining the motion for summary judgment, upon the one ground that petitioners were not covered by the Fair Labor Standards Act but were covered solely by the Walsh-Healey Act (R.7-24).

JURISDICTION

The jurisdiction of the court is invoked under Title 28 U.S.C.A. s. 347 (a). The opinion was rendered April 12, 1949. This application for a writ of certiorari has been made within the time provided for under Title 28 U.S.C.A. s. 350.

QUESTIONS PRESENTED

1. Whether the Walsh-Healey Act, to the exclusion of the Fair Labor Standards Act, controls the creation and the enforcement of claims of employees of an inde-

pendent contractor with the United States Government for overtime compensation while engaged in the production of goods which were later shipped out of the State to another State.

2. Whether a "cost-plus-a-fixed-fee" contractor with the Government manufacturing goods under such contract, the raw materials of which are shipped to such contractor from without a state and the ultimate products manufactured are shipped without the state, is engaged in "commerce" within the meaning of the Fair Labor Standards Act.

3. Whether a "cost-plus-a-fixed-fee" contractor with the Government, a private corporation, wherein the Government is the owner of the raw materials shipped to such contractor from without the state, and the Government is the owner of the finished products shipped without the state, is a governmental agency exempt from the operation of the Fair Labor Standards Act.

4. Whether the respondent is engaged in the production of goods for commerce within the meaning of the Fair Labor Standards Act.

5. Whether the United States Government, owning plant facilities, raw materials prior to processing and after processing, which materials were processed by a "cost-plus-a-fixed-fee" contractor with the Government and subsequently shipped without the state for use in the prosecution of the war, is a producer and the ultimate consumer of such goods within the meaning of the Fair Labor Standards Act.

6. Whether the United States Government is the employer and is exempt from the operation of the Fair Labor Standards Act under the facts of this case.

7. Whether your petitioners were actually employees of the respondent.

REASONS RELIED UPON FOR ALLOWANCE OF WRIT

1. The questions presented in this cause are of special and outstanding importance for the reason that the goods produced herein were manufactured by a cost-plus-a-fixed-fee contractor with the United States Government under similar conditions to goods produced by many other such contractors which involved many necessary items and products transported in commerce essential to the prosecution of the war, and which production of similar goods has been uniformly held subject to the Fair Labor Standards Act. Many other like cases are being held by District Courts awaiting a decision of this Court upon the vital issues involved.

2. The decision sought to be reviewed is in conflict with the holdings of the Courts of Appeal for the Sixth, Seventh and Ninth Circuits, wherein it was held that employees of a cost-plus-a-fixed-fee contractor with the United States Government are under the coverage of the Fair Labor Standards Act, whereas the decision of the Eighth Circuit held that such employees are not covered by that Act but were covered exclusively by the terms of the Walsh-Healey Act.

3. The opinion of the Court of Appeals for the Eighth Circuit is in conflict with the decisions of this Court in holding that a "cost-plus-a-fixed-fee" contractor is a mere agency of the United States Government. *Alabama* v. *King & Boozer*, 314 U. S. 1; *Buckstaff* v. *McKinley*, 308 U. S. 358; *Curry* v. *United States*, 314 U. S. 14; *Penn Dairies* v. *Milk Control Commission*, 318 U. S. 361.

4. Petitioners were entitled to the benefits of the Fair Labor Standards Act while working for the "cost-plus-a-fixed-fee" contractor, respondent.

5. The said decision sought to be reviewed has decided important questions of Federal law which have not been, but should be, settled by this Court.

6. The said decision has decided directly one question, and inferentially other questions, in a way probably in conflict with applicable decisions by this Court.

Wherefore, your petitioners respectfully pray that a writ of certiorari be issued out of and under the seal of this Court, directed to the United States Court of Appeals for the Eighth Circuit, commanding that Court to certify and send to this Court for its review and determination, on a day certain to be named therein, a full and complete transcript of the record and all proceedings in case No. 13,660, entitled on its docket "Julia Rhoda Aaron and all other plaintiffs and interveners listed in the complaints and interventions in the District Court in Civil Action No. L. R. 1584 consolidated, appellants, vs. Ford, Bacon & Davis, Incorporated, appellee", and that upon a full hearing of said cause, said judgment of said Court of

Appeals for the Eighth Circuit be reversed, and that your petitioners have such other and further relief as the Court may deem proper.

Respectfully submitted

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Attorneys for Petitioners

No.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1948

JULIA RHODA AARON AND ALL OTHER PLAINTIFFS AND INTERVENERS LISTED IN THE COMPLAINTS AND INTERVENTIONS IN THE DISTRICT COURT IN CIVIL ACTION No. L. R. 1584 CONSOLIDATED — *Petitioners*

v.

FORD, BACON & DAVIS, INCORPORATED — *Respondent*

SUPPORTING BRIEF

The opinion of the United States Court of Appeals for the Eighth Circuit in this cause, as well as its opinion in *The United States Cartridge Company, a corporation, v. R. M. Powell, et al.*, upon which the Court based its opinion in the former case, will be found in the printed record (R.7-33).

STATEMENT OF THE CASE

We adopt the statement of the case as set forth in the preceding petition and do not re-state it here.

The questions presented in our petition (with the exception of the applicability of the Walsh-Healey Act) were

raised before this Court in *Kennedy* v. *Silas Mason Co.*, 334 U. S. 249. None of those questions was determined by this Court, but the cause was remanded to the District Court for the purpose of enlargement and amplification of the record.

We believe the record here is complete for consideration of the applicability of the Walsh-Healey Act as well as the other questions presented.

ARGUMENT

1. There have been numerous cases before the courts, both Federal and State, involving the applicability of the Fair Labor Standards Act. See list of such citations on p. 18 of the opinion of the Court in *The United States Cartridge Co., a corporation,* v. *R. M. Powell, et al.*

In none of the cited cases has any court held that the Walsh-Healey Act covers the employment of workmen by a contractor under a cost-plus-a-fixed-fee contract with the United States Government to the exclusion of the Fair Labor Standards Act. The decision sought to be reviewed holds that the Walsh-Healey Act, though not raised or considered by the trial court, related to the jurisdiction of the court and was properly before it. The same thing was true in *Kennedy* v. *Silas Mason, supra.* This Court evidently did not view the issues in the *Kennedy* case as did the Court of Appeals for the Eighth Circuit in its decision, for this Court could have determined the *Kennedy* case by a like holding, and thereby have finally disposed of that and similar litigation if it is true the Walsh-

Healey Act controls to the exclusion of the Fair Labor Standards Act.

"If we are correct in our contention that the Walsh-Healey Act does not control in this cause, then the following argument becomes pertinent in the consideration of the issues raised in this proceeding:

2. By the express terms of the contract between respondent and the Government, the petitioners were denominated and classified as employees of respondent, not of the United States (R.28). All of the detailed supervision over them as to their general conduct, the manner and method of performing their duties and general behavior was exercised by the respondent. The only supervision by the United States was indirectly to insure that the funds advanced by the Government were disbursed according to law. Under like circumstances the employees have been held to be employees of the contractor. *Alabama v. King & Boozer, supra; Bell v. Porter*, 159 F. 2d 117; *Carey v. U. S., supra; U. S. v. Driscoll*, 96 U. S. 421; *Walling v. Hailey Gold Mines*, 136 F. 2d 102.

3. The United States Government and the respondent, in a formal contract executed by them, specifically provided that the respondent should have all of the rights, responsibilities, and duties of an independent contractor. The supervision exercised by the Government was of a general nature usually exercised in cost-plus-a-fixed-fee contracts of this kind. This Court has consistently held that the contractor under similar circumstances is not an agent of the Government, but an independent contractor. *Alabama v. King & Boozer, supra; Baltimore & A. R. Co. v. Lichtenberg*, 308 U. S. 525; *James v. Dravo Construc*

tion Co., 302 U. S. 134; *Penn Dairies* v. *Milk Control Commission*, *supra*; *U. S.* v. *Driscoll*, *supra*.

4. Numerous decisions have defined commerce and what is meant by "production of goods for commerce" within the meaning of the Fair Labor Standards Act. The criterion adopted by the Circuit Court of Appeals, Seventh Circuit, in *Bell* v. *Porter*, *supra*, was the crossing of State lines. There can be no distinction between the production of munitions on the one hand and trucks on the other hand. Medical supplies and food are equally necessary to the winning of a war. No decision has attempted to state the reasons why medical supplies and food should be covered by the Fair Labor Standards Act and at the same time exclude munitions of war, when both are to be devoted to use by the Government to winning a war. *Alabama* v. *King & Boozer*, *supra*; *Atlantis Co.* v. *Walling*, 131 F. 2d 518; *Bell* v. *Porter*, *supra*; *Bowie* v. *Gonzales*, 117 F. 2d 11; *Clyde* v. *Broderick*, 144 F. 2d 348; *Fox* v. *Summit King Mines*, 143 F. 2d 926; *Helena Glendale Ferry Co.* v. *Walling*, 132 F. 2d 616; *Kirschbaum Co.* v. *Walling*, 316 U. S. 517; *Overnight Motor Transportation Co.* v. *Missel*, 316 U. S. 572; *Rutherford Food Corporation* v. *McComb*, 331 U. S. 722; *U. S.* v. *Darby Lumber Co.*, 312 U. S. 100.

5. There is almost conclusive evidence that Congress intended the Act to apply to goods produced for transportation by the United States to be found in the subsequent legislative history in which Congress recognized that the Fair Labor Standards Act applied to workers employed in plants producing armaments and other vital war materials for the Government. Both the offer and

the rejection of various amendments designed to exempt such workers from the Act were predicated on the premise that they were within the existing coverage provisions. Some eighteen bills were introduced for the purpose of suspending or restricting the overtime provisions of the Act for the war's duration. Such amendments would have been largely unnecessary had the existing Act not applied to workers producing war goods for the Government. By their rejection Congress clearly indicated its desire that the Act continue to be applied to employees engaged in these activities. Cf. *Apex Hosiery Co.* v. *Leader*, 310 U. S. 469; *United States* v. *Delaware & Hudson Co.*, 213 U. S. 366, 414; *Alabama* v. *King & Boozer*, *supra*.

6. In the production of goods at the Arkansas Ordnance Plant the items produced were components which were required to be shipped to other establishments in other States for further processing or assembly before coming to rest as a finished article ready to be delivered for ultimate consumption. The work performed by the petitioners herein was merely one process in several processes and under no consideration could it be said that the goods produced or worked on by the petitioners were delivered to the ultimate consumer within the meaning of the Fair Labor Standards Act. The same cases referred to under the other preceding three points are applicable under this point, as well as the following additional authorities: *Hamlet Ice Co.* v. *Fleming*, 127 F. 2d 165; *Santa Cruz Fruit Packing Co.* v. *W.R.B.*, 303 U. S. 453; *Warren Bradshaw Drilling Co.* v. *Hall*, 317 U. S. 88; *W.R.B.* v. *Jones & Laughlin*, 301 U. S. 1.

We believe the petition should be granted and, upon a full hearing, the cause should be reversed.

Respectfully submitted

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1949.

No. 79

JULIA RHODA AARON, ET AL. ..... *Petitioners*

v.

FORD, BACON & DAVIS, INCORPORATED ..... *Respondent*

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

BRIEF OF PETITIONERS

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1949

No. 79

ULIA RHODA AAKON, ET AL ..... *Petitioners*

v.

'ORD, BACON & DAVIS, INCORPORATED ..... *Respondent*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF OF PETITIONERS

This case is pending here on writ of certiorari granted une 27, 1949, to review the final judgment of the United States Court of Appeals for the Eighth Circuit.

The transcript of record for use in this Court is bound n three sections, consisting of the record, the supplemental ecord, and the proceedings in the Court of Appeals. Each ection carries its own pagination. When reference is made n this brief to any of the records, we will designate that art of the first section, consisting of the record, as R.); the second section consisting of the supplemental ecord, as (S.R.); that part consisting of the proceedngs in the Court of Appeals, as (C.R.).

OPINIONS OF THE COURT BELOW

The Court of Appeals in this cause, *Julia Rhoda Aarons et al. v. Ford, Bacon & Davis, Inc.*, 174 F. 2d 730 (C.R.7-9), adopted its opinion in the companion case of the *United States Cartridge Company, a Corporation, v. R. M. Powell, et al.*, 174 F. 2d 718 (C.R.9-33).

JURISDICTION

The jurisdiction of the Court was invoked under Title 28 U.S.C. 1254, which was a consolidation of Sections 346 and 347, Title 28 U.S.C. Jurisdiction was urged because: (1) The questions presented were of special and outstanding importance in the interpretation of the Fair Labor Standards Act, which decision would affect many like cases pending in the various District Courts and which cases are being held in abeyance awaiting a decision of this Court; (2) the decision sought to be reviewed is in conflict with those of the Courts of Appeal for the Sixth, Seventh and Ninth Circuits; (3) the opinion is in conflict with the decisions of this Court in the former's holding that a "cost-plus-a-fixed-fee" contractor is a mere agency of the United States Government; (4) petitioners were entitled to the benefits of the Fair Labor Standards Act; (5) said opinion decided important questions of Federal law which have not been, but should be, settled by this Court; (6) said opinion has decided directly one question, and inferentially other questions, probably in conflict with decisions of this Court.

STATEMENT OF THE CASE

The Arkansas Ordnance Plant was constructed and operated at Jacksonville, Arkansas, in 1941-1945. It was built under a cost-plus-a-fixed-fee contract, and after its completion was operated on the same basis (S.R.21-73). As will be shown from cited cases in the brief, the contract is substantially similar to other Government contracts, some of which were for the operation of ordnance plants.

During the period of operation of the plant, petitioners were employed in various capacities. The capacity in which any one of the petitioners may have been employed and whether that *capacity* or classification is within the coverage of the Fair Labor Standards Act is not in issue. The question is whether the Walsh-Healey Act applied to the exclusion of all other Acts, and if not, whether the Fair Labor Standards Act is applicable.

At the Arkansas Ordnance Plant detonators and primers were loaded or processed, and in addition thereto some of the facilities were devoted to assembling fuses. As indicated by one of the affidavits filed in this cause, about 75% to 85% of the quantity of ordnance items produced were detonators and primers (R.51). 15% to 25% of the production could be said to be devoted to fuses. After processing and assembling of the parts it was necessary to ship the elements to other plants outside of Arkansas for further processing and assembling before they were ready for use or consumption (S.R.51).

On the lines the parts underwent inspection by employees of respondent, and were then loaded in conformity with manuals and loading data supplied by the Ordnance

Department of the Army. Those instructions were in the form of specifications relating to the dimensions of particular items, the processes, and the quality and quantity, as well as testing and inspection criteria. The items when loaded were inspected by the operating company's personnel, assembled into lots, and delivered to the War Department for acceptance. Prior to acceptance, the Ordnance Department of the Army made spot checks to determine whether the lots were acceptable (S.R.51).

Primers were loaded or assembled from many items shipped in from other States. Fuses were larger and more complex (S.R.51).

In the operation of the plant, the Government officers made the usual checks and examinations of payrolls, etc., to determine that the money was being properly expended. The manuals of operation and the specifications for all components loaded, processed, or manufactured originated *in the Office* of the Chief of Ordnance, War Department. The regulations pertaining to safety and safety measures, especially those relating to the handling of explosives, were furnished to the operating agent by the Ordnance Department (S.R.51).

Respondent was the agent charged with the operation of the plant (S.R.39). The terms of the contract show conclusively that the operating agent was an independent contractor. It was required to pay unemployed insurance and carry workmen's compensation insurance (S.R.66, 67). In fact, income taxes were withheld by them and remitted in their name through their New York office; compensation payments were made in accordance with Arkansas law; social security withholding and contribu-

tions were made in the name of Ford, Bacon & Davis, Inc.; group insurance was made available with the premiums being paid in the name of the respondent (R.45).

Respondent set up its personnel division, and was responsible for the hiring of some 79,000 employees (R. 44). A report was made of all personnel changes on accounting forms to the Commanding Officer of the Plant for accounting purposes, but at no time did the Government attempt to control the hiring, firing or the conduct and discipline of the employees (S.R.46).

In short, the plant was designed and constructed to process items of ordnance necessary to the prosecution of the war. The War Department did not have the managerial personnel to operate the plant. Thousands of plants had to be built and operated at Government expense. Where possible a company was selected as operating agent that was engaged in a similar peace time activity. The Government, by such a contract and procedure, could detach a small number of personnel to see that specifications were followed, Government property not misappropriated, and Government funds properly expended.

The set-up at the plant presented no unique, unusual nor extraordinary features. It was like the Louisiana Ordnance Plant, the Iowa Ordnance Plant, the Lake City Ordnance Plant, etc.

The petitioners brought their action under the Fair Labor Standards Act (R.3-13). The respondent filed motion for summary judgment on the ground it was not engaged in commerce or the production of goods for commerce, that petitioners were employees of the United

States, and that the Portal-to-Portal Act constituted a bar (R.17). The District Court, on the motion for summary judgment and response thereto with the respective affidavits, found that respondent was not engaged in commerce or the production of goods for commerce and ordered the summary judgment (R.56-58).

The District Court expressly limited its consideration of the case and finding to that single issue (R.57).

On appeal the issues of commerce, independent contractor and employee relationship were briefed and argued. The Court of Appeals found that the Walsh-Healey Act was exclusively applicable and affirmed the judgment of the District Court (C.R.7-9).

The important question to be determined by this Court is whether the Fair Labor Standards Act applies to employees engaged in the production of ordnance items under a cost-plus-a-fixed-fee contract.

SPECIFICATIONS OF ERROR

The Court erred—

I. In holding that petitioners' employment by respondent was governed by the terms of the Walsh-Healey Act to the exclusion of the Fair Labor Standards Act.

II. By failing to hold that petitioners were engaged in the production of goods for commerce within the meaning of the Fair Labor Standards Act.

III. By failing to hold that petitioners were employees of respondent, an independent contractor.

ARGUMENT

SUMMARY

I. Petitioners contend that the provisions of the Fair Labor Standards Act and the Walsh-Healey Act are not exclusive of each other in their application to the employment of petitioners by respondent.

In all Government contracts which exceed $10,000.00, it is required that certain stipulations based upon the Walsh-Healey Act be incorporated (41 USC s. 35), but that requirement does not exclude the provisions of the Fair Labor Standards Act whenever applicable. The latter is a law of like dignity with the Walsh-Healey Act, and whether any of its provisions were incorporated in the contract under consideration or not, if they were applicable to the situation, that law also must be given equal force. Such was the interpretation placed upon it by the Secretary of Labor when the Fair Labor Standards Act was being considered by Congress. Likewise, a similar construction was made by the Wage-Hour Division of the Department of Labor; inspections by that department were made concurrently under both Acts in nearly all cases, as the Department considered the establishments inspected were covered by both Acts.

Such interpretation was well known to Congress from the several reports of the Department of Labor, and it can reasonably be assumed the interpretation was approved by Congress, as it continued to make appropriations for the enforcement of both Acts.

The Fair Labor Standards Act is more beneficial to employees than is the Walsh-Healey Act. In order to en-

force an employee's right to recover for unpaid wages under the latter Act, it would necessitate an officer of the Government first to determine that such a right existed; a suit by the Government *might* then be instituted. Nothing in the Walsh-Healey Act compels the Government to enforce the right. Under the Fair Labor Standards Act it is not necessary for an employee to depend upon the decision and action of a Government officer—he has the privilege of instituting an action in his own behalf.

The contention that the Government would be penalized by judgments obtained under the Fair Labor Standards Act upon the theory that such judgments would have to be paid ultimately by the Government, is not tenable when the contract provides full protection to the Government in cases of violation by the contractor for failure to pay overtime compensation to any employee (S.R.44).

II. If the Court is of the opinion that the Fair Labor Standards Act is applicable, determination must be made of two contentions originally raised in the District Court. The first one is that petitioners produced goods for commerce within the meaning of the Fair Labor Standards Act.

Petitioners were engaged in the manufacture and processing of munitions from materials purchased outside of Arkansas, shipped to the plant, and when finished (or if not finished and further processing at points outside Arkansas was necessary), were loaded by the employees on railroad cars or in trucks operated by petitioners and transported to points outside the State.

Although the materials shipped into the plant belonged to the Government, nevertheless it was necessary for the employees of respondent, an independnt contractor, to process them, and to ship them to points outside of Arkansas for further processing before becoming finished products. The fact that the contractor was operating under Government contract was not a license to it to maintain substandard labor conditions, while private contractors were prohibited from doing so, and particularly at a time when all or nearly all major industries were operating under Government contracts.

No weight should be given to the contention that the goods were produced for war purposes, and for that reason were not the subject of interstate commerce. Many industries manufactured and shipped food, shoes, clothing, and other goods which were used by the armed forces. They were just as essential for carrying on the war as were munitions. Those industries certainly were subject to the Fair Labor Standards Act when such goods were produced and shipped in commerce. There would seem to be no good reason why one class of employees should be permitted to enjoy the benefits of the Fair Labor Standards Act while the other would be deprived of such benefits.

III. As a component part of their right of action under the Fair Labor Standards Act, petitioners contend that they were employees of respondent, an independent contractor, and not of the United States.

That contention is borne out not only from a reading of the terms of the contract between respondent and the Government but also by the interpretation of the contract by the parties themselves and by the acquiescence of re-

spondent to the inspections made of its plant by the Wage and Hour Division of the Department of Labor.

Under the terms of the contract respondent had supervision and direction of the operation of the plant, and it employed and discharged workmen at the plant; the only supervision which the Government maintained over the contractor or the employees was that the Government directed the specifications of work on the materials and that the contracting officer might require the contractor to dismiss from work any employee deemed incompetent by the contracting officer or whose retention was deemed to be not in the public interest.

This Court (as will be pointed out in detail in the proper places) has upheld the contention here made in cases where there were contracts similar to the one under consideration in this cause.

The Government required that respondent afford adequate protection to the employees in the matter of unemployment compensation insurance and workmen's compensation insurance, which requirements would not have been embodied in the contract if it had been contemplated that the workmen were to be considered employees of the United States.

The Government had the right, of course, to staff the plant with its own employees or with enlisted men of the Army if it saw fit to do so. It knew, however, that it was necessary to have the plant operated by trained personnel whose training would be directed by those experienced in the work, such as respondent.

I

The Walsh-Healey Act Not Exclusive

The Court of Appeals held that the Walsh-Healey Public Contracts Act (49 Stat. 2036, 41 U.S.C. 35-45) and the Fair Labor Standards Act (52 Stat. 1060, 29 U.S.C. 201) are mutually exclusive and that only the Walsh-Healey Act is applicable in the present case. The Court, therefore, held that since the suit was not under the Walsh-Healey Act, the action of the District Court in dismissing the claims should be affirmed.

In the District Court the respondent had filed a motion for summary judgment on the grounds that the petitioners were not engaged in commerce or in the production of goods for commerce, that they were employees of the United States and therefore excluded by the express terms of the Fair Labor Standards Act, and that the Portal-to-Portal Act barred their action (R.17). The District Court expressly limited its consideration of the case to the issues of commerce and production of goods for commerce, and, finding that the employees were not engaged in commerce or the production of goods for commerce, granted the motion for summary judgment (R.56-58).

The action of the employees (petitioners) was bottomed solely on the Fair Labor Standards Act (R.3-13). The Walsh-Healey Act was not pleaded by the respondent as a defense to the claims (R.13-16), was not considered by the District Court, and was not briefed or argued by the petitioners in the Court of Appeals. However that might be, the question of the applicability of the Fair

Labor Standards Act and of the Walsh-Healey Act is before this Court on a comprehensive and adequate record.

The applicability of the Fair Labor Standards Act will be discussed elsewhere in this brief, and this section will be devoted to the Walsh-Healey Act.

The argument may be subdivided into (1) the two acts are not mutually exclusive, (2) the Walsh-Healey Act does not require the exclusion of the employees from the benefits of the Fair Labor Standards, if otherwise within the scope of the latter Act, (3) the purposes of the two acts permit the employee to enjoy the benefits of both, and (4) The Fair Labor Standards Act by its own terms does not exclude employees engaged in commerce or the production of goods for commerce from its benefits because the contract is with the Government.

(1) The two Acts are not mutually exclusive.

The Court of Appeals found that the contract under which the Arkansas Ordnance Plant operated contained the stipulations required by Walsh-Healey Act (49 Stat. 2036), 41 U.S.C. 35, and deduced therefrom that the stipulations were conclusive and the Walsh-Healey Act alone governed. It was overlooked that these stipulations are a part of *every* contract made by the Government for supplies in excess of $10,000. There is no doubt but that the provisions of the Walsh-Healey Act apply to this contract and all similar contracts. The need for supplies created by war conditions doubled and trebled many times the number of contracts subject to the Public Contracts Act. The annual reports of the Secretary of Labor to Congress for the years 1944, 1945 and 1946 point this fact out quite clearly. But this does not mean that the petitioners as

employees of the respondent were not also covered by the Fair Labor Standards Act and entitled to its benefits.

When that Act was under consideration by Congress, the Secretary of Labor, reporting to a joint hearing of the Senate Committee on Education and Labor and House Committee on Labor stated (81 Cong. Rec., Appendix 1484, 75th Cong. 1st Session, June 15, 1937) said:

> "The bill also overlaps to some extent the administrative performance with respect to Government contracts under the Walsh-Healey Act. This Act has been in effect for almost a year and has played a part in bringing about reemployment through its provisions for a 40-hour week and other standards by firms having contracts with the Government. This measure was enacted after the invalidation of the codes as it was considered at that time that it provided the only safe constitutional avenue of approach to the preservation of wage and hour standards by the Federal Government. It applies to persons contracting with the Government, regardless of the effect of the activities of the contractor on interstate commerce. A case in point would be certain distributive concerns engaged in intra-state business. Since it therefore covers employers outside the ambit of the fair labor standards bill, I believe it should be continued in full force and effect subject to the qualification that its labor standards should be integrated with the child labor standards and the fair labor standard orders which this bill contemplated, for it does not seem desirable to have two sets of standards for the same industry."

Section 4(d) of the Fair Labor Standards Act required the Administrator to submit annual reports to Congress.

In his annual report for 1943, page 9, the Administrator noted that the integration of the Wage and Hour (FLSA) and Public Contracts (W-H) Divisions had been completed, and that out of a total of nearly 8,000 inspections under the Walsh-Healey Act, all but 300 of them were concurrent with Wage-Hour inspections (FLSA).

The annual report of the Administrator for 1944, page 10, reads:

> "Many establishments are covered under both Acts so that it is impossible to give separate figures for restitution, which in many cases would be *due under either*. Of the 54,431 inspections completed during the year, 11,900 were made under the Public Contracts Act, all but 269 of which were concurrent with Wage-Hour inspections." (Italics added.)

In his report for the year 1945, page 2, the Administrator called to the attention of Congress that—

> "Under the Public Contracts Act during the fiscal year 131,733 public contracts with a total value of $35,965,367,880 were reported to the Divisions, exclusive of secret, confidential and restricted contracts. In both number and value, this is greater than ever reported in any previous year, greater, indeed, than the total for the first six years the Act was in force beginning in 1937."

> "Many establishments are covered under both Acts, so that it is impossible to give separate figures for restitution which in many cases would be due under either Act. Of the 44,300 inspections completed during the year, 9,400 were made under the Public Contracts Act, all but 160 of which were concurrent with Wage-Hour inspections."

In his Report for 1946, page 14, after making refer-ice to tables showing pertinent data, the Administrator ain called to the attention of Congress the applicability both acts, saying:

> "*Since nearly all establishments subject to the Public Contracts Act are also subject to the Fair Labor Standards Act*, few establishments are selected for inspection only because of receipt of Government contract awards." (Italics added.)

Pages 5 and 6 of the Report for the year 1948 makes e same statement of application of the two acts reiterat-g that "although the latter Act (Walsh-Healey Public ontracts Act) differs from the Fair Labor Standards ct in its application and provisions, it was logical that spections under the two acts be conducted simultaneous-, since most employers subject to the Public Contracts ct, which applies to manufacture or supply contracts by the Government for equipment and supplies in nounts over $10,000, are subject to the Fair Labor Stan-rds Act".

There is a rule of long standing that where Congress aware of the interpretation placed upon an Act by the epartment charged with its administration, and ac-uiesces over a long period of time with that interpreta-on, it is presumed that Congress has approved the ad-inistrative interpretation as expressive of its own intent-nd purpose. This is especially true when continued ap-ropriations are made on the basis of reports submitted the administrative authority. *Brooks* v. *Dewar*, 313 . S. 354; *Fleming* v. *Mohawk Co.*, 331 U. S. 111, 116; see lso *Wells* v. *Nickles*, 104 U. S. 444, 447; *Isbrandtsen-oller Co.* v. *United States*, 300 U. S. 139, 147.

Since the department charged with the responsibility of the two acts construed them as not being mutually exclusive, but that most of the employers subject to the Walsh-Healey Act were also subject to the Fair Labor Standards Act and this construction was in effect approved by the Congress, it would appear that if the requisites necessary to the application of the Fair Labor Standards Act were present, and the contract was with the Government for equipment or supplies in an amount in excess of $10,000, both acts would apply. There is nothing in either act that requires the employee to make an election. Cf. *Brooks* v. *United States*, 337 U. S. 49. But, as pointed out by the Secretary of Labor, *supra*, the two acts may overlap. This usually occurs when the activity of an employer is outside the ambit of the Fair Labor Standards Act; examples, of course, are employers not engaged in commerce or the production of goods for commerce, retailers and others expressly excluded by the latter act. These are very few in number, 300 out of 8,000 inspections in 1943, 249 out of 11,900 inspections in 1944, 160 out of 9,400 inspections in 1945. It is especially interesting that in 1944, 131,733 public contracts were let, excluding secret, confidential and restricted contracts. All of these were covered by the Walsh-Healey Act. Only a very small percentage did not come under the Fair Labor Standards Act. Because of the large number of inspections and because restitution were generally due under *either* act, the Administrator did not attempt to give separate restitution figures. Annual Report 1945, page 2.

Congress expressly recognized that both Acts may apply to the same employer. In 1942 Congress amended subsection (a) of section 1 of the Walsh-Healey Act by adding thereto: "Provided, that the provisions of this

subsection shall not apply to any employer who shall have entered into an agreement with his employees pursuant to the provisions of paragraphs 1 or 2 of subsection (b) of section 7 of an Act entitled 'Fair Labor Standards Act of 1938' ". (52 Stat. 277, chapter 306) It would be meaningless to exempt an employer from the provisions of a part of one Act because of agreements made under another Act unless both Acts were applicable. It is to be noted that Section 7 (29 U.S.C. 207), of the Fair Labor Standards Act applies only where "employees are engaged in commerce or in the production of goods for commerce"; and has to do with collective bargaining agreements; subsection (c) of section 1 of the Walsh-Healey Act applies only to "persons employed by the contractor in the manufacture or furnishing of materials, supplies, articles, or equipment used in the performance of the contract * * *" (41 U.S.C. 35 (c)), and prescribes the eight-hour work day and the forty-hour work week. It is apparent Congress intended by the amendment that employees of a contractor engaged in the manufacture of materials, etc., should not work more than eight hours in one day or forty hours in one week, unless, being also engaged in commerce or the production of goods for commerce, they made an agreement for a longer work day or work week as a result of collective bargaining.

In rejecting the theory that the Fair Labor Standards Act applied, the opinion states:

> "Nor are we impressed with the view that Congress intended that when an industry was engaged in producing munitions of war for the United States under a cost-plus-a-fixed-fee contract and failed to pay an employee not only his unpaid wages but also an amount equal thereto as liquidated damages, and,

in addition, his attorney fees, when another method of safeguarding the employees' rights had been provided which does not entail such a penalty against the United States" (S.R.22).

In voicing such an objection, the opinion loses sight of the fact that the judgment would not be against the United States but against the contractor. The reply to that would be that ultimately the Government would have to reimburse the contractor for any such judgments, and, therefore, strictly speaking, the judgment would be against the Government. We submit that the Government fully protected itself against any such contingency when the contract was prepared and executed.

Article II-D of the contract provides: "The provisions of I-G of Title I shall apply to the work under this Title II" (S.R.38).

Title I-G fixes the hours at eight per day, with time and a half for overtime. For each violation a penalty of $5.00 would be imposed upon the contractor for each laborer or mechanic for every calendar day an employee was required to work over eight hours, and all such penalties imposed should be withheld for the use and benefit of the Government (S.R.36).

If, therefore, the Government had the right to withhold $5.00 per day from the contractor for each day's overtime per employee, that would more than equal the amount recoverable by an employee for a day's overtime. For example, in the suits for overtime during the lunch period (one half hour), based upon the highest rate paid an employee, 66¢, as shown by the Payroll Authorization Exhibit (S.R.155), the amount recoverable for time and a half would be 49½¢, and a like amount for liquidated

damages: total 99c. The attorney's fee would not average more than a like amount (not that much), making a grand total of $1.98. So that, the $5.00 penalty provided by the contract would more than compensate the Government.

The Government is further protected by Article V-B, paragraph 5, of the contract: "Upon completion of the work under Titles I and II . . . . . and again upon completion of the work under Title IV, the Government shall pay to the contractor the unpaid balance of the cost of the work determined under Title V hereof, and of the fees, *less any sum that may be necessary to settle any unsettled claims for labor or materials, or any claim the Government may have against the contractor*" (S.R. 55, 56). (Italics supplied.)

(2) The Walsh-Healey Act does not require exclusion of the employees from the benefits of the Fair Labor Standards Act.

The amendment of 1942 to the Public Contracts Act seems to indicate clearly that Congress recognized application of the Walsh-Healey Act would not exclude employees from the benefits of the Fair Labor Standards Act if otherwise entitled to the benefits of the latter Act. The Public Contracts Act contains exceptions as to certain public contracts (41 U.S.C. 43), and makes reference to its effect on other laws (41 U.S.C. 42), none of which applies to the Fair Labor Standards Act. But nowhere is there to be found any provision excluding operation of any other Act. Congress had the opportunity to amend the Act to so provide, and in 1942 enacted the amendment referred to above. The failure to provide by amendment exclusiveness of application constitutes evidence that Congress did not intend the Public Contracts Act to work

the exclusion of the Fair Labor Standards Act. Where Congress has not pronounced a doctrine of election or exclusiveness of remedies, the courts will not do so. *Brooks* v. *U. S.*, *supra*.

(3) The two Acts permit the employees to enjoy the benefits of both.

The Walsh-Healey Act was considered at the time of its enactment as the only safe constitutional approach to improving the working conditions and raising the wages of that segment of industry doing business with the Government. It was not a statute of general application. It provided for an 8-hour work day and a 40-hour work week; the Secretary of Labor had the right to determine the minimum wages to be paid, and, if permission were granted for work in excess of the stipulated work day and work week, to provide for the rate of overtime, to be not less than one and one-half times the base rate; no male under sixteen nor female under 18 should be employed; and the working place and conditions must not be unsanitary or hazardous or dangerous to the health and safety of employees engaged in the performance of the contract (41 U.S.C. 35). Money penalties were prescribed for under age penalties; cancellation of contract; and collection of amounts underpaid, the sums to be held in a special fund for one year, and then covered in the Treasury.

Because only a small segment of industry was affected by the Act, and further because of the difficulty and cost of administration, a more comprehensive and effective law was needed. In 1938 the Fair Labor Standards Act was placed on the statute books. It applied to all employees engaged in commerce or the production of goods for commerce. Its general purpose was to exclude from

interstate commerce goods produced under conditions detrimental to the maintenance of the minimum standards of living necessary for health and general well-being, *U. S. v. Darby Lumber Co.*, 312 U. S. 100. It establishes minimum wages; maximum hours; maintenance of adequate records and inspection by proper authorities; provides drastic penalty in the nature of fine and imprisonment for violation of the terms of the act and injunctions to prevent future violations; actions by employees directly for unpaid minimum wages or unpaid overtime compensation with a like amount in liquidated damages, the allowance of a reasonable attorney's fee, and prohibits child labor.

Both acts have received a liberal construction. *Perkins v. Lukens Steel Co.*, 310 U. S. 113; *Tennessee Coal, Iron and R. Co. v. Muscoda Local No. 123*, 321 U. S. 590.

A casual reading of the two Acts is sufficient to convince one that the Fair Labor Standards Act is more beneficial to the employee. The minimum wages and overtime rate of the two Acts are practically the same. Under the Public Contracts Act; he must make demand upon the Government within one year for payment of any unpaid wages the Government may have collected for him; while under the Fair Labor Standards Act he may sue his employer directly within the time allowed by the Statutes of Limitation of his own state and recover not only the amount due, but a like sum in liquidated damages and an attorney's fee. Under the first Act his right to payment of unpaid wages depends on the action of the Government, which, because of lack of funds or personnel, may not be able to act in his behalf. Under the latter Act, he has an absolute right to recover unpaid wages, regardless of the action or inaction of the Government. The reports

of the Secretary of Labor for the years 1943 through 1947 clearly demonstrate the inadequacy of the Public Contracts Act. As an example, in 1944, 131,733 public contracts were let, but only 9,400 or 7.1% inspections were made. Thus the employees engaged in the performance of 122,333 public contracts were denied their rights for unpaid minimum or overtime wages under the Walsh Healey Act, and would have been denied all right to recover their unpaid wages had they been excluded from the coverage of the Fair Labor Standards Act.

The same percentage applies to the other years. In all probability the Administrative authority will never have adequate personnel or funds to make one hundred percent inspections of all employers engaged in the performance of contracts within the Public Contracts Act. The prime purpose of this chapter (29 U.S.C. 201-219) was to aid the unprotected, unorganized and lowest paid of the nation's working population, that is, those employees who lack sufficient bargaining power to secure for themselves a minimum subsistence wage, *Brooklyn Sav. Bank v. O'Neill*, 324 U. S. 697. It was designed to extend the frontiers of social progress by insuring to all able bodied working men and women a fair day's pay for a fair day's work, *A. H. Phillips, Inc., v. Walling*, 324 U. S. 490. This chapter, *supra*, was intended to secure to workmen the fruits of their toil and exertion, *Tennessee Coal, etc. v. Muscoda Local No. 123, supra.* See also, *Overstreet v. North Shore Corporation*, 318 U. S. 125; *Overnight Motor Transportation Co. v. Missel*, 316 U. S. 572.

To exclude employees engaged in commerce or in the production of goods for commerce from the benefits and protection of a general act designed to secure them a fair day's pay for a fair day's work because their labor hap-

pened to be devoted to the performance of a supply contract with the Government, while, at the same time, failing to secure to them a fair day's pay for a fair day's work under the Public Contracts Act, is bound to defeat the purposes of both Acts. Congress was informed by the administrator that restitution or recovery of unpaid minimum wages and overtime could not be adequately accomplished under the Walsh-Healey Act. Congress, however, at the same time was advised that the Administrator, whom it had in effect appointed as its agent, was requiring restitution of unpaid wages or overtime on the theory that both Acts were applicable. Had Congress thought that employees, millions of them, would not have the right and opportunity to collect unpaid minimum wages or overtime due them because of the mutual exclusiveness of the two acts, it would have, no doubt, passed legislation abrogating such an inconsistency.

To society, both acts were beneficial in that they prohibited child labor. To the economy of the nation and to the workman, the minimum wage was beneficial. But primarily of concern to the worker was his ability to *collect* wages and overtime due him. The Walsh-Healey Act gave the *Government* the right to collect the unpaid wages due the employees of a firm and to make disbursement to those employees *if* they made specific demand within one year. But to be able to make a demand upon the Government for disbursement, an inspection must have been held and a determination made by the government of amounts due the employees, and the employees must have filed their claims within a year. Because of inadequate personnel, very few inspections and determinations could be made. Report for 1946, page 17, reflect that for all industries subject to the two acts, only eight

percent were inspected; the report for 1948, page 43, reflects that of 29,024 establishments inspected, 14,996 were in substantial violation of the overtime provisions of the two acts. It is illuminating that in 1948 the few inspections made revealed that a total of $10,757,914 in back wages were found to be due employees. (Report for 1948, page 48.) If $10,757,914 in back wages due represented only 8%, 100% would amount to $134,473,924. Taking 1946 an average year, 92% of the employees purportedly protected by the Walsh-Healey Act were not afforded the right or opportunity to recover unpaid minimum wages and overtime guaranteed them by the Act. Their right of recovery, if any, was to be found in provisions of the Fair Labor Standards Act. If the acts were mutually exclusive, then 92% of the employees subject to the Walsh-Healey Act were penalized. It was never the intention of Congress that 92% of the employees engaged in the performance of public contracts would be penalized by being in effect excluded from the provision of *any* act made for their benefit!

(4) The Fair Labor Standards Act does not exclude employees engaged in the performance of a public contract.

The Act does not by its terms or by implication exclude from its coverage employees who may be engaged in the performance of a public contract. The Act, being comprehensive and designed to cover the entire field, specifically exempted those activities and groups to which it did not apply. These exemptions are contained in Section 13 of the Act (29 U.S.C. §213). The exemptions define in one classification certain activities, i.e., employee in executive, etc., capacity; retail or service establishment; seamen; catching, etc., of fish; agriculture; employees of

small newspapers; street car employees; employees engaged in handling, etc., of agricultural or horticultural products; small switchboard operators. Other exemptions are by reference to existing law, for example, employees subject to the provisions of sections 181-188 of Title 45 (which relates to employees (carriers by air) to which Inter-state Commerce Commission has power to establish qualifications pursuant to section 304 of Title 49 (Transportation - Railroads). Nowhere is there any exemption of employees of an employer subject to provisions of sections 35-45 of Title 41 U.S.C. (Walsh-Healey Act). On the contrary, Congress, in its effort to make plain that the application of this Act *should not exclude* application of other laws, provided in Section 18 (41 U.S.C. 218) that "no provisions of sections 201-219 (the Fair Labor Standards Act) of this title or of any order thereunder shall excuse non-compliance with any Federal or State law or municipal ordinance establishing a minimum wage higher than the minimum wage established under such sections or a maximum workweek lower than the maximum workweek established under such sections, and no provision of sections 201-219 of this title relating to the employment of child labor shall justify non-compliance with any Federal or State law or municipal ordinance establishing a higher standard than the standard established under such sections".

The above quoted section was directed to three possible contingencies. One would be where the employer engaged in the performance of a public contract and thus subject to the minimum wage, maximum hours, and child labor provisions of the Walsh-Healey Act. The other two where the State or City had higher standards. It is to be noted that section 18 of the Fair Labor Standards Act does not exempt employees covered by other acts from

the provisions of the Fair Labor Standards Act, but only goes so far as to provide that *compliance* with provisions of the Fair Labor Standards Act *will not excuse* them from compliance with other applicable laws.

It would be but stating the obvious to say that unless the Fair Labor Standards Act *were also applicable*, the provisions of section 18 would be meaningless and without significance. Congress clearly intended by section 18 to make both acts applicable. Suppose that the minimum wage under the Fair Labor Standards Act was 40 cents and under the Walsh-Healey Act undetermined (as happens to be true in *this very case*) and that the employer had not complied with the State requirements as to working conditions. The employer could be prosecuted under the Public Contracts Act for failure to provide sanitary and safe working conditions, and the employees could sue under the Fair Labor Standards Act for minimum wages. Unless this were so, the employees of Ford, Bacon and Davis, Inc., petitioners herein, though presumably engaged in commerce or the production of goods for commerce and otherwise subject to the Fair Labor Standards Act could be paid 20 or 25 cents an hour without recourse on the part of the employees.

Section 18 of the Fair Labor Standards Act arose in the case of *Butte Miners' Union No. 1 v. Anaconda Copper Mining Co.*, 112 Mont. 418, 118 P. 2d 148, which held that "where not inconsistent, the State and Federal provisions jointly govern". The same reasoning would apply to the two Federal acts: they are not inconsistent. Two Federal Courts have passed on this question. The District Court for the Eastern District of Tennessee in the case of *Lasater v. Hercules Powder Company*, 73 Fed. Supp. 264, said

"from an examination of the Eight-Hour Law, the Bacon-Davis Act and the Walsh-Healey Act, together with the congressional history of labor laws raising standards of pay and working conditions, the conclusion is quite evident that the intended coverage of the Fair Labor Standards Act is not restricted because of these previous enactments". In that case the Walsh-Healey Act had been pleaded as a defense on the theory it was exclusive.

The Court of Appeals for the Sixth Circuit, in *Walling* v. *Patton-Tully Transportation Company*, 134 F (2) 945, considered whether the Eight-Hour Law (27 Stat. 34, amended 37 Stat. 726, 40 U.S.C. 121) and the Fair Labor Standards Act were mutually exclusive. As the reasoning of the Court, cogent and peculiarly applicable to the instant case, it will be quoted in part. The Court said, *inter alia*:

> "We perceive no difficulty in the reconcilement of the Eight-Hour Law amendment with the Fair Labor Standards Act. The one limits employment at basic pay to forty hours a week, the other deals solely with the daily employment of men in certain classifications, and limits such employment at basic pay to eight hours a day. No difficulty will be perceived in complying with both statutes, giving over-time pay for work in excess of the weekly maximum, in the one case, and overtime pay for work in excess of the daily maximum, in the other, nor is there any insuperable difficulty in determining the basic rate. A weekly wage will be easily computed in terms of days or hours, a daily wage in terms of hours, and an hourly wage requires no computation in the determination of overtime pay.
>
> "If it be held that the Eight-Hour Law alone applies to the employees of the appellee, it would be permissive, as pointed out by the Administrator,

for the appellee to work its men 56 hours per week, and so long as they were not employed in excess of eight hours on any one day, no overtime compensation would be required. Intention to bring about such a result is not to be ascribed to Congress in the enactment of remedial legislation such as is here involved.

"Like the Fair Labor Standards Act, the Eight-Hour Law is one whose problem it is to eliminate substandard working conditions. As such it should be given construction to effect such purpose. * * * No reason appears why contractors for the Government are to be permitted to maintain substandard labor conditions while private contractors are prohibited from so doing, and such view would thwart the clearly defined purpose of the Congress, particularly if applied at a time when all, or nearly all, major industries are operating upon Government contract."

The maxim "*expressio unius est exclusio alterius*" is peculiarly applicable here. By detailed and specific exclusions, both by describing the activity and by reference to existing statutes, Congress left no doubt of its intentions as to who should be exempted. It is true that the maxim must be applied with caution and as an aid in ascertaining the true intention of Congress, yet where the statute is of general application and the exclusions are numerous and specific, there can be no doubt that it applies. *Continental Casualty Co. v. U. S.*, 314 U. S. 527; *Ford* v. *U. S.*, 273 U. S. 593.

As further proof that the employees were not excluded from the benefits of the Fair Labor Standards Act, attention is called to the passage of the War Labor Disputes Act of June 25, 1943 (50 USCA, App.

Secs. 1501-1511). The Act was enacted for the purpose of reconciling any labor troubles by reason of strikes, lock-outs, real or threatened, in any plant operating under "a contract with the United States entered into on behalf of the United States by an officer or employee of the Department of War, the Department of the Navy, or the United States Maritime Commission", for manufacturing, producing, etc., "any weapon, munition, aircraft, vessel, or boat". Sec. 1507 (a) (2) provided: "In making any such decision the Board shall conform to the provisions of the Fair Labor Standards Act of 1938 as amended; the National Labor Relations Act; the Emergency Price Control Act of 1942, as amended, and all other applicable provisions of law".

The enactment of that law conclusively establishes that it was not the intention of Congress that the Walsh-Healey Act alone should control the employment of those engaged in producing munitions for war, but that it considered the Fair Labor Standards Act as applicable to such employment.

II

Petitioners Were Engaged in the Production of Goods for Commerce Within the Meaning of the Fair Labor Standards Act

We assert the Court of Appeals erred in holding that the Walsh-Healey Act governed petitioners' employment to the exclusion of the Fair Labor Standards Act. Instead it should have held the Act covered petitioners' employment, and that petitioners were engaged in the production of goods for commerce.

The latter question is involved in *Creel, et al., v. Lone Star Defense Corporation*, 171 F. 2d 964, certiorari granted June 6, 1949. In that case the Court of Appeals, Fifth Circuit, held the employees were not engaged in the production of goods for commerce, but did not rule that the Walsh-Healey Act governed.

Should this Court sustain petitioners' contention that the Fair Labor Standards Act governed petitioners' employment, we assume the Court will dispose of the other questions that were raised originally when the District Court granted respondent's motion for summary judgment.

The undisputed facts show that petitioners were engaged in manufacturing and processing munitions from materials purchased outside of Arkansas, shipped to the plant, and when finished, or if not finished but needed further processing at points outside Arkansas, were loaded by the employees on railroad cars or into trucks operated by petitioners and shipped to points outside the State.

To ascertain whether petitioners were engaged in the production of goods for commerce within the meaning of the Fair Labor Standards Act of June 25, 1938, 52 Stat. 1060, 29 USC 201-219, we must look to the terms of the Act.

Section 3(b) of the Act reads:

> "Commerce means trade, commerce, transportation, transmission, or communication among the several states or from any state to any place outside thereof."

Section 3(i):

> "'Goods' mean (including ships and marine equipment) wares, products, commodities, merchandise, or articles or subjects of commerce of any character, or any part or ingredient thereof, but does not include goods after their delivery into the actual physical possession of the ultimate consumer thereof other than a producer, manufacturer or processor thereof."

Section 3(j):

> "'Produced' means produced, manufactured, mined, handled, or in any other manner worked on in any State; and for the purposes of this chapter an employee shall be deemed to have been engaged in the production of goods if the employee was employed in producing, manufacturing, handling, transporting, or in any other manner working on such goods, or in any process or occupation necessary to the production thereof, in any State."

It is inconceivable how the contention can be sustained that petitioners were not engaged in the production of goods for commerce in the light of judicial interpretation of the term. Certainly petitioners manufactured and processed goods for transportation and transmission from the plant in Arkansas to points in other States, as defined by Section 3 (b) of the Act.

Petitioners "produced, manufactured, * * * handled" and "worked on" the goods, and were "engaged in the production of goods", they being "employed in producing, manufacturing, * * * handling, transporting" and "working on such goods, necessary to the production thereof", as defined by Section 3 (j) of the Act.

The "goods" produced or worked upon included "wares, products, merchandise, or articles or subjects of commerce of any character, or any part or ingredient thereof", as defined by Section 3 (i) of the Act. The section excepted the inclusion of "goods after their delivery into the actual physical possession of the ultimate consumer thereof other than a producer, manufacturer or processor thereof".

In the trial of this cause the District Court adopted its own opinion previously rendered in *Barksdale* v. *Ford, Bacon & Davis, Inc.*, 70 F. Supp. 690 (R.58, *et seq.*), as the opinion in this cause (R.57, 38). The Court there held that, as the Government was the owner of the goods that had been delivered to the plant and had physical possession of the goods at all times through its agent (respondent) and its own employees (petitioners), the Government became the ultimate consumer of the goods produced and processed, and for that reason petitioners could not recover.

The Barksdale case was one of the authorities relied upon in *Kennedy, et al.* v. *Silas Mason Co.*, 64 F. 2d 1016, judgment in which was vacated and cause remanded for further development by this Court. 334 U. S. 248. In both the Barksdale and Kennedy cases, the position was taken that the goods (munitions) manufactured and processed were not the subject of commerce, but were produced for use in the prosecution of war; that was is the negation of commerce. Such a theory is not sound. The late war was the direct means of stimulating commerce. Production of goods of various kinds was accelerated because of the war, and the sale or exchange of those goods necessarily became a part of the commerce of this country. The idea that war is a negation of commerce is based

upon the erroneous premises that commerce is confined to an exchange of commodities between peoples of different States. Such a narrow conception of the term has not been entertained by this Court from earliest times to the present. The Court has held that many transactions, other than trade or traffic, constitute commerce, from *Gibbons* v. *Ogden*, 9 Wheat. 1, down to and including *U. S.* v. *Southeastern Underwriters Assn.*, 322 U. S. 533.

"In the Gibbons case, the Court, in answer to the contention that commerce was limited to buying and selling or interchanging of commodities, said:

> "This would restrict a general term, applicable to many objects, to one of its significations. Commerce, undoubtedly is traffic, but it is something more; it is intercourse. It describes the commercial intercourse between nations, and parts of nations, in all its branches, and is regulated by prescribing rules for carrying on that intercourse."

In *U. S.* v. *Southeastern Underwriters Assn.*, *supra*, the Court clearly defined the term "commerce":

> "The real answer to the question before us is to be found in the commerce clause itself and in some of the great cases which interpret it. Many decisions make vivid the broad and true meaning of that clause. It is interstate commerce subject to regulation by Congress to carry lottery tickets from state to state. Lottery Case (*Champion* v. *Ames*) 188 U. S. 321, 355. So also is it interstate commerce to transport a woman from Louisiana to Texas in a common carrier, *Hoke* v. *United States*, 227 U. S. 308, 320-323; to carry across a state line in a private automobile five quarts of whiskey intended for personal consumption, *United States* v. *Simpson*, 252 U. S. 465; to drive a stolen automobile

from Iowa to South Dakota, *Brooks* v. *United States*, 267 U. S. 432, 436-439. Diseased cattle ranging between Georgia and Florida are in commerce, *Thornton* v. *United States*, 271 U. S. 414, 425; and the transmission of an electrical impulse over a telegraph line between Alabama and Florida is intercourse and subject to paramount Federal regulation. *Pensacola Telegraph Co.* v. *Western Union Telegraph Co.*, 96 U. S. 1, 11. Not only, then, may transactions be commerce though non-commercial; they may be commerce though illegal and sporadic, and though they do not utilize common carriers or concern the flow of anything more tangible than electrons and information."

Unquestionably the intent of Congress in the enactment of the Fair Labor Standards Act in 1938 was to lay down a plan for the operation of all industry, whether the operation was performed by private industry or by an independent contractor with the Government under a cost-plus-a-fixed-fee contract. At that time Italy and Germany were laying plans for the invasion of other countries. Predictions were freely made that the United States might eventually be drawn into conflict with foreign powers as had been the case in World War I. Employees in industrial and commercial plants were being exploited by compelling them to work long hours, at low wages, and under insanitary conditions. That such conditions might be corrected, the Fair Labor Standards Act was adopted.

"The Fair Labor Standards Act was passed by Congress to lessen, so far as seemed then practicable, the distribution in commerce of goods produced under sub-normal labor conditions. An effort to eliminate low wages and long hours was the method chosen to free commerce from the inter

ference arising from production of goods under conditions that were detrimental to the health and well-being of workers . . . . Where the work done, in its essence, follows the usual path of an employee, putting on an 'independent contractor' label does not take the worker from the protection of the Act." *Rutherford Food Corp.* v. *McComb*, 331 U. S. 722.

The Court of Appeals for the Eighth Circuit, in *Helena Ferry Co.* v. *Walling*, 132 F. 2d 616, said:

> "That it was the intention of Congress to include within the protection of the Act every employee engaged in commerce or in the production for commerce within the broad scope of those activities expressed in the Act, is no longer open to doubt. *Fleming* v. *Hawkeye Pearl Button Co.*, 113 F. 2d 52; *Bowie* v. *Gonzalez*, 117 F. 2d 11; *Kirschbaum* v. *Walling*, 316 U. S. 517; *Warren-Bradshaw Drilling Co.* v. *Hall*, 317 U. S. 88. The act is remedial and must be given a liberal construction in accordance with its obvious intent and purpose. 'We must assume that all employees in interstate commerce, so far as reasonably possible, should be made subject to the provisions of the Act', *Fleming* v. *Hawkeye Pearl Button Co.*, *supra*. Those asserting in reference to any employee an exception under the Act, must establish the exemption as being within the spirit and the letter of the statute. *Bowie* v. *Gonzalez*, *supra*. Since the statute is remedial, and by its terms includes every employment and employee coming within the broad scope of its coverage, the section granting exemptions is to be construed strictly against those claiming them. *Fleming* v. *Hawkeye Pearl Button Co.*, *supra*."

See also, *Mustein* v. *Johnson*, 113 F. 2d 106 (8 CA); *Joseph* v. *Ray*, 139 F. 2d 409 (10 CA); *Reynolds* v. *Salt River Valley Water Users Assn.*, 143 F. 2d 963 (9 CA).

> "When Congress defined 'commerce' in the Fair Labor Standards Act, Congress intended to give quoted term the broadest possible meaning, so as to include all transactions, conditions and relationships as had been theretofore known and acknowledged as constituting commerce in the constitutional sense." *Atlantic Co.* v. *Walling*, 131 F. 2d 518 (5 CA), quoted with approval in *Bell* v. *Porter*, 159 F. 2d 117 (7 CA).

The contention that the Government cannot engage in commerce where it has a cost-plus contract has been repudiated by several courts.

In *Clyde* v. *Broderick*, 144 F. 2d 348 (10 CA), the Court said:

> "There is nothing in the Fair Labor Standards Act which indicates an intent or purpose to exempt from its coverage employees whose activities relate to the movement in interstate commerce of personally owned goods of an employer or goods moving interstate for the convenience of the United States Government. The Act creates no such exemption and we cannot. See *Walling* v. *Haile Gold Mines*, 136 F. 2d 102 (4 CA); *Walling* v. *Patton-Tulley Transp. Co.*, 134 F. 2d 945 (6 CA)."

In the Walling case (cited above) it was said:

> ". . . . The argument that it was the Congressional intention to make the Fair Labor Standards Act inapplicable to work under Government contract must be rejected. No reason appears why contractors for the Government are to be permitted to maintain sub-standard labor conditions while private contractors are prohibited from so doing and such view would thwart the clearly defined purpose of the Congress, particularly if applied at a time

when all, or nearly all, major industries are operating upon Government contract."

The above language was quoted with approval in *Walling v. McCrady Const. Co.*, 156 F. 2d 932 (3 CA).

See also on that point: *Fox v. Summit King Mines*, 143 F. 2d 926 (9 CA); *Rich v. Puget Sound Bridge & Dredging Co.*, 156 F. 2d 334 (9 CA).

In the well considered case of *Jackson v. Northwest Airlines* (Minn.), 75 F. Supp. 32, Judge Nordbye, after quoting from Section 3 (b) of the Fair Labor Standards Act, said:

> "Neither this provision nor any other provision of the Fair Labor Standards Act declares that the United States Government can not be engaged in 'commerce' within the meaning and intent of that Act. And since the provision defines the term 'commerce' broadly and goes to the coverage of the Act, it must be construed liberally. So literally, the provision includes transportation by the Government across State lines with the term 'commerce', and the plaintiffs in question, according to the literal and plain interpretation of this provision, were in 'commerce' under the Fair Labor Standards Act. Nothing in the Act implies a contrary meaning.
>
> "Defendant, not the Government, is the one against whom these actions have been brought and who will be liable under this statute. No one is seeking to hold the Government liable under this Act. Any liability the Government may incur as a result of these proceedings results from a contract with defendant not from the statute. Neither the cases which defendant cites nor the policy upon which they are based, purport to effect such a situation. To do so here would cause the Fair Labor

Standards Act to turn upon the considerations other than the employer-employee relationship, as the Act clearly contemplates. Defendant must stand upon its own feet in this litigation as a private employer. The Government is not present as an employer.

"The defendant's claim that Section 3 (b) is inapplicable by implication to govern shipments and transportation is not supported by the fact that the Government is exempted from the 'employer' definition. Because the Government is exempted from the definition of employer and is thereby exempt from liability under the Act (because liability under the Act turns on the 'employer status') does not mean that the Government transportation activities cannot affect the liability of private persons under the Act. The questions of employer and commerce are separate and different ones.

"The real question here is whether, in view of any aid for determining Congressional intent to grant by implication under the commerce definition of the Fair Labor Standards Act an exemption which would deny the protection and benefits of the Act to employees of civilian employers who supply goods to the Government. That Congress did not intend to exempt the Government's transportation of goods across State lines from 'commerce' when such an exemption would deny the Act's protection to employees of private employers who supply the Government, seems clear from the purpose of the Act as well as from its literal wording.

"This Act is a remedial Act. Its purpose was to eliminate, not to perpetuate, sub-standard undesirable labor conditions and their effect upon transportation across State lines. It sought to exclude from transportation across State lines the goods produced for commerce under conditions detrimental to standards of living which are neces-

sary to the health and general well being of employees who produce the goods, and to prevent the use of transportation across State lines as a means of spreading and perpetuating sub-standard labor conditions among the workers of the several States. *United States* v. *Darby Lbr. Co.*, 312 U. S. 100. This was conceived by the Congress to be a basic need of the nation, and it is the public policy and need which must be kept in mind constantly when determining Congress' intent under the Act which was possible to accomplish this purpose. That this purpose would prompt Congress to include rather than exclude by silent indirection, employees of employers supplying the Government with goods, seems free from doubt. The Government is a large purchaser and transporter of merchandise, and the accomplishment of the purpose of the Act would be hampered seriously if the employees of employers producing goods for the Government were not protected by the Act. It is just as detrimental to labor conditions, industrial peace and standards of living if the Government transports goods produced under undesirable working conditions across State lines as when a private citizen effects such transportation.

"Well considered cases have reached the conclusion that Section 3 (b) of the Act does not intend that transportation by the Government should deprive any one Governmental employee, otherwise covered by the Act, from its protection."

In support the Court cites *Bell* v. *Porter, supra; Timberlake* v. *Day & Zimmerman* (D.C.Ia.), 49 F. Supp. 28; *Umthun* v. *Day & Zimmerman*, 235 Ia. 293; 10 N. W. 2d 238; *Roland* v. *United Airlines, Inc.* (N.D.Ill.), 75 F. Supp. 525; *Clyde* v. *Broderick, supra; Walling* v. *Patton-Tulley Co., supra.*

Continuing, Judge Nordbye stated:

"In the latter case the Court said: 'The argument that it was the Congressional intention to make the Fair Labor Standards Act inapplicable to work under Government contract, must be rejected. No reason appears why contractors for the Government are to be permitted to maintain sub-standard labor conditions while private contractors are prohibited from so doing, and such view would thwart the clearly defined purpose of the Congress, particularly if applied at a time when all, or nearly all, major industries are operating upon Government contract'.

"*Mamani v. Louis Berger & Trans. Co.* (D.C. Va.), 30 F. Supp. 742, holds that Government transportation does not prevent the mails from being in 'commerce' as between the employee who transports all of the mail from the trains to the postal station, and his private employer who has a contract with the Government to provide such transportation.

"Defendant has cited several cases in opposition: *Barksdale v. Ford, Bacon & Davis, Inc.* (D.C. Ark.), 70 F. Supp. 691; *Diring v. Hazeltine Elec. Corp.*, 70 F. Supp. 686, rev. in part (2 CA); *Krueger v. Los Angeles Shipping & Dry Dock Corp.* (S.D. Cal.), 74 F. Supp. 595; *Steinat v. Kaiser Co.* (D.C. Ore.), 71 F. Supp. 551; *Urban v. Victory Naval Building Co.* (D.C. Mass.), 74 F. Supp. 270.

"Those cases approach the problem on the theory that the transportation activity is a Governmental administrative act and therefore is not commerce, or else on the theory that the goods are war goods and, therefore, not in commerce. It seems more sound, however, to conclude that the rules of statutory construction and the broad intent and purpose with which Congress enacted the Fair Labor

Standards Act required the view that Congress did not intend to exempt by indirection and silence the employees of private employers who perform services or furnish goods to the Government for use by it even if the Government transports the goods across State lines with its own personnel or under its own name, or even if it intended to use the goods for the war purposes. The administrative capacity under which the goods were transported herein may be assumed. But is not such transportation 'commerce' as between plaintiffs and the defendant employers and employees in view of the purposes of the Fair Labor Standards Act? The one who transports the goods and its status in doing so has no necessary relation to the interstate activities of private employers and employees in view of the purposes of the Fair Labor Standards Act. Moreover, it is generally recognized that, as far as commerce is concerned, the one who owns the goods when transportation is effected, is immaterial.

"Commerce is indubitably necessary in the carrying on of a war. A country directing its entire industrial activities towards a successful prosecution of a global war must necessarily utilize the facilities of commerce in order to achieve its goal. And this is true whether the transportation is effected by the use of ordinary railroad or truck facilities carrying goods across State lines or effected by the Government's using its own personnel. If war is the antithesis of commerce when the Government owns or transports the goods which are ultimately designed for the war area, then it is likewise the antithesis of commerce when goods ultimately designed for the war area are shipped by a private producer or manufacturer. No good reason is suggested why commerce loses its identity as such in war times in an area where actual war is not being waged. The planes in question herein were not flown on any major activities directly

from the St. Paul Airport. As far as the records indicate, they were flown to other airfields or training stations within the United States and remained there until further orders were given as to their ultimate destination. The mere fact that a war exists does not necessarily mean that a distinction between interstate commerce on the one hand, and transportation as a part of an actual military operation on the other, must be lost. Although the transportation of plans or planes to and from modification center was a part of the war effort, it does not follow that it was a part of a military operation so as to negate the existence of commerce. War is not necessarily the antithesis of commerce which is carried on outside of the combat zone. If this were true, then all interstate activities, private and Governmental, directed to the successful prosecution of the war, fall outside of the sphere of commerce. These planes which were modified were flown across State lines after leaving the manufacturers en route to St. Paul, and, after modification by plaintiffs, were transported across State lines before they were engaged in any actual military operations. It is difficult to differentiate as far as commerce is concerned between the movement of war materials across State lines and bomber planes flown across State lines. Neither will be devoted to the war effort until after their arrival at their ultimate destination. Until that time they are in commerce within the Fair Labor Standards Act and the constitutional conception of the term as realistically as transportation of any other goods across State lines."

But the opposition may contend that some of the cases referred to turned on the question of instrumentalities used for the promotion of commerce, and not on the question of whether the employees themselves produced goods for commerce, for the reason that they manufactured an

nitions of war, and munitions of war were not goods in commerce.

That question was raised before the Court of Appeals, Seventh Circuit, in *Bell* v. *Porter*, *supra*. The Court held that the manufacture of munitions of war were goods produced in commerce under a Government cost-plus-a-fixed-fee contract.

The principal facts in that case were similar to the ones here. Among other things, the Court said:

> "Appellants operated the Elwood Ordnance Plant at Elwood, Illinois, where they were engaged in the manufacture of shells, explosives and munitions for the armed forces, under a cost-plus-a-fixed-fee contract with the United States Government. The plant, including all buildings, machinery and equipment, was owned by the Government, but all of it was managed and operated by appellants as independent contractors. The Government procured, owned and furnished appellants all powder and other component parts used in the manufacture of the munitions. Appellants, however, as consignees, procured and received certain other materials and supplies used in the assembling and loading of the munitions from various consignors without the State of Illinois. Title to these supplies vested in the Government at the time of delivery. All munitions produced at the plant were shipped from the plant to various army installations throughout the United States upon orders received by the commanding officer from the Ordnance Department in Washington, D. C. Appellants had complete supervision of employees, including the hiring and discharging of all employees. Upon these facts the District Court concluded that appellees were engaged in the production of goods for commerce within the meaning of the Act.

> "In support of their contentions appellants argue that Government owned goods shipped by the Government across State lines is an administrative act of the sovereign and is not interstate commerce, and that the word 'commerce' as used in the Fair Labor Standards Act is limited to 'commercial or business commerce'.
>
> "On the first point raised it will be enough to say that cost-plus-fee contractors with the Government engaged in war production are not agents of the Government and do not share the Government's sovereign immunities. *Alabama* v. *King* & *Boozer*, *supra*; *Curry* v. *U. S.*, *supra*. And it has been held that the production of goods for interstate transportation by or for the Government is production in commerce within the meaning of the Act. *Umthun* v. *Day* & *Zimmerman*, 235 Ia. 293, 10 N. W. 2d 238; *Clyde* v. *Broderick* (10 CA), 114 F. 2d 348."

After stating that Congress meant to define "commerce" in the Act so as to give it the broadest possible meaning which would include all transactions theretofore known as constituting commerce, the Court continued:

> "The constitutional power given to Congress to regulate 'commerce' is not confined to commercial or business transactions but includes the transportation of persons and property no less than purchase, sale and exchange of commodities and goods which may move in commerce though they never enter the field of commercial competition." (See citations in support.)

In *Umthun* v. *Day* & *Zimmerman*, *supra*, cited by the Court in the *Bell* v. *Porter* case, the Court held, as did the United States District Court of Iowa, in *Timberlake* v. *Day* & *Zimmerman*, *supra* (also cited in *Bell* v. *Porter*,

supra), that employees of the contractor operating the Iowa Ordnance Plant were covered by the Act. The Court used this language:

> "The act is remedial and is to be liberally construed. *Fleming* v. *Hawkeye Pearl Button Co.* (6 CA), 113 F. 2d 56.
>
> "The Wage and Hour Division of the Department of Labor has interpreted the Act to include such an employment as that involved here. This construction of the statute by the administrative department charged with its enforcement, although not binding on us, should be given our respectful consideration. *Overnight Motor Transp. Co.* v. *Missel*, 316 U. S. 572.
>
> "Determination of whether the Act is applicable depends not upon the nature of the employer's business, but upon the character of the employees' activities. *Overstreet* v. *North Shore Corp.*, 318 U. S. 125; *Warren-Bradshaw Drilling Co.* v. *Hall*, 317 U. S. 88; *Kirschbaum Co.* v. *Walling*, 316 U. S. 517; *Clyde* v. *Broderick Co.* (10 CA), 144 F. 2d 348, and cases cited."

In *Lasater* v. *Hercules Powder Co.*, 73 F. Supp. 264 (6 CA), the contentions urged by petitioners in this cause were upheld. In that case, the defendant operated the Volunteer Ordnance Works for the manufacture of munitions under a cost-plus contract with the Government. The Government owned the ground and all of the personal property at the plant.

> "The whole operation was under the control of the Government. During the operation period Government officials were constantly present and actively supervised and inspected. Subject to the control reserved in the Government, the plant was

maintained and operated by the defendant as an independent contractor, including the right to hire and discharge all employees."

Defendant disclaimed liability because the plaintiffs were not engaged in commerce nor in the production of goods for commerce. Among other things, the Court said:

"The insistence has been made that the TNT, being munitions of war, was not 'goods' under the terms of the Fair Labor Standards Act. However, the defendant appears to concede that the definition in the Act is sufficient to cover the TNT, but that the commodity was not 'goods' as having been delivered into the actual physical possession of the ultimate consumer.

"The proof is that the TNT moved on Government bills of lading, but the defendant remained in possession of the TNT and did the shipping upon instructions from the Government. The cars were loaded and jointly inspected by the railroad, by the Government and by the defendant. This was done to meet the rules set out by the Interstate Commerce Commission. So actually the goods did not get into the physical possession of the United States before shipment. In addition, this provision of the Act is most probably for the benefit of the ultimate consumer and cannot be invoked by the producer.

"I might say parenthetically that evidently all hands thought all during the time of the manufacturing of TNT that this commodity was 'goods' moving in commerce for they were scrupulous to observe the rules of the Interstate Commerce Commission.

"Without an attempt to further and fully analyze this question, I give my opinion to be that the plaintiffs were engaged in 'the production of

goods for commerce' within the Fair Labor Standards Act."

The opinion of the District Court in the Barksdale case, *supra*, as one of the grounds for its ruling, stated:

> "The goods in question were munitions of war and were manufactured for the purpose of being consumed by the United States in the prosecution of the war. Hence the United States, in our opinion, was the ultimate consumer thereof within the meaning of the Act, and the plaintiff was not engaged in the 'production of goods' for commerce" (R.66).

The Court had in mind the exception mentioned in Section 3 (i) of the Fair Labor Standards Act, "Goods * * * does not include goods after their delivery into the actual physical possession of the ultimate consumer other than a producer, manufacturer or processor thereof".

The undisputed facts in this case are that respondent through its employees, had the actual physical possession of the goods at the time and while they were being manufactured and processed, and loaded on railroad cars or trucks. Petitioners' cause of action was not based upon a claim for compensation for any work done upon the goods, *after* they had been delivered into the actual physical possession of the United States but before such possession. Ford, Bacon & Davis, Inc., therefore, was not the ultimate consumer; it was the producer, manufacturer, or processor, and consequently not entitled to invoke the benefit of the exception stated in Section 3 (i) of the Act.

The above interpretation of Section 3 (i) is the one that the Administrator of the Wage and Hour Division has consistently placed upon that section of the Act. Interpretative Bulletin No. 5 (Oct. 1940), par. 6; re-

adopted without change in the 1947 revision. See 29 Code Fed. Reg. Part 776.7 (b), 12 Fed. Reg. 4583, 4585. There the Administrator interprets Section 3 (i) as not exempting employees working on the goods during the course of manufacture, and says that this section "does not affect the coverage of the act as far as the employees producing the products are concerned", and it concludes:

> "Congress clearly did not intend to permit an employer to avoid the minimum wage and maximum hours standard of the Act by making delivery within the State into the actual physical possession of the ultimate consumer, who transports or ships the goods outside the State."

In several of the decisions which are contrary to the contention of petitioners, the courts seem to have fallen into an erroneous interpretation of the terms of the contract relating to the "physical possession" of the materials produced and processed at the plants, and also of Section 3 (i) of the Fair Labor Standards Act.

That section defines "goods" as all commodities except "goods after their delivery into the actual physical possession of the ultimate consumer other than a producer, manufacturer or processor thereof". The decisions referred to base their position on the ground that because the United States at all times owned the materials and equipment which went into the production of the munitions they had "physical possession" of the goods. They overlook the fact that the exclusionary clause makes "actual physical possession", rather than title, the controlling feature. The contract between the United States and respondent makes it plain that only title and not actual physical possession was retained by the United States.

The contract provides that the contracting officer, representing the United States, "Shall at all times have access to the premises, work and materials" and "shall at all times be afforded proper facilities for inspection of the work" (S.R.64). It further provides that if the contract is terminated due to respondent's fault, the contracting officer "may enter upon the premises and take possession and all for the purpose of completing the work contemplated by this contract, of any or all materials, tools, machinery, equipment, and appliances which may be owned by or in the possession of the contractor * * * and may complete or employ any other person or persons to complete said work" (S.R.59). That would contemplate the full actual physical possession of all of the materials by the contractor and his employees during the period of manufacture or processing of the goods.

III

Petitioners Were Employees of Respondent—Not of the United States

The contract between appellee and the United States, the conduct of all the parties during the period in dispute here, and an abundance of decided cases, render the conclusion that appellants were employees of appellee and not of the United Stats, unassailable.

Under the contract (S.R.21-74), appellee was directed to employ all persons necessary to carry on the operations of the Arkansas Ordnance Plant "who shall be subject to the control and constitute employees of the contractor" (S.R.41). Appellee was obligated to hire, control, direct, pay and terminate all employees (S.R.41, 65). The briefest perusal of the contract is sufficient to apprise one of

the fact that the appellants were employees only of the appellee and were not employees of the United States. Reference is made to Art. VII-A (S.R.61); Art. III-A (S.R.38); Art. IV-A-1 (S.R.39); Art. IV-D-b (S.R.43); Art. IV-D-c (S.R.43); Art. V-A-1 (S.R.45); Art. V-A-1-d (S.R.46); Art. V-A-1-f (S.R.46); Art. V-A (S.R.61).

In circumstances where employees were not paid, suits to recover compensation lay against appellee—not against the United States.

At least since 1878 it has been well-settled that in circumstances such as the instant one, petitioners are employees of the cost-plus contractor and not of the United States. *United States* v. *Driscoll* (1878), 96 U. S. 421 (24 L. ed. 847).

In that case appellee sought to recover certain overtime compensation from the United States. Appellee had been employed by Ordway, a contractor, who had a cost plus contract with the United States to cut and furnish granite. During the period of the contract with Ordway the Government employed and paid a superintendent and clerk who were to be present at all times. The former was to see that everything was done according to the contract, and that no frauds were committed on the government. It was also his duty, at the end of every month, to certify Ordway's accounts for his expenditures during that time. The clerk was his assistant, and subject to his directions. The employees were engaged and paid as follows: when a man was set to work, Ordway's foreman gave his name to the clerk of the superintendent, who put it on the time-book. The foreman put the price opposite the name. The clerk kept a ledger account, made out a pay-roll at the end of each month, and had the men sign it.

It was approved by the superintendent, and delivered to Ordway, and he received the amount from the United States, with fifteen per centum added, according to the contract." 96 U. S. 423, 24 L. ed. 847.

In denying recovery, the Supreme Court held there was no privity between the employee and the United States as he was the employee of Ordway; and that the Government had nothing to do with the manner of payment, that was a matter between the contractor and the United States.

Here the contract between appellee and the United States by its own terms negates any inference that the United States is the employer. Under the contract appellees were required to make contributions for social security, unemployment compensation, group hospitalization insurance and workmen's compensation (R.30,35). Patently, were appellants employees of the United States they would not have been recipients of the benefits of social security, unemployment compensation, group hospitalization and workmen's compensation, as contemplated by the contract.

The more recent cases clearly support the contention of appellants that they are employees of the appellee within the scope of the applicable statutes.

In *National Labor Relations Board v. Atkins & Co.*, 331 U. S. 398, the appellee company refused to bargain with certain plant guards on the grounds that the guards were not their employees within the purview of Section 2(3) of National Labor Relations Act, 29 USCA 152(3). The company was engaged in war production and the plant guards were required to be civilian auxiliaries to the military police of the United States Army. The employment or dismissal of the guards was subject to Army control.

In holding the guards were employees of the company within the scope of the Act the Supreme Court said:

> "We cannot say that the Board was without warrant in law or in fact in concluding that respondent retained 'a sufficient residual measure of control over the terms and conditions of employment of the guards' so that they might fairly be described as employees of respondent. *The most important incidents of the employer-employee relationship—wages, hours and promotion—remained matters to be determined by respondent rather than by the Army.* Respondent could settle those vital matters unilaterally or by agreement with the guards. And the guards were free to negotiate and bargain individually or collectively on those items. It is precisely such a situation to which the National Labor Relations Act is applicable. It is a situation where collective bargaining may be appropriate and where statutory objectives may be achieved despite the limitations imposed by militarization. Under such circumstances, the Board may properly find that an employee status exists for purposes of the Act.
>
> "In this setting, it matters not that respondent was deprived of some of the usual powers of an employer, such as absolute power to control their physical activities in the performance of their service. Those are relevant but not exclusive *indicia* of an employer-employee relationship under this statute. As we have seen, judgment as to the existence of such a relationship for purposes of this Act must be made with more than the common law concepts in mind. That relationship may spring as readily from the power to determine the wages and hours of another, coupled with the obligation to bear the financial burden of those wages and the receipt of the benefits of the hours worked, as from the absolute power to hire and fire or the power to

> control all the activities of the worker. In other words, where the conditions of the relation are such that the process of collective bargaining may appropriately be utilized as contemplated by the Act, the necessary relationship may be found to be present." *National Labor Relations Bd. v. Hearst Publications* (322 U. S. *supra*, 129; 88 L. ed. 1183, 64 S. Ct. 851)." (Emphasis added.)

In the instant appeal, it is undisputed that respondent retained control over those most important employee-employer relationships—*wages, hours and promotions.*

Another recent case is *Wilson & Co., Inc. v. National Labor Relations Board* (C. A. 8, 1947), 162 F. 2d 313.

In that case appellant petitioned for a review of the National Labor Relations Board order which directed appellant to cease and desist from violations of Sections 8.(1) and (5) of the National Labor Relations Act, 49 Stat. 449, 29 U.S.C.A. 151, *et seq.*, and to require the company to bargain collectively with certain plant guards. This case was for all practical purposes similar to *National Labor Relations Board v. Atkins & Co.* (1946), *supra*, 331 U. S. 398, 91 L. ed. 1563. The plant guards here were first civilian auxiliaries of the United States Military Police and later were deputized as special deputy sheriffs.

In holding that the plant guards were employees of the company within the Act the Court stated (313):

> "We shall first consider the contention that plant guards are not employees. As a matter of law it is not true that the petitioner's plant protection employees lost their status as 'employees' under the Act by reason of militarization, or of deputization. The powers there given to them, among

other things, strengthened their qualifications to protect their master's property. By express regulations of the government such powers did not destroy the relation of master and servant existing at the time the new functions were bestowed upon them. This Court has held that 'to clothe a watchman appointed by a railroad company to guard its property with police powers does not transform, in any way his relation to the company as an employee'. *Chicago & N. W. Ry. Co.* v. *McKenna*, 7 Cir., 74 F. 2d 155, 157. We can perceive no substantial distinction between the relation of a 'militarized' plant guard and his employer and that of a 'deputized' guard and his employer.

"If any doubt existed as to whether the finding of the Board that militarized and deputized plant guards in the circumstances of this case are employees within the meaning of the Act is valid, that doubt has now been effectually removed by the decision of the Supreme Court on May 19, 1947, in *National Labor Relations Board* v. *E. C. Atkins & Co.*, 67 S. Ct. 1265, and *National Labor Relations Board* v. *Jones & Laughlin Steel Corporation*, 67 S. Ct. 1274. Both these points were presented in those cases and the findings and orders of the Board were sustained in each case."

Another similar and applicable case is *Jackson* v. *Northwest Airlines, Inc.*, *supra*. Here again was a cost-plus contractor and the applicability of the Fair Labor Standards Act was disputed. The District Court held:

"'*Defendant, not the United States Government, was the employer of each plaintiff.* Defendant was not the agent of the Government in the employee sense. *It was an independent contractor.* * * * It hired persons, including plaintiffs, to perform that work. It paid them from a payroll which ran in defendant's name. And when jobs were available

in other branches of the defendant company, the modification of employees could transfer to those branches. Such a right was in no way involved in the contracts between the Government and the defendant. * * * *It is plain, and the Government had direct and immediate control over the persons performing the work.* * * * The mere fact that the Government determined what work was to be done on the planes and inspected the planes after defendant completed the work on them is not important here. Anyone who hires another to perform work as an independent contractor states the work to be done, often in some detail. Defendant here was hired to perform the work set out by the Government, not to determine what work was to be done according to the military needs of the plant.

"Plaintiffs were paid by defendant, and took their orders from defendant. * * * The fact that the Government kept a deposit for the defendant on which defendant might draw for the expenses of plaintiffs' salaries and cost of the project seems unpersuasive because it is of little, if any, probative value. This was only the procedure by which the Government paid the cost of the project which it hired defendant to undertake. It seems no different than if defendant paid it out of its own money, as it often did. After all, every independent contractor is reimbursed for what he does in some manner or other and by some procedure.

* * * *

"*Under all the circumstances, as shown on the record, the actual employer, not the Government, was plaintiffs' employer.* And defendant's contention that the Fair Labor Standards Act is inapplicable here because the Government was the employer is unsustainable and must be rejected. Other Courts, interpreting similar war contracts, have held likewise. *Bell v. Porter*, 7 Cir., 1946, 159 F. 2d 117.

certiorari denied 67 S. Ct. 1092; *Tinkelenberg v. Dorg & Zimmerman*, D. C. Iowa, 1943, 49 F. Supp. 2, 31. See, also, *State of Alabama v. King & Boozer*, 314 U. S. 1, 62 S. Ct. 43, 86 L. Ed. 3; 140 A.L.R. 615; *Carey v. United States*, 314 U. S. 14, 62 S. Ct. 48, 86 L. Ed. 9; *Maiquan v. Legg's Baggage & Transfer Co.*, D. C. Va. 1941, 39 F. Supp. 742." (Emphasis added.)

It is uncontroverted that instant respondent hired petitioners-employees; that respondent paid petitioners from its own payroll; that respondent transferred petitioners to other work as the needs arose; and that respondent had direct and immediate control over petitioners. Such being the case petitioners are clearly employees of respondent and not the United States.

Dicino, et al. v. Joshua Hendy Corporation (D. C. Calif.), 77 F. Supp. 893, is yet another case in point. In reviewing the general purposes of the Fair Labor Standards Act the District Court held (894-5):

> "The Fair Labor Standards Act, because of its nature and aim, has been construed liberally by all the courts which have had occasion to interpret it. Such liberality extends to all its provisions, and especially to what I might call, using an insurance term, 'coverage'. The courts have been very generous in determining which workmen are entitled to the benefits of the Act. One of the latest declarations on the subject is found in a case from the Tenth Circuit Court of Appeals. Judge Bratton states:
>
> "'In respect of coverage of employees, the definitive provisions of the Act are extremely comprehensive in their sweep. *United States v. Rosenwasser*, 323 U. S. 360, 65 S. Ct. 295, 89 L. Ed. 301. The Act is remedial and must be given a liberal construction with its manifest intents and purpose

> in view." (Citing cases.) * * * And in doubtful situations, coverage is to be determined broadly by reference to the underlying economic realities rather than by traditional rules governing legal classifications of master and servant on one hand, and employer and independent contractor on the other. Cf. *National Labor Relations Board v. Hearst Publications*, 322 U. S. 111, 64 S. Ct. 851, 88 L. Ed. 1170."

It is well settled, of course, that the Fair Labor Standards Act is a remedial act and accordingly must be liberally applied and construed. It is submitted, however, construed liberally or strictly, the act is clearly controlling here and the conclusion that the instant petitioners are employees of respondent is inescapable. In *Dewin, et al. v. Joshua Hendy Corporation, supra*, a far less convincing situation was presented than the one here, yet it was held that the employees were entitled to the benefits of the Act. The following quotation from that case sets forth the facts involved and the holding (899):

> "On October 28, 1945, the defendant was engaged in constructing cargo ships and assault troop ships for the United States Maritime Commission. The buildings and facilities of the defendant's shipyards, at Terminal Island, California, were owned by the Commission. All parts, materials, and supplies used in the construction of ships were owned by the Commission. The Commission had the right to hire or discharge employees, approved all wage rates, and was a party to all negotiations between the shipyard operators and the unions representing the employees. The Commission had representatives in the shipyards to watch the labor conditions and wage payments made by the shipyard operators.
>
> "While the defendant constructed ships, under contract with the Commission, the contractor, and it

alone, built the ships. And while the Commission had representatives to watch what was being done, *ultimately*, the responsibility was upon the defendant contractor, who was held responsible for the construction and delivery of the ships.

"Under the circumstances, I am of the view that the employees of the defendant are covered by the Act, as being engaged in the production of goods for interstate commerce, under subdivisions (b), (i), and (j) of Section 203 of Title 29 U.S.C.A. 201."

A. H. Phillips, Inc. v. *L. Metcalf, Walling, supra*:

"The Fair Labor Standards Act was designed 'to extend the frontiers of social progress' by insuring to all our able-bodied working men and women a fair day's pay for a fair day's work'. Message of the President to Congress, May 24, 1934. Any exemption from such humanitarian and remedial legislation must therefore be narrowly construed, giving due regard to the plain meaning of statutory language and the intent of Congress. To extend an exemption to other than those plainly and unmistakably wtihin its terms and spirit is to abuse the interpretative process and to frustrate the announced will of the people." (p.493).

In *Bell* v. *Porter, supra*, the appellees employees, who were firemen, were denied recovery of claimed overtime compensation for "sleeping time" since "* * * appellees, in consideration of their employment as firemen, were willing to sleep on the premises and to keep themselves available for duty if called during their rest period; their contract was to wait to be engaged; hence the time spent in sleeping is not compensable." (p. 120). Even though recovery was denied in this particular instance, the employees were nonetheless held employees of the appel-

lants under the Fair Labor Standards Act. The contractual relationship between the contractor in *Bell v. Porter*, *supra*, is so nearly like the situation existing between the instant respondent and the United States that it is considered desirable to quote that portion of the opinion setting forth the relationship, which it is submitted, fully supports the position of petitioners herein:

> "Appellants operated the Elwood Ordnance Plant at Elwood, Illinois, where they were engaged in the manufacture of shells, explosives, and munitions for the armed forces, under a cost-plus-fixed-fee contract with the United States Government. This plant, including all buildings, machinery and equipment, was owned by the Government, but all of it was maintained and operated by appellants as independent contractors. The Government procured, owned and furnished appellants all powder and other component parts used in the manufacture of the munitions. Appellants, however, as consignees, procured and received certain other materials and supplies used in the assembling and loading of the munitions from various consignors, without the State of Illinois. Title to these supplies vested in the Government at the time of delivery. All munitions produced at the plant were shipped from the plant to various army installations throughout the United States upon orders received by the Commanding Officer from the War Department in Washington, D. C. Appellants had complete supervision of all employees, including the hiring and discharging of all employees; and maintained their own fire department, in which appellees were employed as fire fighters."

In the performance of the contract by the appellee and the United States, appellee was an independent contractor.

Respondent contended in its pleadings that it was merely an agent of the United States, thereby asserting that its acts were those of the United States (R.14). It is assumed that it will further contend that it did not pay sales taxes to the State of Arkansas and that it received reduced freight rates upon shipments and other similar arguments (R.19). The circumstances that it did not pay sales taxes to the State of Arkansas and also received reduced freight rates do not establish that it was entitled to those benefits as it clearly was not a governmental agency. The erroneous decision of the Arkansas State Revenue Commissioner holding that respondent was not liable for payment of the Arkansas tax can not sustain such position here. In W. F. Whittel's affidavit he undertook to show that the Government was the direct purchaser of all shipments which went to the plant, as respondent, so he stated, was instructed to ship all materials to the Government (R.19). The contract does not justify such a conclusion. *Barksdale* v. *Ford, Bacon & Davis, Inc., supra*, adopted that erroneous interpretation. Attached to the affidavit of Mr. Whittel (Exhibit 3A) is a copy of the form used for all respondent's purchase orders (S.R.79). It shows "Operator: Ford, Bacon & Davis, Inc.," and directs the dealer to "* * * kindly enter order as specified below". The order is signed "Ford, Bacon & Davis, Inc., Operator", by ", , Purchasing Agent". "Ship to: Ordnance Property Officer, Jacksonville, Arkansas. For Account of Operator: Ford, Bacon & Davis, Inc., * * * Mail Direct to Ford, Bacon & Davis, Inc., Arkansas Ordnance Plant, Little Rock, Arkansas" (S.R.79). Nothing in the order form authorized any purchases to be charged to the account of the Government, nor were any such purchases charged to the Government. On the contrary purchases were charged and invoices were sent to appellee (R.39). The contractor was patently

without authority to bind the Government. In the event there had been a loss on purchases or goods, or if such had been damaged, the appellee, and not the Government, would have been the one to seek such recovery as might have been justified.

Substantially all of the issues raised, or that could be raised, in the foregoing statement have been disposed of favorably to the position of instant appellants by decision of the United States Supreme Court. *Alabama* v. *King and Boozer*, *supra*, and *Curry* v. *United States*, *supra*.

In each of the two Supreme Court cases cited above there were standard cost-plus contracts substantially similar to the one involved in this cause, which contracts provided for construction of certain buildings for the Army, and where in each case, the contractor was to be reimbursed by the Government for all authorized expenditures. *Alabama* v. *King & Boozer*, involved the question whether the Alabama state sales tax applied to materials purchased by the contractor in connection with the Government construction. *Curry* v. *United States* considered the application of the Alabama use tax on purchases of materials brought into the state and used in similar construction.

In both cases the procedure for ordering goods and materials used by the contractors was the same. All of the orders were approved by a contracting officer representing the Army in much the same fashion as was done in the instant case. In *Alabama* v. *King & Boozer*, the Government intervened and contended, among other things, that as it was the recipient of the materials so the contractor and the sales in reality were to the United States

The Court stated that "The soundness of this conclusion turns on the terms of the contract and the rights and allegations of the parties under it. The Court further held that the contractor was the purchaser and not the Government, and that the state sales tax was payable on the purchases. The Court, in passing on this question, stated:

> "The contract provided that the title to all materials and supplies for which the contractors were 'entitled to be reimbursed' should vest in the Government, 'upon delivery at the site of the work or at an approved storage site and upon inspection and acceptance in writing by the contracting officer'" (p.10).

A similar provision was incorporated in the contract involved here (Art. VII-D; S.R.63).

As stated earlier, in each of the two foregoing cases, the procedure followed in ordering materials was like that involved in the present cause. The lumber was sold and delivered on the order of the contractors as in the present case. The Court, in *Alabama* v. *King & Boozer*, held that,

> "* * * however extensively the Government may have reserved the right to restrict or control the action of the contractors in other respects, neither the reservation nor the exercise of that power gave to the contractors the status of agents of the Government to enter into contracts or to pledge its credit. * * * See also, *United States* v. *Driscoll*, 96 U. S. 421. * * *

> "* * * The circumstances that the title to the lumber passed to the Government on delivery does not obligate it to the contractor's vendor under a

cost-plus contract more than under a lump sum contract. Cf. *James* v. *Dravo Construction Company*, 302 U. S. 134, 82 L. ed. 155 * * *" (pp. 13, 14).

The Court in the foregoing cases held that there was no infringement of the Government's immunity in the imposition of the tax, notwithstanding the fact that the burden of the tax, since it constituted part of the costs and the contractor was to be reimbursed on a cost-plus basis, was passed on to the United States. The decision in *Alabama* v. *King & Boozer* supports the contention of the appellants that the Arkansas Revenue Commissioner was in error when he relieved the appellee of the obligations to pay the Arkansas sales tax.

The Supreme Court in *Curry* v. *United States, supra*, concludes that the contractors were not a governmental agent:

> "* * * We think that the contractors in purchasing and bringing the building material into the state and appropriating it to their contract with the Government, *were not agents or instrumentalities of the Government;* * * *." (Emphasis supplied.)

Since respondent is, as a matter of law, not an agent of the United States the conclusion is obvious that it must be an independent contractor.

In *Snyder* v. *Dravo Corporation* (D.C. Pa.), 6 F.R.D. 546, the District Court considered the motions by the plaintiffs for summary judgment and by the defendant for permission to amend its answer so that defendant might set up the defense that plaintiffs were not in the production of goods in commerce. The District Court denied the motion of plaintiffs for summary judgment

and permitted the defendant to amend its answer, and in doing so, observed:

> "I am aware that cost-plus-fixed-fee contractors of the Government engaged in work of production are not agents and do not share the Government's sovereign immunity."

In the case of *Penn Dairies* v. *Milk Control Commission of the Commonwealth of Pennsylvania* (1943), 318 U. S. 261 (86 L. ed. 748), the facts were these: an Army quartermaster had made a contract with the dairy under which the dairy agreed to furnish milk to an Army camp at prices below the minimum price established by the Milk Control Commission. The dairy was ordered to show cause why its license should not be revoked. The dairy contended that the application of the regulation of the Milk Control Commission to sales to a Government agency violated the constitutional immunity of the Federal Government. In this connection the Supreme Court of the United States said:

> "But those who contract to furnish supplies or render services to the Government are not such agencies [of the Government] and do not perform governmental functions [case citations omitted]; and the mere fact that non-discretionary taxation or regulation of the contractor imposes an increased economic burden on the Government is no longer regarded as bringing the contractor within any implied immunity of the Government from state taxation or regulation."

In *Timberlake* v. *Day & Zimmerman*, *supra*, a situation much like the instant one was presented to the Court. The defendant was "engaged in processing of war materials for the use of the armed forces of the United

States and operates a plant owned by the Government in or near the city of Burlington, Iowa, and known as the 'Iowa Ordnance Plant.'". The Court held:

> "That the defendant, Day & Zimmerman, in the processing work that it is doing for the Government, is an independent contractor and not an agent of the Government" (p.30).

Umthun v. Day & Zimmerman, Inc., supra, involved the application of the Fair Labor Standards Act. This was the same contractor and contract involved in *Timberlake* v. *Day and Zimmerman, supra*. The contractor operated the ordnance plant under a cost-plus-fixed-fee contract just as did respondent in this case. Plaintiff was an employee of the contractor. The company was again treated as an independent contractor. The Iowa Supreme Court said:

> "At all times involved here, defendant, a private corporation, *as an independent contractor*, and not as agent, operated the Iowa Ordnance Plant near Burlington under a contract with the United States Government by which the Government paid defendant a fixed fee plus expenses. * * *
>
> "* * * Plaintiff was not an employee of the Government but of a private corporation" (emphasis added) (16 N.E. 2d 261).

In *Walling* v. *Patton-Tulley Transportation Co., supra*, the employees in question were engaged on dike and revetment construction under contracts which their employers had with the United States. At p. 949 the Circuit Court of Appeals said:

> "The argument that there was the Congressional intention to make the Fair Labor Standards

Act inapplicable to Government contracts, must be rejected. No reason appears why contractors for the Government are to be permitted to maintain sub-standard labor conditions while private contractors are prohibited from so doing, and such view would thwart the perfectly defined purpose of the Congress, particularly if applied at a time when all or nearly all, major industries are operating upon Government contracts."

See also, *Walling* v. *McCrady Construction Co., supra*, where the argument that an independent contractor doing work for a Governmental unit is the alterego of that Governmental unit was rejected.

Respectfully submitted

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IN THE

Supreme Court of the United States

OCTOBER TERM, ~~1948~~ 1949

JULIA RHODA AARON ET AL. ..... *Petitioners,*

v. No. ~~999~~ 77

FORD, BACON & DAVIS, INC. ..... *Respondent.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1948

JULIA RHODA AARON ET AL. ..... *Petitioners,*

v. No. 809

FORD, BACON & DAVIS, INC. ..... *Respondent.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The judgment of the United States District Court for the Eastern District of Arkansas (R. 56-58) adopted the opinion filed by the same court in the case of *Barksdale* v. *Ford, Bacon & Davis, Inc.*, 70 F. Supp. 690 (R. 58-79). The opinion of the United States Court of Appeals for the Eighth Circuit (App. R. 7-33) is reported at ..... F. (2) .....

JURISDICTION

The jurisdiction of this court is invoked under Title 28 U.S.C.A. 347(a) (see Petition for Certiorari, page 3). This is Section 240 of the Judicial Code, as amended. This section has been superseded by the revised Judicial Code; Ch. 646, Pub. L. 773, 80th Cong., 2nd Sess. (June 25, 1948). Jurisdiction should have been invoked under Section 1254 of the new Code (28 U.S.C. 1254).

STATEMENT OF THE CASE

Respondent deems the statement of petitioners insufficient. In referring to the record in this brief reference to the original record filed by petitioners in the Court of Appeals is as follows: "R. ....". Reference to the supplemental record filed by respondent in the Court of Appeals is as follows: "S. R. ....". Reference to that part of the record containing the proceedings had in the Court of Appeals will be as follows: "App. R. ....".

The petitioners, plaintiffs below, approximately 1,800 in number, filed seven separate actions against the respondent, defendant below, seeking additional compensation alleged to be due under the Fair Labor Standards Act. By stipulation, the pleadings in one action only have been included in the record.

Plaintiffs allege (R. 3-13) that they were employed at the Arkansas Ordnance Plant at Jacksonville, Arkansas, for varying periods of time, and they seek additional pay alleged to have accrued during their respective periods of employment for what appear to have been primarily portal to portal activities.

In Paragraph IV of the complaint (R. 4) plaintiffs set forth the distances from the main gate of the plant to the various work areas, and allege that employees at the plant were under defendant's control upon passing through the main gate because the defendant, among other things, would not permit them to use motorcycles, bicycles, scooters, horses, carriages, or skates as a means of transportation, and concluded that such travel time was necessary to the production aims of defendant and for its benefit, and, therefore, compensable (R. 7, 8). Other preliminary and postliminary activities were described in the complaint, and plaintiffs requested access to the time clock records maintained at the plant to determine the exact amount of time spent on the premises of the Ordnance Plant (R. 5-12).

Plaintiffs contend the Fair Labor Standards Act is applicable, alleging in Paragraph III of the complaint (R. 4) "that the defendant * * * controlled, maintained, and operated the Arkansas Ordnance Plant, wherein goods for commerce were produced", and in Paragraph IV (R. 4)

that plaintiffs were engaged in the production of goods for commerce. They do not allege that they were "engaged in commerce".

The defendant answered, denying generally the allegations in the complaint, denying specifically that the Fair Labor Standards Act was applicable to plaintiffs' employment, denying that plaintiffs were engaged in the production of goods for commerce; alleging that defendant was the agent of the Government with respect to the employment of plaintiffs and that therefore the Government was the employer and the Fair Labor Standards Act inapplicable, pleading accord and satisfaction; alleging that the activities for which plaintiffs seek compensation are not compensable by contract or custom, that plaintiffs were paid in accordance with regulations, orders, rulings, and approvals of the Ordnance Department, an agency of the United States, and that, therefore, the claims were not compensable by virtue of the Portal-to-Portal Act of 1947 (R. 13-16).

Thereafter, the defendant moved for summary judgment under Rule 56 of the Federal Rules of Civil Procedure. The motion was based upon the ground of inapplicability of the Fair Labor Standards Act. It specifically alleged (a) that plaintiffs were not engaged in commerce or in the production of goods for commerce; (b) that plaintiffs were employees of the United States, and, therefore, exempt from coverage under the Fair Labor Standards Act; and (c) that plaintiffs' claims were barred under the provisions of the Portal-to-Portal Act of 1947 (S. R. 1). Attached to the motion were four affidavits and numerous exhibits (S. R. 2-124).

A response, containing affidavits in opposition to the motion, was filed by the plaintiffs (R. 41), but at the hearing in the trial court plaintiffs' counsel stipulated that the affidavits in opposition raised no controverted questions of fact (R. 2). For the purposes of this case, the matters of fact set forth in the affidavits and exhibits attached to the motion for summary judgment are undisputed.

Also before the District Court at the time of the hearing on the motion for summary judgment were the request

of plaintiffs for admissions of fact and responses thereto (S. R. 124-135) and interrogatories propounded by plaintiffs and responses thereto (S. R. 136-170). The matters of fact set forth in these pleadings also were undisputed. A brief summary of the facts disclosed by the undisputed pleadings before the court follows:

The United States, acting through the War Department, entered into a contract with Ford, Bacon & Davis, Inc., for the construction and operation of the Arkansas Ordnance Plant, at Jacksonville, Arkansas (S. R. 21-73). This contract was authorized by the Act of July 2, 1940 (Public Law No. 703, 76th Congress, U.S.C.A. Title 50, App. Sec. 1171) (S. R. 22) which provides in part that the Secretary of War is authorized to provide for the operation of plants "either by means of Government personnel or through the *agency* of selected qualified commercial manufacturers under contracts entered into with them".

The plant was constructed pursuant to the terms of the contract, and the Government then exercised its option to have the contractor operate the plant. The plant and all facilities therein were the property of the Government (S. R. 9, 14). By express contract provision the title to all work completed or in the course of construction, preparation, or manufacture was in the Government (see Contract, Art. VII-D, S. R. 63).

The Government furnished directly in excess of 90% of all materials used at the plant (S. R. 11). The Government took title to all property acquired through the facilities of Ford, Bacon & Davis, Inc., at its point of origin (S. R. 4). A commanding officer was always on duty at the plant and had supervision and control of the entire area (S. R. 12). The Government retained the right to approve or disapprove the hiring or firing of any employee (S. R. 12, 16). Salaries and wages were required to be approved by the Government (S. R. 18). The Government paid all freight bills direct, and paid telegraph, teletype, and electric bills direct (S. R. 8, 9, 13). Practically all property shipped into the plant was shipped on Government bills of lading, or, if commercial bills of lading were used, they were converted to Government bills of lading (S. R. 4).

The Government furnished all money disbursed by the contractor (S. R. 3). Ford, Bacon & Davis, Inc., had no investment whatever in the plant or in the operation thereof (S. R. 10). The Government specified the items to be produced and issued detailed instructions as to the method of production (S. R. 4, 20). The Government maintained inspectors and supervisors to observe and check on each step in the manufacture of munitions. The contractor had no discretion in the method of manufacture. Not only was it required to produce an item of certain specifications—it was required to do so in a certain, specified manner (S. R. 20).

The contractor did not sell munitions to the Government or to any other party (S. R. 16). It recruited the labor and furnished the management for the processing of Government property, as instructed from time to time by the Government. If defective munitions were produced the loss was borne by the Government and not by the contractor (Contract, Art. V-A, 1, S. R. 48). The contractor risked no capital in this enterprise (S. R. 8, 10). The Government paid all costs of every kind. For its services the contractor received a fixed fee which was not dependent in any way upon the amount of munitions produced (Contract, Art. IV-C, S. R. 42).

Prior to the time that the plaintiffs in this suit were employed the Government approved a list of job classifications setting forth the wages to be paid in each classification (S. R. 18). The defendant was required to comply with these schedules, and before any wages were paid the Government audited the pay rolls to determine their compliance with instructions.

When processing was complete the munitions either were stored in Government warehouses or were loaded into freight cars on the plant premises. The munitions were then shipped by the Government on Government bills of lading to military establishments either within the United States or overseas (S. R. 3).

The Government designated which employees should be paid for work over forty hours a week and which should not (S. R. 18). The Government maintained independent checkers at the clock houses (S. R. 14), it determined when

and to what extent overtime should be paid, and Government auditors approved all time cards before payment was made (S. R. 14). The contractor was not permitted to deviate from the Government pay policies (S. R. 18). No wage or salary payments were made except upon specific approval of the Government (S. R. 18).

The correspondence set forth in Exhibit 5 to the motion for summary judgment (S. R. 90-97) indicates the close supervision over wage payments maintained by the Government. In that instance, although the contractor was experiencing difficulty in employing janitors at the rate previously fixed by the Government, the Government refused to permit an increase in the wage rate.

Upon the uncontradicted evidence before it the district judge concluded that plaintiffs could not recover under the Fair Labor Standards Act, and the motion for summary judgment was granted (R. 56). The district judge previously had presided at the trial of a similar case (Barksdale v. Ford, Bacon & Davis, Inc., 70 F. Supp. 690) on the merits, and he adopted his opinion in that case, in so far at it was applicable to the present controversy (R. 57).

Upon appeal to the United States Court of Appeals for the Eighth Circuit, the case was submitted to a court of three judges. Later, after the opinion in Kennedy v. Silas Mason Company, 334 U. S. 249, the court set aside the previous submission, and the cause was set for reargument before the court *en banc*. The Court of Appeals affirmed the judgment of the trial court, though on different grounds, and the plaintiffs now seek a writ of certiorari.

QUESTIONS PRESENTED

The primary question presented is whether the courts below erred in holding that the plaintiffs were entitled to no relief under the provisions of the Fair Labor Standards Act.

Subsidiary issues relate to the reasons assigned for nonapplicability of the Fair Labor Standards Act. These involve the questions (1) whether, as the Court of Appeals held, some other act of Congress defines the rights of the plaintiffs to the exclusion of the Fair Labor Standards Act;

(2) whether, as the district court held, plaintiffs were not engaged in the production of goods for commerce and, thus, by its terms, the Fair Labor Standards Act is inapplicable; (3) whether the plaintiffs were in the employ of the United States, as this court held in the United Mine Workers case (330 U. S. 258) and, therefore, exempted by express provision of the act; (4) whether the materials worked on by the plaintiffs were "goods" as defined in the Fair Labor Standards Act; and (5) whether, in view of the Portal-to-Portal Act of 1947, the plaintiffs may recover in any event.

STATUTES INVOLVED

The pertinent portions of the Fair Labor Standards Act[1] follow:

"§ 203. Definitions

"As used in Sections 201-219 of this title—

* * *

"(d) 'Employer' includes any person acting directly or indirectly in the interest of an employer in relation to an employee but shall not include the United States or any State or political subdivision of a State, or any labor organization (other than when acting as an employer), or anyone acting in the capacity of officer or agent of such labor organization.

* * *

"(i) 'Goods' means goods (including ships and marine equipment), wares, products, commodities, merchandise, or articles or subjects of commerce of any character, or any part or ingredient thereof, *but does not include goods after their delivery into the actual physical possession of the ultimate consumer thereof other than a producer, manufacturer, or processor thereof.*"

"§ 207.

"(a) No employer shall, except as otherwise provided in this section, employ any of his employees who is engaged in commerce or in the production of goods for commerce—

[1] Act of June 25, 1938, c. 676, 52 Stat. 1060, 29 U.S.C.A. 201-219.

* * *

"(3) for a workweek longer than forty hours * * * unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.

"§ 216.

"(b) Any employer who violates the provisions of * * * Section 207 of this title shall be liable to the employee or employees affected in the amount of * * * their unpaid overtime compensation * * * and in an additional equal amount as liquidated damages. * * * The court in such action shall * * * allow a reasonable attorney's fee to be paid by the defendant * * *."

Pertinent provisions of the Walsh-Healey Public Contracts Act [2] follow:

"§ 1.

"In any contract made and entered into by any executive department * * * or other agency or instrumentality of the United States * * *) for the manufacture or furnishing of materials, supplies, articles, and equipment in any amount exceeding $10,000 there shall be included the following representations and stipulations:

* * *

"(b) That all persons employed by the contractor in the manufacture or furnishing of the materials, supplies, articles, or equipment used in the performance of the contract will be paid * * * not less than the minimum wages as determined by the Secretary of Labor.

* * *

"(c) That no person employed by the contractor in the manufacture or furnishing of the materials, supplies, articles, or equipment used in the performance of the contract shall be permitted to work in excess of eight hours in any one day or in excess of 40 hours in any one week:

[2] Act of June 30, 1936, c. 881, 49 Stat. 2036, 41 U.S.C.A. 35-45.

* * *

"§ 6.

" * * * Whenever the Secretary of Labor shall permit an increase in the maximum hours of labor stipulated in the contract he shall set a rate of pay for any overtime, which rate shall be not less than one and one-half times the basic hourly rate received by any employee affected: Provided that whenever in his judgment such course is in the public interest the President is authorized to suspend any or all of the representations and stipulations contained in Section 35 of this title."

Pertinent provisions of the Act of July 2, 1940,[3] follow:

"(a) In order to expedite the building up of the national defense, the Secretary of War is authorized, * * * with or without advertising, (1) to provide for the necessary construction * * * of plants * * * for the development, manufacture, maintenance, and storage of military equipment, munitions, etc., * * * (2) to provide for the * * * manufacture * * * of * * * munitions * * * *under such conditions as he may deem necessary*, and (3) to enter into such contracts * * * *as he may deem necessary* to carry out the purposes specified in this section * * * Provided further, that no contract entered into pursuant to the provisions of this section which would otherwise be subject to the provisions of the Act entitled 'An Act to provide conditions for the purchase of supplies and the making of contracts by the United States, and for other purposes,' approved June 30, 1936 (49 Stat. 2036; 41 U.S.C., Secs. 35-45), shall be exempt from the provisions of such Act solely because of being entered into without advertising pursuant to the provisions of this section * * *.

"(b) The Secretary of War is further authorized, with or without advertising, to provide for the operation and maintenance of any plants * * * constructed pursuant to the authorization contained in this section and Section 5, either by means of Government personnel or *through the agency of selected* qualified commercial manufacturers under contracts entered into with

[3] 54 Stat. 712, 50 U.S.C.A. App. 1171.

them, and when he deems it necessary in the interest of national defense, to lease, sell, or otherwise dispose of, any such plants, * * * *under such terms and conditions as he may deem advisable.*"

Pertinent provisions of the Portal-to-Portal Act of 1947[4] follow:

"§ 251. Congressional findings and declaration of policy. (a) The Congress finds that the Fair Labor Standards Act of 1938, as amended, has been interpreted judicially in disregard of long-established customs, practices, and contracts between employers and employees, thereby creating wholly unexpected liabilities, immense in amount and retroactive in operation, upon employers with the results that, if said Act as so interpreted or claims arising under such interpretations were permitted to stand, * * * (7) the courts of the country would be burdened with excessive and needless litigation and champertous practices would be encouraged; (8) the Public Treasury would be deprived of large sums of revenues and public finances would be seriously deranged by claims against the Public Treasury for refunds of taxes already paid; (9) the cost to the Government of goods and services heretofore and hereafter purchased by its various departments and agencies would be unreasonably increased and the Public Treasury would be seriously affected by consequent increased cost of war contracts; and (10) serious and adverse effects upon the revenues of Federal, State, and local governments would occur.

"§ 252. (a) No employer shall be subject to any liability or punishment under the Fair Labor Standards Act of 1938, as amended, the Walsh-Healey Act, or the Bacon-Davis Act (in any action or proceeding commenced prior to or on or after May 14, 1947), on account of the failure of such employer to pay an employee minimum wages, or to pay an employee overtime compensation, for or on account of any activity of an employee engaged in prior to May 14, 1947, except an activity which was compensable by either—(1) an express provision of a written or nonwritten contract

[4] Act of May 14, 1947, c. 52, 61 Stat. 84, 29 U.S.C.A. 251-262.

in effect, at the time of such activity, between such employee, his agent, or collective-bargaining representative and his employer; or (2) a custom or practice in effect, at the time of such activity, at the establishment or other place where such employee was employed, covering such activity, not inconsistent with a written or nonwritten contract, in effect at the time of such activity, between such employee, his agent, or collective-bargaining representative and his employer.

"(b) For the purpose of subsection (a) of this section, an activity shall be considered as compensable under such contract provision or such custom or practice only when it was engaged in during the portion of the day with respect to which it was so made compensable.

"(c) In the application of the minimum wage and overtime compensation provisions of the Fair Labor Standards Act of 1938, as amended, of the Walsh-Healey Act, or of the Bacon-Davis Act, in determining the time for which an employer employed an employee there shall be counted all that time, but only that time, during which the employee engaged in activities which were compensable within the meaning of subsections (a) and (b) of this section.

"(d) No court of the United States, of any State, Territory, or possession of the United States, or of the District of Columbia, shall have jurisdiction of any action or proceeding, whether instituted prior to or on or after May 14, 1947, to enforce liability or impose punishment for or on account of the failure of the employer to pay minimum wages or overtime compensation under the Fair Labor Standards Act of 1938, as amended, under the Walsh-Healey Act, or under the Bacon-Davis Act, to the extent that such action or proceeding seeks to enforce any liability or impose any punishment with respect to an activity which was not compensable under subsections (a) and (b) of this section."

"§ 258. In any action or proceeding commenced prior to or on or after May 14, 1947, based on any act or omission prior to May 14, 1947, no employer shall

be subject to any liability or punishment for or on account of the failure of the employer to pay minimum wages or overtime compensation under the Fair Labor Standards Act of 1938, as amended, the Walsh-Healey Act, or the Bacon-Davis Act, if he pleads and proves that the act or omission complained of was in good faith in conformity with and in reliance on any administrative regulation, order, ruling, approval, or interpretation, of any agency of the United States, or any administrative practice or enforcement policy of any such agency with respect to the class of employers to which he belonged. Such a defense, if established, shall be a bar to the action or proceeding, notwithstanding that after such act or omission, such administrative regulation, order, ruling, approval, interpretation, practice, or enforcement policy is modified or rescinded or is determined by judicial authority to be invalid or of no legal effect."

ARGUMENT

PLAINTIFFS ARE ENTITLED TO NO RELIEF UNDER THE FAIR LABOR STANDARDS ACT.

The complaint prays relief under the Fair Labor Standards Act (R. 4, 12). Plaintiffs do not purport to state a cause of action on any other ground. Therefore, if the Fair Labor Standards Act does not support the claim, the complaint was properly dismissed by the lower courts. It matters not whether plaintiffs could have stated a cause of action under the Walsh-Healey Act, the Act of July 2, 1940, or some other federal or state law, or even an action on contract. The question is whether they are entitled to relief on the claim as asserted in the complaint.

This Court, in *Kennedy* v. *Silas Mason Company*,[3] reversed a judgment for the defendant rendered pursuant to motion under Rule 56 of the Rules of Civil Procedure on the ground that, as a matter of good judicial administration, the Court should not attempt to decide the issues because the facts were insufficiently developed.

The facts in the case at bar are fully developed. The plaintiffs have stipulated that the facts set forth in the affidavits supporting the motion for summary judgment are not disputed (R. 2). A trial on the merits could have disclosed no additional facts helpful to a decision of the issues involved on the appeal.

A large number of cases by employees at the Arkansas Ordnance Plant are on file in the United States District Court at Little Rock. Prior to the submission of the Motion for Summary Judgment to the District Court in this case, the District Court had tried a number of these cases on their merits. In each instance, with one exception, judgment was rendered for the defendant on findings of fact on the merits by the judge, or on verdict of the jury. The exception was the case of *Barksdale* v. *Ford, Bacon & Davis, Inc.*[4] In that case, the parties stipulated that the plaintiff was entitled to a judgment if his claim fell within the provisions of the Fair Labor Standards Act. Evidence relat-

[3] 334 U. S. 249; 92 L. Ed. 1347 (1948).
[4] 70 F. Supp. 690 (E. D. Ark. 1947).

ing to this issue was introduced, after which the Court made findings of fact and delivered an opinion holding that plaintiff had no cause of action under the Act. No appeal was taken from the judgment entered thereon. The trial court spent many weeks in the trial of cases by employees at the Arkansas Ordnance Plant. It appeared that if all cases had to be tried on their merits, the Court might be occupied exclusively with such trials for many months. As pointed out in the Barksdale case, the Court was of the opinion that there was no liability under the Fair Labor Standards Act. No case was pending in either the Eighth Circuit or in this Court that would determine the legal issues of liability. It was then that the summary judgment procedure was invoked in an effort to obtain a speedy and expeditious determination of the cases. The affidavits in support of the motion for summary judgment set forth substantially the same facts as were presented to the District Court by testimony of witnesses in the Barksdale case. The affiants had testified in the Barksdale case. By stipulating that these facts were not controverted (R. 2), the plaintiffs have admitted that they are correct. It is submitted that the policy which dictated the decision in the Kennedy case[7] is not applicable to the case presented here and that the trial court and the Court of Appeals were fully justified in deciding the issues involved.

A. THE FAIR LABOR STANDARDS ACT IS NOT APPLICABLE TO THE EMPLOYMENT OF THE PLAINTIFFS.

The Act of July 2, 1940,[8] is the statutory authority for the construction of Government munitions plants and their operation by private contractors. The Secretary of War is granted broad powers in this regard. He was authorized to lease or sell such plants to private manufacturers, to operate the plants by means of Government personnel, or to operate the plants "through the agency of selected qualified commercial manufacturers under contracts entered into with them." In the case of the Arkansas Ordnance Plant, which was constructed and operated pursuant to the

[7] 334 U. S. 249; 92 L. Ed. 1347 (1948).
[8] 54 Stat. 712; 50 U.S.C.A. App. 1171.

authority of said Act (S. R. 22), the Secretary of War determined to use the latter method, and on July 15, 1941, a contract was executed between the United States and Ford, Bacon & Davis, Inc. (S. R. 21-73). The precise question here is whether the Fair Labor Standards Act sets forth the standards by which employees at the plant were required to be paid.

Section 1(a)(1) of the Act of July 2, 1940,[9] authorizes the Secretary of War to provide for the construction of war plants. Subsection (2) authorizes him "to provide for the * * * manufacture * * * of munitions * * * at such places and under such conditions as he may deem necessary". Subsection (3) authorizes the making of contracts by the Secretary of War "as he may deem necessary to carry out the purposes specified". Subsection (b) authorizes the disposal of such plants "under such terms and conditions as he may deem advisable". Subsection (c) authorizes advance payments to contractors "upon such terms and conditions * * * as the Secretary of War shall prescribe". The Act contains a proviso that no contract entered into pursuant to the authority granted thereunder shall be exempt from the provisions of the Walsh-Healey Act[10] solely because of being entered into without advertising.

There can be no doubt that Congress could have authorized the Secretary of War to make contracts of the kind referred to in the Act of July 2, 1940, without complying with the Fair Labor Standards Act[11]; that is, Congress could have specified that salaries of employees engaged in the performance of such contracts should be determined without reference to the Fair Labor Standards Act. The question, therefore, is whether Congress did give the Secretary of War this authority.

We submit that the Court of Appeals was correct in holding that Congress did confer this authority on the Secretary of War and that the Fair Labor Standards Act has no application to installations such as the Arkansas Ordnance Plant. We believe it is clear that Congress had no

[9] 54 Stat. 712; 50 U.S.C.A. App. 1171.
[10] 49 Stat. 2036; 41 U.S.C.A. 35-45.
[11] 52 Stat. 1060; 29 U.S.C.A. 201-219.

intention of restricting the War Department in securing the supplies necessary to protect the nation in time of war.

The Secretary of War was authorized to make contracts "under such conditions as he may deem necessary". The only limitation was that with respect to the Walsh-Healey Act. Thus it is clear that the Congress considered labor relations. It did not deem it expedient to include the Fair Labor Standards Act in the limitation of authority and it is, therefore, reasonable to assume that Congress did not intend that the Fair Labor Standards Act should be controlling with respect to the wages and hours of employees at the plants mentioned in the Act.

Although it is unnecessary to decide the issue in this case, we submit that the statement of Circuit Judge Johnsen in his concurring opinion in the court below is unanswerable. We quote from the opinion (R. 27):

> "If a test of these powers should have arisen in a situation indicating the impossibility or impracticability in attempting to make prompt defense preparations, of having the wage scales and overtime rates fixed in these plants except by War Department action, I should doubt that any court would have difficulty in seeing in the nature and the language of the Act, as I have discussed them above, a reservoir of power in the Secretary of War so to act, independent of the wage and hour provisions of any other statute."

We respectfully submit that the Secretary of War, in operating the Arkansas Ordnance Plant in the manner in which it was operated, was acting within his authority and that the plaintiffs, as employees at the plant, can assert no rights under the Fair Labor Standards Act.

B. THE EMPLOYEES AT THE ARKANSAS ORDNANCE PLANT WERE NOT ENGAGED IN THE PRODUCTION OF GOODS FOR COMMERCE.

Even though it be conceded that Congress did not, by the Act of July 2, 1940, remove Government-owned, contractor-operated war plants from the sphere of the Fair

Labor Standards Act, still that Act, by its terms, is not applicable to the Arkansas Ordnance Plant.

The overtime provisions of the Act (Sec. 7) apply only to employees "engaged in commerce or in the production of goods for commerce". The employees in this case do not allege that they were engaged in commerce; they state only that they were engaged in the production of goods for commerce.

The munitions upon which the employees worked were at all times the property of the United States (S. R. 14, 15, 63) and the United States shipped the completed items to military installations outside the State of Arkansas (S. R. 16). The question, simply stated, is whether a shipment by the United States in its sovereign capacity of its own property across state lines for defense of the nation in time of war constitutes commerce.

The proposition that such shipments are not commerce finds either direct or inferential support in decisions by the Supreme Court of Arkansas [12] and by the Courts of Appeal for the Second,[13] Fourth,[14] Fifth,[15] Sixth,[15a] Eighth,[16] Ninth,[17] and Tenth[18] Circuits.

The Court of Appeals for only one Circuit, the Seventh, has indicated a contrary opinion,[19] and since the opinion was based upon an independent ground, the remarks of the court concerning the commerce issue are dicta.

That the Government was the producer of the munitions is undisputed. Also undisputed is the fact that the

[12] H. B. Deal & Co., Inc. v. Leonard, 210 Ark. 512; 196 S. W. (2) 991 (1947).

[13] Divins v. Hazeltine Electronics Corp., 163 F. (2d) 100 (C.C.A. 2, 1947).

[14] Walling v. Haile Gold Mines, Inc., 136 F. (2) 102 (1943) when read in connection with Holland v. Haile Gold Mines, Inc., 44 F. Supp. 641 (1942).

[15] Kennedy v. Silas-Mason Co., 164 F. (2) 1016 (1947); Creel v. Lone Star Defense Corp., 171 F. (2) 964 (1949) cert. granted June 6, 1949.

[15a] Selby v. Jones Construction Company, F. (2) , C.C.H. 16 Labor Cases ¶ 65,177 (C.C.A. 6, May 27, 1949).

[16] Crabb v. Welden Brothers, 164 F. (2) 797 (C.C.A. 8, 1947).

[17] National Labor Relations Board v. Sunshine Mining Co., 110 F. (2) 780 (1940); Fox v. Summit King Mines, Ltd., 143 F. (2) 926 (1944); Ritch v. Puget Sound Bridge & Dredging Co., 156 F. (2) 334 (1946) when read in connection with the District Court opinion 60 F. Supp. 670. (1945).

[18] Clyde v. Broderick et al., 144 F. (2) 348 (1944) when read in connection with the District Court opinion 52 F. Supp. 553 (1943).

[19] Bell v. Porter, 159 F. (2) 117 (C.C.A. 7, 1946).

Government shipped the munitions. The Government was both consignor and consignee (S. R. 107, 109, 111). Was the Government engaged in commerce in making these shipments? We submit that decisions of this court make it clear that the Government was not engaged in commerce. Thus, in New York ex rel. Rogers v. Graves,[20] it was held that the Government, by shipping merchandise in the exercise of its sovereign functions, was not engaged in commerce even though incidental to such shipments, merchandise was commercially transported for others.

This court has further held that the Government, in the generation, sale and distribution of electricity, is not engaged in commerce.[21]

We respectfully submit that there is no real conflict in the decisions of the various Courts of Appeal on this issue, and that the issue has been determined correctly and in accord with prior decisions of this Court.

C. PLAINTIFFS WERE EMPLOYEES OF THE UNITED STATES.

The United States is not required to pay its employees in accordance with the Fair Labor Standards Act. This is expressly provided in the Act.[22]

Provisions in the contract designating Ford, Bacon & Davis, Inc., an independent contractor (S. R. 41) are not controlling. The real question is the actual relationship of the parties.[23]

The facts in the case amply justify the assertion that plaintiffs were employees of the Government. The Government recognized the unique relationship existing between it and the contractor (S. R. 163). Ford, Bacon & Davis, Inc., was merely a corporate manager of the plant for the Government. The Government, though utilizing the services of private managers, nevertheless retained ultimate control. It was for purposes of convenience that the

[20] 299 U. S. 401, 406; 81 L. Ed. 306, 309 (1937).
[21] Ashwander v. Tennessee Valley Authority, 297 U. S. 288; 80 L. Ed. 688 (1936).
[22] Sec. 3(d); 29 U.S.C.A. 203(d).
[23] Rutherford Food Corp. v. McComb, 331 U. S. 722, 729; 91 L. Ed. 1772, 1778 (1947); McComb v. McKay, 164 F. (2) 40 (C.C.A. 8, 1947).

plant was operated in the name of the contractor. This system of operation did not change the nature of plaintiffs' employment. The Government was still the boss, so to speak. Thus, it dictated the wage rates and required the contractor to comply therewith (S. R. 18). The extent of this supervision is illustrated by Exhibit 5 (S. R. 90-97) and Exhibit 6 (S. R. 97-101) to the Motion for Summary Judgment. The Government refused to permit an increase in janitors' wages of seven cents per hour, although the contractor was having difficulty in securing help at the pre-existing rates. If a purported independent contractor cannot hire a janitor or a laborer without specific approval of the principal, we submit that the contract creates an agency relationship and not an independent contractor relationship.

The Government maintained checkers in the clock houses where employees clocked in and out (S. R. 14); it audited and approved time cards (S. R. 14) and witnessed pay roll payments (S. R. 14). Exhibits D-3 (S. R. 159) and D-4 (S. R. 161) are photostats of typical time cards and indicate Government approval of the time recorded.

The Ordnance Safety Manual (S. R. 84-90) sets forth detailed instructions as to conduct of employees.

We believe that the opinion of this Court in United States v. United Mine Workers [24] is clearly in point. The Court said:

> "The defendants, however, point to the fact that the private managers of the mines have been retained by the Government in the role of operating managers with substantially the same functions and authority. * * * The regulations, however, also provide for the removal of such operating managers at the discretion of the Coal Mines Administrator. Thus the Government, though utilizing the services of the private managers, has nevertheless retained ultimate control." [25]

This Court, in National Labor Relations Board v. Atkins & Company,[26] held that the power to determine wages and hours of another coupled with the obligation to bear

[24] 330 U. S. 258; 91 L. Ed. 884 (1947).
[25] 330 U. S. 288; 91 L. Ed. 909-910.
[26] 331 U. S. 398; 91 L. Ed. 1563 (1947).

the financial burden of those wages was sufficient to establish the employer-employee relationship. The record in the case at bar not only discloses that these powers were vested in the Government but also all of the other common-law attributes of an employer.[26a]

The courts below would have been justified in basing the judgment on this one issue and, therefore, the writ should not be granted.

D. THE MATERIALS WORKED ON BY PLAINTIFFS WERE NOT "GOODS" AS DEFINED BY THE ACT.

Section 3(i) of the Act [27] in defining "goods" provides that the term "does not include goods after their delivery into the actual physical possession of the ultimate consumer thereof other than a producer, manufacturer, or processor thereof."

We believe that this provision of the Act clearly excludes the material worked on by the plaintiffs. The Government was the ultimate consumer of the goods. The record clearly reflects that the Government had title to and possession of the materials at all times relevant hereto.

District Judge Lemley, who presided at the trial of this case, made a finding of fact in a similar case, as follows: [28]

> "The defendant at no time had title to the finished products of the plant, and at no time had title to any of the component parts of such products, or of the materials, supplies, machinery, equipment, or other property used in connection with the contract, title thereto and possession thereof being at all times in the United States and subject to its sole control."

[26a] Selby v. Jones Construction Company, ... F. (2) ..., C.C.H. 16 Labor Cases ¶ 65,177 (C.C.A. 6, May 27, 1949).

[27] 29 U.S.C.A. 203(i).

[28] Barksdale v. Ford, Bacon & Davis, Inc., 70 F. Supp. 690, 691 (see Finding of Fact No. 11).

The defense here asserted has been recognized and enforced in a number of cases.[29] It has been argued that the exclusion is not applicable because, if it be assumed that the munitions being produced had already been delivered into the possession of the United States, then the United States became a producer, manufacturer, or processor thereof. But if this be true, then the employees were employees of the United States and thus excluded under Section 3(i) of the Act.

E. PLAINTIFFS ARE BARRED BY THE PORTAL-TO-PORTAL ACT OF 1947.

The Portal-to-Portal Act of 1947[30] provides that an employer shall not be liable for failure to pay an employee overtime compensation for any activity except an activity which was compensable by express provision of contract or by custom or practice in effect at the time and at the place where the employee was employed.

It is clear from the complaint that plaintiffs seek to recover for activities of the character mentioned in the Portal-to-Portal Act. The affidavit of A. R. Clarke (S. R. 18) negatives the existence at the Arkansas Ordnance Plant of any contract, custom or practice which would support these claims. This affidavit is not controverted. The Response to Motion for Summary Judgment (Par. 6, R. 41) filed by plaintiffs specifically admits that there is no issue of fact on the effect of the Portal-to-Portal Act of 1947. It would seem to follow, therefore, that the dismissal of the complaint could be justified on this ground[31] as well as the

[29] Crabb v. Welden Bros., 164 F. (2) 797 (C.C.A. 8, 1947); Divins v. Hazeltine Electronic Corp., 163 F. (2) 100 (C.C.A. 2, 1947); Barksdale v. Ford, Bacon & Davis, Inc., 70 F. Supp. 690, 693 (E. D. Ark. 1947); Anderson v. Federal Cartridge Corp., 72 F. Supp. 644 (Minn. 1947); Kruger v. Los Angeles Shipbuilding and Drydock Corp., C.C.H. 12 Labor Cases ¶ 63,660 (S. D. Calif. 1947); Lynch v. Embry-Riddle Co., C.C.H. 10 Labor Cases ¶ 62,923 (S. D. Fla. 1945).

[30] Act of May 14, 1947, c. 52, 61 Stat. 84, 29 U.S.C.A. 251-268.

[31] Seese v. Bethlehem Steel Co., 168 F. (2) 58 (C.C.A. 4, 1948); Rogers Cartage Co. v. Reynolds, 166 F. (2) 317 (C.C.A. 6, 1948); Tucker v. Pratt & Whitney Aircraft Corp., 77 F. Supp. 227 (D. C. Mo. 1948); Grayzeski v. Federal Shipbuilding & Dry Dock Co., 76 F. Supp. 845 (D. C. N. J. 1948); Alameda v. Paraffin Cos., 75 F. Supp. 282 (D. C. Colo. 1947); Conwell v. Central Mo. Tel. Co., 74 F. Supp. 542 (D. C. Mo. 1947); Story v. Todd Houston Shipbuilding Corp., 72 F. Supp. 690 (D. C. Tex. 1947); Plummer v. Minneapolis-Moline Plow Co., 76 F. Supp. 745 (D. C. Minn. 1948); Sinclair v. U. S. Gypsum Co., 75 F. Supp. 439 (D. C. N. Y. 1948); Lasater v. Hercules Powder Co., 73 F. Supp. 264 (D. C. Tenn. 1947).

others hereinbefore mentioned and that certiorari should be denied.

CONCLUSION

Respondent is cognizant of the fact that this Court granted certiorari in a somewhat similar case [32] on June 6, 1949. We submit, however, that the record in the case at bar fully justifies the judgment in the lower courts; that said judgments may be sustained on each of the grounds mentioned herein, and are correct; that there is no real conflict between the various Circuits upon the ultimate result; that the judgment is in accord with decisions of this Court, and that the petition for a writ of certiorari should be denied.

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[32] Creel v. Lone Star Ordnance Plant, ... U. S. ..... (June 6, 1949).

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NO. 79

In the Supreme Court of the United States

OCTOBER TERM, 1949

JULIA RHODA AARON AND ALL OTHER PLAINTIFFS AND INTERVENERS LISTED IN THE COMPLAINTS AND INTERVENTIONS IN THE DISTRICT COURT IN CIVIL ACTION NO. L. R. 1584, CONSOLIDATED,

Petitioners,

vs.

FORD, BACON & DAVIS, INCORPORATED,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF OF RESPONDENT

WILLIAM L. MARBURY,
E. L. McHANEY, JR.,
Counsel for Respondent.

OTTO ATCHLEY,
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Of Counsel.

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In the Supreme Court of the United States

OCTOBER TERM, 1949

No. 79

JULIA RHODA AARON AND ALL OTHER PLAINTIFFS AND INTERVENERS LISTED IN THE COMPLAINTS AND INTERVENTIONS IN THE DISTRICT COURT IN CIVIL ACTION NO. L. R. 1584, CONSOLIDATED,

Petitioners,

vs.

FORD, BACON & DAVIS, INCORPORATED,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF OF RESPONDENT

The Record

The record in this case is printed as a single volume in three sections, each carrying its own pagination. The first section consists of the abstract of record filed by petitioners in the Court of Appeals, in which they printed some and summarized other parts of the original transcript of record of the proceedings in the District Court which had previously been filed in the Court of Appeals. That abstract is referred to as "the Record" and will hereinafter be cited as "R.". The second section consists of portions of the original transcript (including some which petitioners had undertaken to summarize in their abstract) which were printed by respondent for the consideration of the Court of

Appeals. These portions of the original transcript are referred to as "the Supplemental Record" and will hereinafter be cited as "S. R.". The third section consists of the proceedings in the Court of Appeals and will hereinafter be cited as "App. R.". The case was heard below on both the Record and the Supplemental Record (App. R. 6, 35) in accordance with the practice prevailing in the Eighth Circuit.[1]

The Opinions Below

The brief opinion of the District Court is embodied in the order for summary judgment entered on August 15, 1947 (R. 56-58). In that order, the District Court adopted the opinion which it had previously filed in the case of *Barksdale v. Ford, Bacon & Davis, Inc.*, 70 F. Supp. 690, (E. D. Ark. 1947). The opinion of the Court of Appeals is printed in the record (App. R. 8-9) and reported in 174 F. (2d) 730. It accepts as controlling the opinion filed by the same court on the same day in the case of *United States Cartridge Co. v. Powell, et al.*, which is printed in the record (App. R. 10-33) and reported in 174 F. (2d) 718.

Jurisdiction

The judgment of the Court of Appeals was entered on April 12, 1949 (App. R. 33). The petition for certiorari was granted on June 27, 1949, 337 U. S. 955. The jurisdiction of this court is invoked under Section 1254 of the Revised Judicial Code (28 U. S. C. 1254).

Questions Presented

1. Did the coverage of the Fair Labor Standards Act extend to those who, during the recent war, were engaged

[1] See Rule 11 of the Rules of the Court of Appeals for the Eighth Circuit.

in the production of munitions at Government-owned ordnance plants operated through the agency of private contractors by authority of the National Defense Act of July 2, 1940?

2. Were such persons engaged in the production of goods for commerce within the meaning of the Fair Labor Standards Act?

3. Were such persons "employees" within the meaning of the Fair Labor Standards Act?

4. Does the Portal-to-Portal Act of 1947 bar petitioners' claim?

Statutes Involved

The statutes involved are the Walsh-Healey Public Contracts Act of June 30, 1936 (c. 881, 49 stat. 2036; 41 U. S. C. §35, et seq.), the Fair Labor Standards Act of 1938 (Act of June 25, 1938, c. 676, 52 Stat. 1060, 29 U. S. C. §201, et seq.),[2] the National Defense Act of July 2, 1940 (c. 508, 54 Stat. 712, 50 U. S. C. App. §§1171, 1172, and 5 U. S. C. §189(a)), and the Portal-to-Portal Act of 1947 (Act of May 14, 1947, c. 52, 61 Stat. 84, 29 U. S. C. §251, et seq.). The pertinent provisions of these Acts are so extensive that for convenience they are printed as Appendix A of this brief (infra pp. 95-108).

Statement of the Case

The Government has intervened as *amicus curiae* in this case as well as in *Creel v. Lone Star Defense Corporation*, No. 58, October Term, 1949, and *Powell v. The United*

[2] The Fair Labor Standards Act was amended by the Act of October 28, 1949 (c. 736, Public 393, 81st Cong. 1st Sess.). To the extent that the new amendments are pertinent, they will be set forth in the course of the argument.

States Cartridge Company, No. 96, October Term, 1949, and has filed a consolidated brief in which it is said that the "salient facts. * * * are concededly substantially similar in all three cases. * * * The contracts, employment relationships and methods of operation in all three cases were substantially the same. The three records together afford a complete and representative picture of the operation and relationships." With these statements we agree, but anyone familiar with the record in this case would hardly recognize the Statement of Facts which appears in the Government's brief.

The explanation is that the Solicitor General has attempted to construct a synthetic case, first, by dipping into all three records and extracting from them certain facts which create an impression favorable to petitioner's claims, and, second, by quoting extracts from a publication (not to be found in any of the three records) which sets forth at length the conclusions of the writer on certain questions which are pertinent here. Although, as we shall see (infra, pp. 18, 19), this publication never pretended to be an authoritative expression of War Department views, and although it was later superseded by official statements emanating from higher sources, the Government relies on it to establish facts for which no support can be found in these records. *At the same time, the careful and comprehensive findings of the trial court in this case are simply ignored.*

Those findings, which completely contradict many important statements to be found in the Government's brief, were originally made after trial on the merits of a suit brought against this respondent by a fellow employee of petitioners (R. 58-64). When the present suits came on for trial before the same judge, in order to save time the testi-

mony in the earlier case was summarized in affidavit form and presented on motion for summary judgment. In the order granting that motion, the trial court expressly adopted the findings in the earlier case (R. 57). These findings, which were made by an experienced trial judge and not disturbed by the Court of Appeals, relieve this court of the necessity of searching through thousands of pages of the records in these three cases in order to arrive at the "salient facts". They present a picture which is typical of many similar operations undertaken by the Government as a part of its program of war production and afford a solid basis for consideration and disposition of the issues raised in all three of the cases now before this court.

The Proceedings Below

This suit was brought in the District Court of the United States for the Eastern District of Arkansas. The petitioners alleged that they had been employed in the Arkansas Ordnance Plant as handlers, carriers, and processors of explosives, or as line leaders and assistant line leaders on production lines or as operators whose duties were to handle, make, load, assemble, process and produce items of ordnance in that plant (R. 4). They charged that they "were compelled by the necessities of the defendant's business, by the physical arrangement of the Plant, by the productive aims of the defendant, and by instructions of the defendant to perform work and labor for and to be upon the premises controlled, maintained and operated by the defendant for approximately thirty-five (35) minutes prior and thirty (30) minutes subsequent to the scheduled work hours each work day for which they were not compensated. *This action is to recover compensation for such work, labor and time*" (R. 5). [Italics supplied.].

The complaint alleged that petitioners were engaged in the production of goods for commerce within the meaning of the Fair Labor Standards Act of 1938 and that they had a cause of action for overtime wages due to them under the provisions of that act (R. 4). Respondent answered, denying that it was engaged in the production of goods for commerce or that petitioners were engaged in commerce or in the production of goods for commerce (R. 14). The answer stated further that petitioners were employees of the United States within the meaning of the Act, that the activities on which petitioners based their claim were preliminary and postliminary to their regular hours of work and were not compensable by express provision of any written or unwritten contract in effect at the time of their employment or by any custom or practice in effect at such times at the Arkansas Ordnance Plant, and that respondent in making payment to those employed at the Arkansas Ordnance Plant had relied in good faith on regulations, orders and rulings of the Ordnance Department (R. 14-15). Other defenses not material to this appeal were likewise asserted (R. 15). All allegations of the complaint not specifically admitted were generally denied (R. 14).

Respondent then filed a motion for summary judgment (S. R. 1) on the following grounds:

> "(a) That the plaintiffs were not engaged in commerce or in the production of goods for commerce within the meaning of those terms as used in the Fair Labor Standards Act; and
>
> "(b) That the plaintiffs were employees of the United States and as such were not covered by the Fair Labor Standards Act; and
>
> "(c) That, by virtue of the provisions of the Portal-to-Portal Act of 1947, the plaintiffs may not recover herein."

This motion was supported by numerous affidavits and exhibits (S. R. 2-124).[3] Petitioners served on respondent written requests for the admission of certain facts, to which respondent made written answer (S. R. 124-135). Thereafter petitioners propounded written interrogatories to respondent, to which replies were made under oath (S. R. 136-171). Petitioners then filed a response to the motion for summary judgment with accompanying affidavits (R. 41-52).

The case came on for hearing in the District Court which, after considering "the pleadings in the action, the affidavits in support of the motion filed by the defendant, the affidavits opposing the motion filed by the plaintiffs, the admissions of fact made by the defendant pursuant to the request of the plaintiffs under Rule 36 of the Federal Rules of Civil Procedure, [and] the responses to interrogatories propounded to the defendant by the plaintiffs, pursuant to Rule 33 of the Federal Rules of Civil Procedure. * * * and upon the statement of counsel for the defendant that the affidavits in opposition to the motion raised disputed questions of fact in connection with the applicability to this action of the Portal-to-Portal Act of 1947, and upon the statement of counsel for plaintiffs that the affidavits filed by the plaintiffs in opposition to the motion raise no controverted questions of fact" found that "there is no genuine issue as to any material fact and no controversial question of fact to be submitted to the trial court in connection with the first alleged ground for summary judgment" (R. 56-57).

[3] The motion for summary judgment and supporting affidavits and exhibits, petitioners' request for admission of facts and answer of respondent and petitioners' interrogatories and respondent's replies thereto are all inadequately summarized in the abstract filed by petitioners in the Court of Appeals (R. 17-41, 53-56). For this reason reference is made to the pages of the Supplemental Record where the relevant parts of those documents appear in full.

The court found further that "the facts in this case concerning the grounds set forth in paragraph 1 (a) of the motion for summary judgment are substantially the same as the facts in the case of *Barksdale v. Ford, Bacon & Davis, Inc.*, Civil Action No. L. R.-1323 in this court, and the court adopts the opinion filed by it in said cause No. L. R.-1323 as its reasons for the entry of this judgment in so far as the reasons assigned in said opinion are applicable here, and orders that a copy of said opinion be filed herein and made a part of the record in this case." The court then stated as a conclusion of law that petitioners were not engaged in commerce or in the production of goods for commerce and, declining to pass on any other issue raised in the motion for summary judgment, ordered that the action be dismissed (R. 57-58).

Petitioners appealed from this order to the Court of Appeals for the Eighth Circuit. The Agreed Statement filed by counsel for petitioners and respondent in the Court of Appeals recited that at the hearing in the District Court "counsel for plaintiffs stipulated that the affidavits in opposition to the motion for summary judgment raised no disputed issues of fact" (R. 2). The case was first argued before the Court of Appeals prior to the announcement of the opinion of this Court in *Kennedy v. Silas Mason Co.*, 334 U. S. 249 (1948). After that case had been decided, the Court of Appeals set aside the submission of the present case and set it for reargument before the court *en banc*. The parties were granted leave to file supplemental briefs "particularly directed to the applicability, if any, of either the Fair Labor Standards Act of 1938 * * *; the Act of July 2, 1940 * * *; or the Walsh-Healey Public Contracts Act * * *" (App. R. 11). On reargument, all seven judges of the Eighth Circuit concurred in affirming the order of the trial court. The court adopted

as controlling its own decision in the case of *United States Cartridge Co. v. Powell*, 174 F. (2d) 718, decided the same day (App. R. 8-9, 10-33).

The Facts

Armed with the authority conferred by the National Defense Act of July 2, 1940,[1] to provide for the construction of "plants, buildings, facilities, utilities and appurtenances thereto" for the manufacture and storage of munitions and to provide for the operation of any such plants, buildings, etc., "*either by means of Government personnel or through the agency of selected qualified commercial manufacturers under contracts entered into with them*", the War Department determined to construct at Jacksonville, Arkansas, a new ordnance facility for the loading of fuzes, boosters, primers and detonators. Accordingly, a tract of land containing several thousand acres was acquired in the desired neighborhood.[2] A contract was then

[1] For the citation and text of the relevant parts of the statute see Appendix A, *infra*, pp. 102-104.

[2] Although the complaint alleges that the plant was located upon "an enclosed reservation containing several thousand acres", we have been unable to find in the record any reference to the exact size of the plant. In this connection, however, the following passage from a speech delivered by Colonel T. C. Gerber, Field Director of Ammunition Plants, before the Engineers' Club of St. Louis and the St. Louis Section of The American Institute of Mining and Metallurgical Engineers on the 16th of March, 1944, may be of interest:

> "Many of you may have visited TNT plants or loading plants. Those of you who have not, would probably be most impressed by the immense size of the area each covers, and the widely separated manner in which buildings are laid out. Both TNT and loading plants consist of lines or groups of buildings scattered over an area which in some cases is as great as 20,000 acres. None of the buildings are of great size, and most are of special construction, so that if an explosion should occur, damage to both personnel and property would be limited by distance and the lightness of the missiles."

entered into with the respondent for the design, construction and equipment "upon a site to be furnished and made available by the Government" of a plant consisting of "loading buildings, administration buildings, shops, railroads, roads, steam lines, air lines, electric lines, telephone lines, fencing, lighting, power house, dormitories, water and sewer systems, staff dwellings, messhall, cafeterias, guard quarters, fire fighting equipment and housing thereof, and other buildings and equipment necessary or appropriate for a loading plant of the approximate capacity aforesaid, with storage buildings adequate for about 30 days' supply of incoming materials and about 60 days production of finished product" (S. R. 25).

For reasons which have been fully explained in statements made since that time,[1] the War Department had come to the conclusion that the managerial skill of respondent's organization might be needed in the vast program of munitions production which Congress had authorized. Accordingly, the contract gave the Government the option to call on respondent to operate the plant once it had been constructed and equipped, and to train key personnel for that purpose. The provisions of the contract applicable to the operation of the plant are found in Titles IV to VII, inclusive, and it is with these, and these only, that we are concerned in the present case. *It should be emphasized that Titles I through III, inclusive, have no bearing on the present case.* Thus the provisions of Titles I-F and I-G are, by their express terms, limited to the work done under that particular title, that is to say, to the work of design, engineering and construction (S. R. 25,

[1] See Campbell, "The Industry Ordnance Team", pages 101 and following. See also the report of Representative Albert J. Engel published in Army Ordnance Report No. 6, August 21, 1944, under the title "Ordnance Ammunition Production".

33-36). Similarly, the provisions of Article II-D and Article III-D have application only to work done in connection with the procurement of production equipment and the training of key personnel necessary for the operation of the plant (S. R. 38-39).

The essential features of the arrangement between the respondent and the Government are described in the comprehensive findings of fact of the trial court (R. 60-64). From these findings the following facts appear:

1. The Arkansas Ordnance Plant was a military reservation owned by the United States over which the United States had acquired exclusive jurisdiction. The entire plant was at all times under the command of an ordnance officer who exercised full and complete control over the property and the installations thereon. (See paragraphs 6, 21 and 22 of the Findings of Fact (R. 60, 62)).

2. The plant was designed for and was used exclusively in the manufacture of munitions used by the Government in the prosecution of the war. (See paragraph 14 of the Findings of Fact (R. 61)).

3. All munitions manufactured or processed at the Arkansas Ordnance Plant were manufactured or processed under the direct supervision and control of the Government. The Government specified the manufacturing processes to be used. It directed the type and quantity of munitions, the specifications thereof, and the rate of production. Inspections were made by the Government during each step of their manufacture or processing. Detailed rules and regulations governing safety and methods of production were promulgated by the Government. Respondent was required to comply with these rules and regulations, and Government-paid employees were present to report on compliance. The Government, from time

to time, sent to the respondent production schedules directing the respondent to produce munitions of certain designated specifications. The respondent was required to meet these schedules. It had no discretion as to the type of munitions to be made, the quantity thereof, or the method or process used in their manufacture, and the respondent produced no munitions except as requested by Government directive. On occasion the Government transferred production schedules from other ordnance plants to the Arkansas Ordnance Plant for completion. In such cases, if the original plant had made any contracts for materials and supplies on account of such schedules, the respondent was required to take over such supply contracts and to pay the vendors in accordance therewith from Government funds. (See paragraphs 25, 26, 27 and 28 of the Findings of Fact (R. 62-63)).

4. The Government did not purchase from the respondent nor did the respondent sell to the Government the munitions produced at the plant. The respondent had no financial stake in the contract. The Government agreed to bear all the costs, and all expenditures were made from a fund advanced by the Government. In addition, the respondent was paid a fixed fee in monthly installments. This fee was not dependent upon the quantities produced, nor was the respondent penalized if materials manufactured or processed at the plant did not meet specifications and could not be used. The contract specifically provided that the respondent should be allowed all costs of reworking rejected munitions and all costs of material finally rejected. (See paragraphs 12, 13 and 19 of the Findings of Fact (R. 61) and Article V-B-3(d) of the contract between respondent and the Government (S. R. 54)).

5. The wage policies of the respondent were determined by the Government, primarily through the com-

manding officer at the plant. Before a single dollar was paid in wages, the respondent was required to submit to the commanding officer a job classification and wage rate schedule. After approval, the respondent was required to comply literally with this schedule. The commanding officer could discharge any employee and could approve or disapprove the hiring or firing of any employee. The hiring of every employee and all changes of status, either in classification or wage rate, had to bear the written approval of the contracting officer. Checkers were maintained in clock houses where employees reported in, and the Government audited and approved the time cards. The Government even maintained men to observe payroll payments to the employees. (See paragraphs 23, 24 and 32 of the Findings of Fact (R. 62-63)).[7]

6. The Government supplied all the component parts of the products with which the employees at the Arkansas Ordnance Plant were required to deal. It also supplied approximately 95% of the materials, supplies, machinery, equipment and other property used in connection with the contract for the operation of the plant. The purchase of the balance of such materials, supplies, machinery and equipment and other property was effected through the agency of the respondent, with the prior approval of rep-

[7] See paragraph 8 of the Statement of Labor Policy printed as Appendix B to this brief. This Statement was implemented from time to time by appropriate instructions issued by the Office of the Chief of Ordnance. These Ordnance Procurement Instructions (hereinafter referred to as OPI) were given wide public circulation and may be found in the services published during the war by Commerce Clearing House, Inc., and the Prentice-Hall Corporation. Excerpts from these instructions are printed in the record (S. R. 76-78, 163-164). As to the statements made in paragraph 5 above, see OPI 9107, et seq. See also decision of Comptroller General, B-22235 dated December 19, 1941, 21 Dec. Comp. Gen. 593.

resentatives of the Government. (See paragraphs 9, 15, 30 and 31 of the Findings of Fact (R. 60, 61, 63)).

7. All items furnished by the Government were shipped to a Government representative at the plant on Government bills of lading as the property of the United States "for military use". Items purchased through the agency of the respondent were likewise shipped to a Government representative at the plant on Government bills of lading marked "Government Property for Military Use", and the Government took title to such items at their point of origin. The Government maintained an accountable property officer who was accountable for all property used in connection with the contract for the operation of the Arkansas Ordnance Plant from the time of the arrival of such property at the plant. (See paragraphs 9, 15, 18 and 31 of the Findings of Fact (R. 60, 61, 63)).

8. The title to the land, buildings, machinery, equipment, materials, supplies and all other property used in connection with the contract for the operation of the Arkansas Ordnance Plant, as well as the title to all finished products produced at that Plant, was at all times in the Government. (See paragraphs 8, 10, 11 and 17 of the Findings of Fact (R. 60-61)).

9. Not only did the Government at all times have title to all the property used in connection with the contract as well as the finished products produced at the Arkansas Ordnance Plant, but it at all times had actual physical possession thereof. (See paragraphs 9, 10, 11, 17 and 31 of the Findings of Fact).[8]

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[8] The record amply supports the findings of the trial court on this point. All supplies, materials, components and other property used in connection with the contract were shipped to a Government officer at the plant, usually on Government bills of lading (S. R. 4-11). Where

10. The finished products of the Arkansas Ordnance Plant were shipped by the Government under Government bills of lading to military facilities beyond the State of Arkansas for use by the armed forces of the United States in the conduct of the war. Some shipments went directly overseas and others went to military facilities located within the United States. (See paragraph 10 of the Findings of Fact (R. 60)).

It will be noted that the trial court made no findings with respect to the respondent's contention that the claim of petitioners was barred by the Portal-to-Portal Act of 1947.[9] Certainly, the allegations of the complaint fail to allege the existence of any contract or custom calling for payment for time spent in such activities as are described in the complaint (R. 5-12). The affidavit of W. F. Whittle

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the Government did not supply the property as "free issue", it was purchased only after approval by a Government representative (S. R. 2). As soon as the property arrived at the plant, it was inspected and checked by a Government representative (S. R. 2). If approved by him, it was paid for from Government funds advanced to the contractor, and a Government officer became accountable therefor (S. R. 2, 14). The goods were then processed under constant supervision by the Government (S. R. 4, 14, 15, 20). The affidavit of W. F. Whittle expressly states that "the Government had title to and possession of all property used in connection with the operations of the Arkansas Ordnance Plant" (S. R. 14). After completion, the goods were inspected by a Government representative and if found to be in accordance with specifications were approved for shipment. Government bills of lading were then prepared by or at the direction of a Government representative (S. R. 3, 12). Those bills of lading named a Government officer as shipper and a Government officer as consignee (S. R. 16). The actual physical loading of the vehicles in which the goods were to be removed from the plant was done by persons on the payroll of respondent under supervision of a Government representative (S. R. 3). See in this connection the opinion of the trial court (R. 65-66).

[9] For the citation and text of the relevant parts of this Act see Appendix A, infra, pp. 105-108.

filed in support of the motion for summary judgment expressly denies the existence of any such contract or custom (S. R. 16). Furthermore, there is much in the affidavits to support the contention that the respondent acted in good faith relying on rulings of the Ordnance Department (S. R. 18). However, the affidavits filed with petitioners' response to the motion for summary judgment seemed to raise some questions of fact as to the nature of the work done, and counsel for the respondent so stated to the trial court.[10] Counsel for petitioners disclaimed in the trial court the intention to raise any such issue of fact, and in the agreed statement filed in the Court of Appeals joined in a stipulation to the effect that "the affidavits in opposition to the motion for summary judgment raised no disputed issues of fact" (R. 2). Accordingly, it is submitted that on this record petitioners must be taken to have admitted that respondent paid them in good faith in reliance on rulings of the Ordnance Department and that the activities on which their claim is based were not compensable by express provision of any written or unwritten contract in effect at the time of their employment or by any custom or practice in effect at such time at the Arkansas Ordnance Plant.

[10] This is noted in the order of the trial judge dismissing the complaint (R. 57).

Argument

Introduction

The arguments which follow are made with the full approval of the Department of the Army. In an effort to justify the action of the Department of Justice in supporting the position of the petitioners in these cases, the Solicitor General has attempted to show that the Army has been guilty of inconsistency. To this end no less than twenty-three pages of the Government's brief (pp. 33-55, inclusive) are devoted to quotations from Presidential addresses, pronouncements of the National Defense Advisory Commission, testimony given before Congressional Committees by officials in charge of the defense program, and a variety of publications emanating from sources within the War Department and elsewhere. In order to explain the significance of all of this material, it would be necessary to write an historical treatise far exceeding in length this entire brief. We shall limit ourselves to the general proposition that, with exceptions to be noticed, it has no bearing on the questions at issue here.

What this court has now to decide is whether those Government arsenals which were operated "through the agency of selected, qualified, commercial manufacturers under contracts entered into with them" by virtue of the provisions of the National Defense Act of July 2, 1940, were covered by the Fair Labor Standards Act. That they were covered by the Walsh-Healey Public Contracts Act is conceded. Thus the general principle of overtime compensation for those engaged in war production, (which is the concern of many of the utterances relied on by the Government), is not now drawn in question. That the Fair Labor Standards Act was not inapplicable to war production contracts *as such* was certainly the view generally held by administrative officials throughout the period of World War II. There is also much evidence that those officials did not believe that the Act

was inapplicable to cost-plus-a-fixed-fee contracts *as such*. But these points so strenuously argued by the Government may be conceded without in any way affecting the force of most of the contentions made in this brief. For in the argument which follows, it is nowhere contended that all war production contracts were exempt from the coverage of the Act, nor is it argued that all cost-plus-a-fixed-fee contracts were so exempt. Furthermore, the contentions hereinafter made, except those made under point III, are completely consistent with the idea that many government contracts (including cost-plus-a-fixed-fee contracts) are within the ambit of the Act.

The foregoing statements, it is believed, dispose of all the documents on which the Government relies to establish the inconsistency of the Army except two. One is the "Manual of Instructions for the Administration of Contracts" published by the Office of the Chief of Ordnance in 1941. The other is the Memorandum of Agreement signed on December 23, 1943, by representatives of the War, Navy, Labor, and Justice Departments under which private contractors were directed not to raise the defenses on which respondents are now relying in these cases.

As to the first publication, the observation has already been made that it did not pretend to express the official views of the War Department. This clearly appears from the text of a letter written by the Secretary of War to the Comptroller General on August 25, 1942, where the Ordnance Manual is referred to merely as an expression of the views of the Ordnance Department (see 22 Comp. Gen. Dec. 277). The sole medium for the expression of the official views of the War Department on subjects relating to procurement was the Procurement Regulations published from time to time in the Federal Register.[11] Procure-

[11] See Para. 101, War Department Procurement Regulations, 10 C. F. R. Cum. Supp. §81.101

ment Regulation No. 9, which dealt with the Fair Labor Standards Act, was scrupulously careful to avoid the expression of any opinion as to the application of the statute to Government-owned-privately-operated ordnance plants.[12] Moreover, the Ordnance Manual of 1941 was published before Pearl Harbor. Following the entry of the United States into the war, many provisions of that manual were superseded. In particular, the issuance by the Under Secretary of War and the Assistant Secretary of the Navy on July 18, 1942, of the "Statement of Labor Policy Governing the Government-Owned-Privately-Operated Plants," completely altered the situation in so far as the labor policies applicable to these plants were concerned.[13] The Solicitor General has seen fit to ignore this Statement, perhaps because it so clearly robs of all real significance the Ordnance Manual on which he places such reliance.

As to the Interdepartmental Memorandum of Agreement, the true significance of the War Department's acquiescence in this agreement cannot be understood without a knowledge of many circumstances not disclosed in the brief of the Government. In that connection, the attention of this court is called to the letter dated June 14, 1944, from the Judge Advocate General of the Army to the Attorney General and to the letter of March 26, 1946, from the Secretary of War to the Attorney General, both

[12] See Para. 96(b), War Department Procurement Regulations, 10 C. F. R. 1944 Supp. §8.96(b).

[13] The text of this Statement is considered to be of such importance to the issues presented in this case that it has been reproduced in full as Appendix B to this brief. It was referred to in Ordnance Procurement Instructions printed in the Record (R. 163). According to an article published in the New York Times on July 19, 1942, Messrs. Joseph A. Padway and Henry Kaiser, counsel for the American Federation of Labor, Mr. Lee Pressman, counsel for the CIO, and Mr. Allan S. Haywood, Organization Director of the CIO, participated in the preparation of this Statement.

of which are printed in Appendix C (see pp. 114-123, infra). Those letters explain why the War Department agreed that the Department of Justice should instruct its United States Attorneys to notify contractors not to defend claims of this character on the ground that their employees were not engaged in the production of goods for commerce. That reason was not because the defense was believed by the War Department to lack merit but because it was feared that it would succeed and thereby raise collateral issues which might prove embarrassing in the prosecution of the war.

As to the merits of other defenses, there have been varying expressions ranging from outright disapproval to qualified approval. As these defenses began to find favor with one court after the other, there has been a progressive relaxation of the restrictions which the Department of Justice placed on private contractors. Because of those restrictions, concessions were made (as in the *Creel* and *Powell* cases, for example) which the Solicitor General now cites as evidence that contractors lacked faith in the merits of the defenses hereinafter to be presented. Thus the Department of Justice, having compelled contractors to abandon these defenses, now attempts to rely on that abandonment to prove that the defenses never amounted to anything. In declining to attempt to lift itself by its own boot straps in this way, the Department of the Army hardly deserves to be charged with inconsistency.

Summary of the Argument

I.

The record in this case adequately presents the issues. The trial judge made comprehensive findings of fact based on extensive affidavits. The legal issues were argued and considered by the Court of Appeals in the light of *Kennedy v. Silas Mason Co.*, 334 U. S. 249 (1948).

II.

The coverage of the Fair Labor Standards Act did not extend to those employed in the production of munitions at the Arkansas Ordnance Plant. That plant was, in effect a Government arsenal. It had been constructed by the Government on Government-owned land, jurisdiction over which had been ceded to the United States by the State of Arkansas. The entire tract had been proclaimed to be a military reservation and was at all times under the command authority of a military officer directly responsible to the Chief of Ordnance. The plant was designed for the loading of ammunition and was operated solely for that purpose. While, by virtue of the special authority conferred on the Secretary of War by the National Defense Act of July 2, 1940, the actual operation of the plant was carried on through the agency of a private contractor, control over every phase of that operation remained at all times in the commanding officer.

The inapplicability to such a unique industrial unit of the usual principles governing relations between private contractors and their employees was recognized by those charged with the administration of the munitions program. The policies established by those administrators took such installations as the Arkansas Ordnance Plant wholly outside of the scope of the competitive economy which it was the purpose of the Fair Labor Standards Act to regulate.

III.

The Walsh-Healey Act alone applied to employees at the Arkansas Ordnance Plant. (1) Congress intended that act alone to apply to work done in producing munitions for the Government. Moreover the provisions of the two Acts are wholly incongruous. (2) Con-

gress deliberately refrained from extending the provisions of the Fair Labor Standards Act to the novel form of economic activity authorized by the National Defense Act. By contrast, a proviso added to that legislation in conference extended the coverage of the Walsh-Healey Act to contracts made by negotiation. Doubtless, Congress had in mind those inconsistencies in the provisions of the Walsh-Healey Act and of the Fair Labor Standards Act which led the Court of Appeals to the conclusion that the two acts were mutually exclusive. Those inconsistencies have particular significance in connection with activities of the kind authorized by the National Defense Act and support the conclusion that Congress by implication excluded such activities from the scope of the Fair Labor Standards Act.

IV.

The manufacture in a Government-owned arsenal from Government-owned materials of munitions of war is not the production of goods for commerce within the meaning of the Fair Labor Standards Act, even though the company managing the plant is a private concern acting as such under a contract with the Government. (1) The shipment by the Government of Government-owned munitions of war to military installations is not commerce within the meaning of the Fair Labor Standards Act. It is more in the nature of an administrative act of the Government which lacks the essential characteristics of those commercial activities which it was the purpose of Congress to regulate. The prosecution of a war is not commerce. (2) The ammunition thus produced is not "goods" in the sense that that word is used in the Act. Section 3(i) of the Act excepts from the definition of "goods" "goods after their delivery into the actual physical possession of the ultimate consumer thereof other than a pro-

ducer, manufacturer or processor". The Government was the "ultimate consumer" of the ammunition produced at the Arkansas Ordnance Plant. The materials and components from which that ammunition was made were at all times in the actual physical possession of the Government; the completed ammunition was inspected by the Government, accepted or rejected by the Government, and stored or shipped by the Government to military installations. Thus petitioners were working on the goods after they came into the actual physical possession of the ultimate consumer. Furthermore, the provisions of Section 3(i) were designed to exclude local enterprise from the ambit of the Act and were expressly intended to apply to the manufacturer of goods delivered to ultimate consumers prior to crossing state lines. Since the ultimate consumer was in actual physical possession of these goods prior to their delivery across state lines, it follows that petitioners are not covered by the Act.

V.

Paragraphs (d) and (e) of Section 3 of the Fair Labor Standards Act exclude employees of the United States from the coverage of the Act. This exclusion was intended to exempt all those employees whose compensation was controlled by the Government. Such employees were not among those for whose benefit the Act was designed, as they were not subject to the pressure of unfair competitive conditions. By a variety of methods, the Government could and did protect these employees against exploitation. The fact that arrangements for their employment were made by a private contractor managing a plant is not controlling in view of the extent of Government supervision over their activities.

VI.

The Portal-to-Portal Act of 1947 affords a complete defense to petitioners' claim. The complaint shows that the work for which recovery was sought consisted of activities before and after scheduled working time. The affidavits supporting the motion for summary judgment denied the existence of any contract or custom that such activities should be compensated. Furthermore, the affidavits establish the good faith reliance by respondent on rulings of officials of the Ordnance Department. The petitioners have stipulated that there is no dispute as to these facts.

I.

THE RECORD ADEQUATELY PRESENTS THE ISSUES

Kennedy v. Silas Mason Co., 334 U. S. 249 (1948) came to this court under peculiar circumstances. The respondent in that case had filed a motion for summary judgment supported by a single affidavit only two printed pages in length. Aside from the motion and its supporting affidavit, the record consisted merely of the contract between the respondent and the government and the opinion of the lower courts. The record was wholly barren of any findings of fact. Moreover, in the Court of Appeals and again in this court, issues were argued which had not been considered below. For all of these reasons, this court declined on that record to pass on the questions sought to be presented.

The present case is wholly different. It is true that the grounds stated in support of respondent's motion for summary judgment in the trial court made no reference to the National Defense Act of July 2, 1940, or to the Walsh-Healey Act, nor does it appear that any argument was

made to the trial court based on the provisions of those acts. However, the motion for summary judgment was supported by voluminous and informative affidavits, and these were supplemented by respondent's answers to requests for admission of fact and to interrogatories propounded to it by petitioners. The trial judge made comprehensive findings of fact which cover every aspect of the case and afford a solid basis upon which to dispose of all of the issues presented by this appeal (R. 60-64). Moreover, all of those issues were fully presented to and considered by the Court of Appeals when the case was reargued.

Thus this court now has the benefit of the views of all seven judges of the Eighth Circuit on the relationship of the Walsh-Healey Public Contracts Act of 1936, the Fair Labor Standards Act of 1938, and the National Defense Act of July 2, 1940. Accordingly, it is submitted that the issues upon which this court declined to pass in the *Silas Mason Company* case are now ripe for decision and that the record in the present appeal presents an appropriate opportunity for this court to dispose of them.

II.

The National Defense Act Set Up a Wholly New System of War Production Which Was Completely Outside the Scope of the Fair Labor Standards Act

Chief Justice Vinson has recently reminded the Bar that this court does not "make a fortress of the dictionary" and has therefore consistently refused "to pervert the process of interpretation by mechanically applying definitions in unintended contexts". *Farmers Irrigation Co. v. McComb*, 337 U.S. 755 (decided June 27, 1949). It is hard to conceive of a case to which these words have clearer application than that presented by this appeal.

Petitioners invoke the provisions of a statute passed in 1938 to make effective "the Congressional conception of public policy that interstate commerce should not be made the instrument of competition in the distribution of goods produced under substandard labor conditions, which competition is injurious to the commerce and to the States from and to which the commerce flows".[14] They seek to apply those provisions to the production, in what is, in effect, a government arsenal, of munitions of war intended for the use of the armed services. It is scarcely conceivable that this is a "meaning that at the particular time and place and in the setting of a particular statute might reasonably have acceptance by men of common understanding".[15]

Viewed as part of the whole texture of laws and of the economy to which they apply, the limits of the area which the Fair Labor Standards Act was intended to cover become clear. The general purpose of federal wage and hour legislation is readily apparent from the legislation introduced and enacted as a result of the depression of the 1930's. The hearings before Congressional committees held in connection with the proposed 30-hour week bills,[16] The National Industry Recovery Act,[17] the Ellenbogen Bill for the regulation of the textile industry,[18] the First Guffey Coal Act,[19] and the Fair Labor Standards Act itself are replete with statements as to the unfair competitive ad-

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[14] Mr. Justice STONE, speaking for this court in *United States v. Darby*, 312 U. S. 100 (1941) at page 115.

[15] Mr. Justice CARDOZO, speaking for this court in *Hale v. State Board*, 302 U. S. 95 (1937) at page 101.

[16] H. R. 14518, 72d Cong., 2d Sess.; H. R. 4557, 73d Cong., 1st Sess.; H. R. 8492, 73d Cong., 2d Sess.; H. R. 7198, 74th Cong., 1st Sess.

[17] 48 Stat. 195.

[18] H. R. 8072, 11770, 12285, 74th Cong., 2d Sess.

[19] 49 Stat. 991.

vantage accruing in interstate markets to employers with lower labor standards.

The first attempt to solve the problem on a broad scale was the National Industrial Recovery Act. When this act was invalidated, Congress determined that it could require proper labor standards at least from those who would do business with the government. It enacted the Walsh-Healey Public Contracts Act, providing that government contracts be awarded only to persons who would comply with certain minimum standards, including minimum wages and maximum hours.

In May, 1937, the President requested Congress to take further action with respect to labor conditions. He pointed out that unrestrained interstate competition produced serious social consequences and recommended that the channels of interstate commerce be closed to goods produced under conditions which did not meet certain standards. The bills which became the Fair Labor Standards Act were introduced.

The major testimony in the extensive Congressional hearings on the bills proves that the heart of the problem, so far as the national economy was concerned, was that goods produced under substandard conditions moved across state lines in competition with other goods and in this manner the substandard conditions were spread.[30]

The committee reports on the bill which became the Fair Labor Standards Act are to the same effect. For example, the House Committee Report, No. 2182, 75th Cong.,

[30] Joint Hearings Before the Senate Committee on Education and Labor and the House Committee on Labor, 75th Cong., 1st Sess., on S. 2475 and H. R. 7200, pp. 93-95, 111, 127, 134, 140, 160, 175, 183, 187, 193, 200-245, 309-316, 365, 397-398, 402, 403-407, 413-414, 455.

3rd Sess., p. 7, summarizes the facts upon which the legislation rests:

> "Section 2 of the committee amendment contains a statement of the effect which the maintenance of substandard labor conditions exerts on interstate commerce. This finding is abundantly supported by the testimony at the joint hearings held on H. R. 7200 and S. 2475 during the first session of the Seventy-fifth Congress. The hearings indicate (1) that the maintenance of substandard labor conditions in a particular industry by a few employers necessarily lowers the labor standards of the whole industry, and that this lowering of the standards is brought about by reason of the fact that the channels of interstate commerce have been open to goods produced under substandard labor conditions; * * *"

The Senate Committee Report, No. 884, 75th Cong., 1st Sess., pp. 4-5, contains the following statement:

> "This law proposes to accomplish this purpose by closing the channels of interstate commerce to goods produced under conditions which do not meet the rudimentary standards of a civilized democracy. * * * It applies only to the industrial and business activities of the Nation insofar as they utilize the channels of interstate commerce, or seriously and substantially burden or harass such commerce."

The Fair Labor Standards Act itself outlines its objectives as follows:

> "Finding and Declaration of Policy
>
> "Sec. 2 (a) The Congress hereby finds that the existence, in industries engaged in commerce or in the production of goods for commerce, of labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers (1) *causes commerce and the channels and instrumentalities of commerce to be*

used to spread and perpetuate such labor conditions among the workers of the several States; (2) burdens commerce and the free flow of goods in commerce; (3) *constitutes an unfair method of competition in commerce;* (4) leads to labor disputes burdening and obstructing commerce and the free flow of goods in commerce; and (5) *interferes with the orderly and fair marketing of goods in commerce.*

"(b) It is declared to be the policy of this Act through the exercise by Congress of its power to regulate commerce among the several States, to correct and as rapidly as practicable to eliminate the conditions above referred to in such industries without substantially curtailing employment or earning power." (Italics supplied.)

This court has recognized that the intention of Congress was to regulate the production and movement of goods which compete with other goods in a commercial sense. In *United States* v. *Darby*, 312 U. S. 100, the court said (p 122):

"* * * As we have said the evils aimed at by the Act are the spread of substandard labor conditions through the use of the facilities of interstate commerce for competition by the goods so produced with those produced under the prescribed or better labor conditions; * * * The Act is thus directed at the suppression of a method or kind of competition in interstate commerce which it has in effect condemned as 'unfair', as the Clayton Act has condemned other 'unfair methods of competition' made effective through interstate commerce. * * *"

Turn now to the Arkansas Ordnance Plant where petitioners were working when the claims arose upon which the present suit is founded. This was one of about 100 great plants built by the Government on Government land. The plant was designed and used for a single purpose—to produce munitions for use in the war. In ordinary times

such a plant would be managed by military men. But these were not ordinary times. On the contrary, the ammunition requirements which the Ordnance Department was expected to satisfy obviously demanded more managerial competence than all the resources of the Government could possibly furnish.

The following extracts from the speech of Colonel Gerber referred to in footnote 5 above are pertinent:

"In the 1940 world of uncertainty of daily crises, of mounting fears and terrors, what did we do about ammunition? The immediate problem was clear. The total production in the U. S. of smokeless powder and TNT which are basic in the manufacture of ammunition was about 100,000 pounds per day each, which is roughly the quantity sufficient to maintain an army of only 100,000 troops on the field of active combat for a single day. The existing facilities for the loading of new military ammunition consisted of two Government arsenals, one, Frankford Arsenal, for the manufacture of small arms ammunition, and the other, Picatinny Arsenal, for the loading of ammunition other than small arms. * * *

"The capacity of the Government arsenals was not a capacity intended to meet the needs of war. They had been traditionally laboratories for the technological improvement of ammunition, rather than factories for mass production. We had only one such Arsenal for large ammunition. Further, the production that was needed was inconceivable on any basis other than that of actual newly constructed capacity, for the estimated needs were many, many times any capacity that could be hoped for from arsenals. The program for manufacture of ammunition became primarily a program for construction of ammunition plants because there were no facilities in existence which could give the desired production, and there were none which it was practical to adapt to such production, and there were almost no outside sources from which these quantities of ammunition could be obtained. The program called for the immediate construction of plants which could make military explosives and could load shell, bombs and other items with these explosives.

* * *

"In May of 1940 the Ordnance Department was procuring materials of war at a rate of one million dollars per month. In

The only solution was to enlist the services of those private companies which had demonstrated their possession of industrial "know how" in related fields. If the services of these organizations could be obtained to manage these great arsenals of democracy, the job might be done. In 1940 those services could be obtained in only one way, that is to say, by building new arsenals and by hiring those companies to operate them.

May of 1943, we were procuring materials of war at a rate of one and a half billions per month, or 150,000 per cent more than three years previously. In those three years, Ordnance procurement plans had expanded into a 65 billion dollar program, and the Ordnance Department was procuring materials annually which were equal in value to one-half the total national income in 1932. Ammunition procurement has been a substantial part of the Ordnance program, involving the expenditure of approximately two billion, eight hundred million dollars in 1943.

"Prior to 1940, the Ordnance Department was a relatively small branch of an army still handicapped by many of the restrictions and curtailments of the pacifist philosophy of the 20's and 30's. Neither in numbers nor in the all-around ability required, was the existing personnel of the Ordnance Department, or of any other branch of the Government, capable alone of carrying out the tremendous industrial program which was necessary. If the skill for business administration on this gigantic scale existed anywhere, it was possessed by the leaders of industry who had successfully demonstrated their abilities as peace-time administrators and producers.

"It was to these leaders that the Ordnance Department turned for aid in the crisis that was at hand. In 1940, Major Gen. Levin H. Campbell, Jr., who is now Chief of Ordnance, was made Chief of the Facilities and Plant Administration Section, which had the mission of developing the facilities necessary to meet the ammunition program. General Campbell was, and is, a firm believer in the ability of American industry to meet the tremendous problems connected with preparation for war. He felt that the leaders of industry were the logical men to call upon for the practical development of our ammunition program. Accordingly, procedures for the joint management by industry and the Ordnance Department of the ammunition program were

But the operation of a government installation by a private contractor was such a drastic departure from peacetime practices that Congressional action was clearly necessary. Accordingly, the Secretary of War presented to the appropriate committees of Congress the draft of a bill which, with amendments which will be hereafter noticed, became the law commonly known as the National Defense Act of July 2, 1940. The authority conferred on the Secretary of War by that legislation was sufficiently broad to allow the operation of government installations "through the agency of commercial manufacturers", and contracts such as that with respondent speedily followed.

No sooner had these "procedures for the joint management by industry and the Ordnance Department of the ammunition program" been worked out, than the problem of labor relations in these installations came to the fore. After careful study of this question at top level, the "Statement of Labor Policy Governing Government-

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worked out and cost-plus-a-fixed-fee contracts for the operation of ammunition plants were negotiated with various large corporations.

"The names of these contractors are familiar to all of you — duPont, Hercules, Firestone Rubber, United States Rubber, Atlas Powder, Cities Service, and a host of others. People are often surprised to learn that among them are subsidiaries of the Quaker Oats Company, which has done a very good job in loading bombs, and of the Proctor & Gamble Co., which has received the Army-Navy 'E' for its excellence in the loading of ammunition. In addition to these great manufacturing corporations, several large construction engineering companies also went into the business of operating ammunition plants. Chemical Construction Corp., Silas Mason Co., Day & Zimmerman, Todd & Brown, Fraser-Brace, Sanderson & Porter, and Ford, Bacon & Davis are typical examples. These names alone will indicate clearly to you gentlemen the caliber of the business talent which went into the creation of the ammunition industry * * *"

Owned-Privately-Operated Plants" was issued on July 18, 1942, by Under Secretary of War, Robert P. Patterson, and Assistant Secretary of the Navy, Ralph A. Bard, with the approval of William Green, President of the American Federation of Labor, and Philip Murray, Chairman of the Congress of Industrial Organizations.[1] The first two paragraphs of that statement read as follows:

> "Congress has charged the War and Navy Departments with the responsibility for the operation of nearly 100 giant Government-owned munitions plants, the backbone of the Nation's armament program. Under the terms of the Congressional Mandate, the War and Navy Departments had the option of themselves operating the plants or operating them through the agency of selected qualified commercial contractors. In order fully to utilize the labor and management resources of the Nation and to minimize encroachment upon the country's industrial structure, the two Departments chose the latter course. The industrial units thus created are unique.
>
> "All are owned outright by the United States, and all but a very few are located upon military reservations. All are engaged solely in war production—the manufacture and loading of explosives and ammunition, the assembly of bombers and the fabrication of guns and other munitions. In all of the plants the work performed is of a secret or confidential nature, and in many of them it is highly hazardous. All are operated by private contractors under 'Management Service' contracts, any of which may at any time be terminated by the Government if it should decide either to operate the plant itself or to entrust its operation to another contractor. The normal factors which go to make up commercial profit are lacking. The Government had title to the product at all times. It pays the contractor a fixed fee for its services which fee is unaffected by

[1] See footnote 13, supra, p. 19.

wages or other costs, production delays or stoppages. The Government reimburses the contractor for all costs, including wages, and in most instances must approve such costs, including wage scales, in advance. The Army or Navy officer in charge may direct the discharge of any employee if he deems it to be in the public interest. *These plants embody a new and unique tripartite relationship among Government, labor, and management. They are sufficiently different from traditional Government establishments so that existing Government policies regulating labor relations are not entirely suitable.*" (Italics supplied)

There followed an enumeration of policies to be observed in the operation of establishments such as the Arkansas Ordnance Plant. Discrimination in employment because of race, creed, color or sex was prohibited. The recognition of an exclusive bargaining agent was to be deferred until a majority of the estimated total number of employees at the appropriate bargaining unit had been hired. Provision was made for the establishment of grievance procedures with the approval of the representative of the Army or Navy in charge of operations at the plant. Provision was made for disregarding seniority in layoff or reemployment where the factors of ability and aptitude were not equal. Agreements between management and employees were prohibited which in the opinion of the Secretary of War or the Secretary of the Navy would restrict or hamper output. The War and Navy Departments agreed to establish joint policies to govern the exercise of their contractual responsibility to approve or disapprove proposed wage scales at such establishments. Provision was made for War and Navy Department approval of initial wage scales and of any subsequent adjustments therein. Procedures were established for the discharge, at the direc-

tion of the War or Navy Department of persons suspected of subversive activities.

The policies established by this statement were not mere pronouncements. As the findings of fact of the trial court clearly show, those policies were effectively implemented. The control exercised by the War Department over its "Government-owned-privately operated" plants was comprehensive. Indeed, the term "privately-operated" can only be regarded as somewhat Pickwickian. True, the contractor was to recruit the labor force and to supply the staff to supervise it as well as to purchase (with the prior approval of a government representative) a small part of the machinery, equipment, materials and supplies needed to operate the plant. But here the resemblance to ordinary private operation ended.

The contract permitted the War Department to tell the contractor what to produce, in what quantities to produce it, when to produce it, and how to produce it. All of this the War Department did. Moreover, the contract permitted the War Department to tell the contractor where to look for its labor, whom to employ, how much to pay those whom it did employ, what bargaining agents to recognize, and what agreements to make with them. Again the War Department did all this. The War Department paid all the bills and advanced money to the contractor so that it would not be required to use any of its own funds. For its services the contractor received a monthly fee, which bore no relation to the amount of ammunition produced. Small wonder that Judge JOHNSEN in the court below described this as "a novel and revolutionary setup in the field of American industrial life".

See Appendix B, infra, pp. 109-113.

Throughout the period of their operation by private contractors, the peculiar nature of these establishments was recognized.[3] Thus by General Order No. 14, adopted November 24, 1942, as amended August 17, 1943 (8 F. R. 11651), the National War Labor Board delegated to the Secretary of War the power conferred on the Board by Executive Order 9381 (8 F. R. 13083) to carry out the wage policies stated in the order and the directives issued by the Economic Stabilization Director under the order, including especially the authority to pass on wage and salary adjustments of employees whose salaries were not fixed by statute and the power to rule upon all applications for wage and salary adjustments covering civilian employees employed by the War Department, the Army Exchange Service and "Government-owned, privately operated facilities of the War Department". By letter dated December 24, 1942, the Commissioner of Internal Revenue delegated similar authority to the Secretary of War.[4]

Return now to the Fair Labor Standards Act. Would it not truly be a perversion of the process of interpretation to apply the language of that act to the Arkansas Ordnance Plant? The sanctions of that act were designed to give teeth to the Congressional purpose to prevent goods produced under substandard conditions from using the channels of commerce to compete with other goods. Surely, it would be unnecessary to apply such sanctions in a situation where the Government determined the wages to be paid. In *United States v. Wittek*, 337 U. S. 346 (decided June 13,

[3] See opinion of the Comptroller General of the United States in *Todd Shipyards Corporation*, B-85234, June 24, 1949, holding the operator of a navy yard subject to a statute limiting expenditures by the Navy Department.

[4] For the text of this letter, see War Department Procurement Regulations §800.903-3, 10 F. R. 1887 (1945).

1949), this court held that the District of Columbia Emergency Rent Act of December 2, 1941, had no application to houses constructed by the Navy Department under the authority of Section 201 of the Second Supplemental National Defense Appropriation Act of 1941. These houses were being operated and managed by the National Capital Housing Authority, a governmental agency originally created under another name by Executive Order No. 6868. The Court of Appeals for the District of Columbia Circuit had held that this agency was a "landlord" as that term was defined in the Emergency Rent Act. This court, speaking through Mr. Justice BURTON, said 337 U. S., at p. 355:

> "The issue before us does not turn upon what particular agency is operating the Bellevue Houses or the other Government-owned housing of the United States. The issue is whether the United States, *through whatever agency it operates*, is to be controlled in its rental policies by the District Administrator of Rent Control." (Italics supplied).

After pointing out that the defense housing involved in that case could hardly be distinguished from certain government-owned low-rent housing projects also operated by the National Capital Housing Authority, Mr. Justice BURTON said, 337 U. S., at p. 360:

> "We find no evidence that Congress believed that the managers of any of its housing projects in the District would be 'tempted * * * to demand exorbitant rentals' or engage in the rent-gouging practices * * * against which the new Act was directed. It seems obvious that the need for District rent control was not in the operation of Government-owned housing, where the Federal Government already had complete control over the rentals, but was in the operation of privately owned housing, where neither the Federal nor District Governments had any control."

The parallel to the present case seems evident. True, in the *Wittek* case the operating agency was itself a governmental body, while in the present case the respondent is a private corporation, but, as in that case, so here, "the issue does not turn upon what particular agency is operating." As in that case, so here, the need of regulation of wage rates was not in the operation of government-owned munition plants where the Federal Government already had complete control over the wages but was in the operation of privately-owned industries whence substandard conditions spread through the operation of competitive forces.

We submit that the words of the Fair Labor Standards Act were chosen because of their application to the conditions which Congress was seeking to regulate. Just as the framers of the Georgia statute exempting the Atlantic Coast Line "from taxation" were not thinking of income taxes to be imposed a century later (*Atlantic Coast Line v. Phillips*, 332 U. S. 168 (1947)) so the framers of the Fair Labor Standards Act, in choosing the words which determined the ambit of that act, never contemplated the "new and unique tripartite relationship among government, labor and management" which first came into being under the National Defense Act of July 2, 1940. The conclusion, we submit, must be that the Arkansas Ordnance Plant and other government-owned privately-operated installations like it are completely outside the scope of the Fair Labor Standards Act.

This conclusion is strengthened by a study of the sanctions which Congress provided for the enforcement of the Act. The incongruities involved in applying those sanctions to the Arkansas Ordnance Plant are obvious. Suppose, for example, that the petitioners are upheld in their contention that they have done overtime work for which

they have not been paid as the act requires. Did Congress really intend that the transportation officer at the Arkansas Ordnance Plant who shipped detonators to the Hampton Roads port of embarkation should be subject to fine and imprisonment? Yet Section 15 of the Act makes it unlawful for "any person" to ship any goods in the production of which any employee was employed in violation of Section 7 of the act, and Section 16 subjects any person who wilfully violates any of the provisions of Section 15 to fine or imprisonment or both. Suppose again that petitioners are correct in their contention that they were not paid as the act required. Was the District Court of the United States for the Eastern District of Arkansas authorized to enjoin the commanding officer at the Arkansas Ordnance Plant from shipping munitions to other military installations? Yet does not Section 17 of the Act confer jurisdiction upon that court to restrain violations of Section 15? Moreover, as Judge JOHNSEN said below (App. R. p. 32):

> "if Congress had intended the employees of the approximately 100 government-owned munitions plants, that were established, to have rights beyond those granted by the National Defense Acts or the Walsh-Healey Act, and to be able generally to recover double damages and attorneys' fees, it hardly seems reasonable to suppose that it would have left the situation so that those working in some plant, which might by chance be making guns, ammunition, or other supplies entirely for use at some training camp or on some rifle or artillery range, existing within the same state where the plant was located, would be precluded from such benefits on the basis of a commerce test, when it had the power, and there would seem to be no reason not to have treated them equally with the employees of other such munitions plants."

Petitioners point to the fact that Section 3(b) of the Act defines "commerce" in broad terms. They say that the

word, as used in the Constitution, has been held to include the movement of goods or persons across state lines even though no commercial transaction or purpose is involved. But this, it is submitted, is just the kind of mechanical application of definitions to unintended contexts which Chief Justice VINSON had in mind in the remarks previously quoted from his opinion in *Farmers Irrigation Co. v. McComb*, 337 U. S. 755 (1949). It assumes that the word "commerce", as used in this act, must have the same meaning as the same word when used in the Constitution of the United States. It overlooks the fact that "In the Fair Labor Standards Act, Congress did not intend that the regulation of hours and wages should extend to the furthest reaches of federal authority".[25]

Petitioners then seek to rest upon what they claim to have been the administrative construction of the Fair Labor Standards Act. In this connection, they refer to certain correspondence passing between the War Department and other branches of the government, subsequent to the passage of the National Defense Act of July 2, 1940. But it is submitted that this correspondence, when properly understood, does not establish an administrative construction sufficiently definite to carry much weight. Of course, all employees of government-owned contractor-operated plants were paid overtime during the war unless they were in the salaried class, in which case their compensation took account of overtime work. The labor market was such as to to require such payments, quite apart from any statutory provisions. This is made clear by respondent's answer to one of petitioners' requests for admission of fact where it is said:

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[25] Mr. Justice REED in *McLeod v. Threlkeld*, 319 U. S. 491 (1943), at p. 493.

"As a practical matter, the Ordnance Department instructed and approved the payment of all hourly-paid employees at one and one-half or two times their regular hourly rate for all hours in excess of forty worked during any one workweek, thereby eliminating as to them any question of coverage under the Act."

Some contractors, however, became fearful lest the General Accounting Office might seek to disallow vouchers for overtime where no statute required their payment, and to quiet their fears, the Secretary of War sought a ruling of the Comptroller General. The purpose of the letter to the Comptroller General was to obtain a ruling that overtime payments made by contractors to certain classes of employees not covered by the Walsh-Healey Act should not be disallowed by the General Accounting Office. Not unnaturally, the Secretary of War stressed the arguments in favor of the application of the Fair Labor Standards Act. Nevertheless, a reading of the entire letter makes it clear that the Secretary was careful not to commit the War Department to any final view on this question (see Decision B-2864, Sept. 28, 1942, 22 Dec. Comp. Gen. 227). The ruling of the Comptroller General was similarly guarded and went no further than to say that "if it be administratively determined that the interests of the Government will be best served by conceding that the guards here involved are entitled to overtime pay under the Fair Labor Standards Act, this office will not be required to take issue with that view". This was sufficient to satisfy the contractors, and the problem was laid at rest for the time being.

When at a later date claims for overtime were advanced (on theories then novel) by employees at government-owned-contractor-operated establishments, the War De-

(S. R. 128). Compare in this connection the provision of War Department Procurement Regulations, §800.977, 10 F. R. 1883 (1945).

partment, with full concurrence of the Navy Department, at first urged that these claims be resisted. However, because of the desire not to raise collateral issues which might at that time have proved embarrassing, the armed services acquiesced in the decision of the Department of Justice not to permit any defense to these claims to be rested on the ground that they were not engaged in the production of goods for commerce within the meaning of the Fair Labor Standards Act. The correspondence between the War Department and the Attorney General makes it entirely clear that there was no concession on the part of the War Department that the Wage and Hour Administrator was correct in his view that the statute did apply to such installations as the Arkansas Ordnance Plant.[27]

Finally, petitioners point to certain recitals in the Portal-to-Portal Act of 1947 and assert that these show that Congress recognized the applicability of the Fair Labor Standards Act to cost-plus-a-fixed-fee-contracts with the government for production of munitions. In the same connection they refer to the reports of legislative committees explaining the provisions of the Portal-to-Portal Act. The answer to these contentions is clear. The debates on the Portal-to-Portal Act demonstrate that Congress was fully aware of the fact that the application of the Fair Labor Standards Act to government-owned-privately-operated facilities was doubtful.[28] Furthermore, the question in

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[27] See Appendix C, infra, pp. 114-123.

[28] During the course of the debates on H. R. 2157, which became the Portal-to-Portal Act, Senator Donnell, one of the authors of the Act, made the following statement on the floor of the Senate (Vol. 93, Cong. Rec. 80th Cong., 1st Sess., p. 2364.

"Mr. President, those two acts should be included. In the first place, it is true, of course, that few suits, if any, have been filed hitherto under the Bacon-Davis Act or the Walsh-Healey Act

this case is not as to the application of the Fair Labor Standards Act to cost-plus-a-fixed-fee-contracts as such. The question is as to its application to government-owned-privately-operated establishments such as the Arkansas Ordnance Works, and the fact that the contractor in such cases was operating under a cost-plus-a-fixed-fee-contract is only one of many factors which must be considered.

By the same token, it serves little purpose to refer, as do petitioners, to abortive legislation, the effect of which would have been to suspend generally all wage and hour legislation in its application to war production. Nor can important significance be attached to the testimony given by officials of the War, Navy and Labor Departments and of the War Production Board in opposition to such legislation. Obviously, there were many war production con-

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The reason is clear. It is that under those acts all a man can recover is the amount of wages to which he is entitled. Under those acts no one is entitled to recover liquidated damages equal to the amount of wages to which he was entitled. However, Mr. President, two facts should be noted. In the first place, great difficulties may develop for employers in the future, under the Fair Labor Standards Act, because in the case of war contracts, there is great doubt whether suits, even though nominal, against employers are in fact against the Government, and obviously under the Fair Labor Standards Act a suit cannot, by the express provisions of that act, be maintained against the Government.

"Furthermore, it may well be held that suits may not be filed and successfully maintained by employees who were working on war contracts, because interstate commerce might not be involved in such suits. There is now in existence a subcommittee of this body which has been looking into the fact that at one time the Attorney General directed that these two defenses—namely, the absence of the interstate commerce element and the fact that the Government is the real party in interest—not be made."

See also in this connection the text of Senate Resolution No. 73, introduced on July 27, 1947, and referred to the Judiciary Committee.

tracts to which the Government was not a party, and blanket legislation such as was proposed in the bills in question might have had a disrupting effect on war production in situations where the Government was not in a position to control the wages paid.

III.

The Walsh-Healey Act Applied to Employees of the Arkansas Ordnance Plant to the Exclusion of the Fair Labor Standards Act

(a) The Fair Labor Standards Act Was Never Intended to Cover Employees Working Under Government Contracts

All seven judges of the Court of Appeals concurred in the conclusion that the Walsh-Healey Act alone applied to the employees of the Arkansas Ordnance Plant. Six judges concurred in an opinion delivered by Judge Collet, who, after referring generally to the provisions of the Fair Labor Standards Act and the Walsh-Healey Act, stated the question to be decided in the following terms:

> "Which of these two Acts did Congress intend should apply to a cost-plus-a-fixed-fee contractor manufacturing munitions of war exclusively for the United States under contract with the United States?" (App. R. 19).

After analysis of the provisions of both acts, Judge Collet stated that the Court was of the opinion "that the two Acts are sufficiently divergent that both may not apply at one and the same time, that the Walsh-Healey Act was intended by Congress to apply to the employees of manufacturers engaged in producing munitions of war for the United States, and that under the Walsh-Healey Act liquidated damages and attorney fees may not be recovered by the employee" (App. R. 22).

Judge JOHNSEN filed a separate concurring opinion in which he was joined by three of his brethren. He stated that the National Defense Act of July 2, 1940, might well be construed to confer on the Secretary of War plenary powers to fix wage scales and overtime rates and rights for those employed in the "hybrid relationship" involved in the munition plants constructed and operated under the emergency authority of that act, without regard to the provisions of either the Fair Labor Standards Act or the Walsh-Healey Act. However, he found it unnecessary to decide this question because the War Department, in its contract with the operators of the plant, had, as it was clearly authorized to do, specifically made the provisions of the Walsh-Healey Act applicable to the wages and overtime rights of those employed at the plant. After analyzing the provisions of the Walsh-Healey Act, he reached the conclusion that they were essentially incongruous with the provisions of the Fair Labor Standards Act (App. R 24-32).

To repeat here the arguments which are made in those opinions would be a work of supererogation. They seem to us to demonstrate the complete incompatibility of the two statutes. This is particularly true of Judge JOHNSEN's concurring opinion which develops in a striking way the contradictory provisions of the two Acts in so far as they relate to overtime work. An additional point in support of Judge JOHNSEN's argument might have been developed from conflicting provisions of the two Acts with respect to enforcement. Under the Walsh-Healey Act, the Labor Department, in appropriate cases to adjust the differences between contractors and their employees, arrives at mutually agreeable settlements involving no payment of liquidated damages. However, under the provisions of the Fair Labor Standards Act, prior to the passage of the Portal-to-Portal Act, any such procedure was futile. *Brooklyn Sav-*

ings Bank v. O'Neill, 324 U. S. 697 (1945); *Schulte, Inc. v. Gangi*, 328 U. S. 108 (1946). Moreover, even where no compromise is involved, the Walsh-Healey Act imposes on the Labor Department the duty of withholding amounts due under minimum wage determinations, but no power is given to withhold liquidated damages. Consideration might also be given here to the absurdity of applying the fine and imprisonment and injunctive relief provisions of the Fair Labor Standards Act heretofore mentioned, (supra, pp. 38-39).

The fundamental problem is to determine the *intent* of of Congress in enacting the Fair Labor Standards Act. In that connection a brief comparison of the two acts and an analysis of the findings and declaration of policy contained in the Fair Labor Standards Act may be helpful. We have already referred to the general background of the legislation which was enacted following the depression of the early 1930's (supra, pp. 26-29). The Walsh-Healey Act was the first of these statutes. It applies to contracts with the Government for the manufacturing or furnishing of materials, supplies, articles and equipment in any amount exceeding $10,000, and requires all of such contracts to contain certain stipulations. Among these stipulations is the requirement that all persons employed by the contractor in the manufacture of the goods used in the performance of the contract must be paid the minimum wages as determined by the Secretary of Labor to be those prevailing locally for persons in the particular industry, and that no persons may be employed by the contractor in the performance of the contract in excess of eight hours in any one day or in excess of forty hours in any one week, unless all hours worked in excess of eight per day or forty per week are compensated at time and one-half the basic rate, except those employed under annual collective bargaining

contracts. The Walsh-Healey Act does not give an employee as liquidated damages an amount of unearned overtime equal to the amount of earned overtime withheld, but any unpaid overtime could be collected at Government expense and without cost to the employee.

Thus prior to the passage of the Fair Labor Standards Act there was in full force and effect a law giving to employees of Government contractors not only all of the benefits which the petitioners now claim under the Fair Labor Standards Act, except the right to receive in addition to the alleged unpaid overtime compensation an equal amount as liquidated damages, but certain additional benefits.

With the passage of the Walsh-Healey Act, following as it did the Davis-Bacon Act,[46] the "Kickback" or Copeland Act,[47] the Eight-Hour Law,[48] and the Heard or Miller Act,[49] Congress had established a definite pattern of laws governing wages and hours and related matters, in the field of Government contracts. These laws evidence the Congressional policy that employees in that field should receive overtime at the rate of time and one-half after forty hours, but without any provision for liquidated damages for nonpayment. Coverage of employees under these laws was not limited to employees engaged in commerce or in the production of goods for commerce, since none of these laws was enacted pursuant to the power granted by the Commerce Clause of the Constitution.

Thereafter, as we have seen (supra, p. 27), the Administration proposed the legislation which ultimately be-

[46] 46 Stat. 1494, 49 Stat. 1011, 40 U. S. C. 276a-276a-7.
[47] 48 Stat. 948, 54 Stat. 1236, 40 U. S. C. §276c.
[48] 37 Stat. 137, 40 U. S. C. 324, 325.
[49] 49 Stat. 793, 40 U. S. C. 270a-270d.

came the Fair Labor Standards Act of 1938. The testimony in the extensive Congressional hearings on that legislation makes it clear that the heart of the problem, so far as the national economy was concerned, was that goods produced under substandard conditions moved in interstate commerce in competition with other goods, and in this manner the substandard conditions tended to spread throughout the country.[33] This thought was carried forward into the text of the Fair Labor Standards Act itself, which contains a specific finding and declaration of policy not only identifying the evil sought to be cured and specifying the proposed remedy, but also indicating the belief of Congress as to the source of the evil and the source of the constitutional authority for the particular remedy to be used.

It will be noted that Congress in Section 2(a) of the Act found the existence of certain evils which it sought to correct, i.e., labor conditions deemed detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers. These conditions were not found or required to exist in connection with the performance by the Government of its administrative function or in the field of Government contracts generally, but only "in industries engaged in commerce, or in the production of goods for commerce". The definition of the term "industry" in Section 3(h) of the Act does not include the United States in the performance of its administrative functions, or in the exercise of its war powers, but limits the term to "trade, business, industry, or branch thereof, or group of industries". The findings of Congress as to the existence in certain industries of detrimental labor conditions which burden commerce, constitute an unfair method of competition in commerce and in-

[33] See footnote 20, supra, p. 27.

terfere with the orderly and fair marketing of goods in commerce, are manifestly not directed at nor were they applicable to the transportation by the Government of Government-owned munitions for the use of the Government's armed forces in time of war.

It is obvious that the considerations for the enactment of the Fair Labor Standards Act do not apply to the Government either as an employer or as the owner of a munitions plant operated for the Government under a cost-plus-a-fixed-fee contract such as the one pursuant to which the Arkansas Ordnance Plant was operated, and this cannot be ignored.

Finally, Congress, in Section 2(b), specifically stated that the Act was being enacted "through the exercise by Congress of its power to regulate commerce among the several States."—the exact language of the Commerce Clause, Article 1 of Section 8 of the Constitution. Thus Congress declared that it sought to accomplish the purposes of the Act by the exercise of a specific power delegated to Congress by the Constitution.

The commerce which Congress has the power to delegate is commerce "among the several states". It has been repeatedly defined by the Supreme Court as activities carried on by and among the citizens of the several states, not those of the Government itself. *Gloucester Ferry Co. v. Pennsylvania*, 114 U. S. 196, 203 (1885); *Addyston Pipe & Steel Company v. United States*, 175 U. S. 211, 241 (1899); *Carter v. Carter Coal Co.*, 298 U. S. 238, 298 (1936). The activities of the Government itself, as distinguished from the activities of the citizens, both natural and corporate, of the several States, are not commerce in the constitutional sense, subject to regulation under the Commerce Clause. When Congress based the Fair Labor Standards Act upon

the power delegated to it to regulate commerce, it defined and limited the intent, purpose and scope of the Act as being applicable to those activities which come within such delegated powers, i.e., to commerce conducted by the people of the several states and not to the administrative or war time activities of the Government itself.

Having in mind the background and history of the Fair Labor Standards Act, the findings and declaration of policy expressed in the Act, and the fact that there was then in full force and effect, as a part of the system of Government Contracts Laws protecting employees of Government contractors, the Walsh-Healey Act, which gave to employees of Government contractors all of the benefits which the petitioners now claim under the Fair Labor Standards Act, except the right to receive in addition to the alleged unpaid overtime compensation "an equal amount as liquidated damages," can it be truly said that the failure to provide for such additional "windfall" was one of the evils which Congress sought to cure by the enactment of the Fair Labor Standards Act? Is it reasonable to assume that Congress intended by the Fair Labor Standards Act to provide that employees on Government contracts should receive, at Government expense, not merely time and one-half overtime, but an additional equal amount "as liquidated damages", when, as in the present case, the Government had, in the first instance, approved the wage scales and payment of wages made to these petitioners? It would appear that since Congress had, by the Walsh-Healey Act, already made provision for workmen employed by contractors dealing with the Government, it was the purpose of Congress in enacting the Fair Labor Standards Act to extend the benefits already enjoyed by workers on Government contracts over the larger field of workers in private industry whose employers were not engaged as Govern-

ment contractors. This Congress expressly sought to do pursuant to the power delegated to it under the Commerce Clause of the Constitution, and inserted the double damage provision as an aid to enforcement and as a species of compulsion against private industry. Surely Congress did not need to provide further penalties against the Government over and beyond those contained in the Walsh-Healey Act. While Congress may have had, in the field of private industry, unregulated by the provision of the Walsh-Healey Act, a reason for providing for liquidated damages without reference in any respect to actual damages, as a means of compulsion to secure observance of the law, there was and is no need of any such liquidated damages in the field of Government contracts, particularly cost-plus contracts for the operation of Government-owned plants, where every action of the contractor is controlled by the Government, checked and supervised by Government auditors and inspectors, and where the Government pays the bill.

We submit then that the Fair Labor Standards Act must be read in the light of (a) Congress's finding as to the evil which it sought to remedy, (b) the policy which it sought to enforce, (c) the power which it sought to exercise, (d) the means of accomplishment of the desired end, and (e) the existence on the statute book of the Walsh-Healey Act, already covering with respect to employees on Government contracts the same field covered by the Fair Labor Standards Act. So read, it will appear that Congress did not intend to have any general language used in the Act applied against the Government itself, and in this connection it is, of course, the well established rule of law that general legislation does not include the Government unless the legislation shows that it expressly or by necessary implications was intended

that the Government be included. *United States v. United Mines Workers of America*, 330 U. S. 258, 272-275 (1948).

As throwing further light upon the intent of Congress in enacting the Fair Labor Standards Act, we direct the court's attention to the provisions of the First War Powers Act wherein Congress empowered the President to authorize any department or agency of the Government to enter into contracts and into amendments or modifications of contracts "without regard to the provisions of law relating to the * * *" performance, amendment, or modification of contracts whenever he deemed such action would facilitate the prosecution of the war. By this Act Congress specifically authorized the President to suspend the provisions of all laws relating to the performance of contracts with the Government, with the single exception of the laws relating to the limitation of profits.[*]

Pursuant to the authority of the First War Powers Act, the President promugated on December 27, 1941, Executive Order No. 9001, (3 C. F. R. Cum. Supp. p. 1054) in which he authorized the War Department "to enter into contracts and into amendments or modifications of contracts * * * without regard to the provisions of law relating to the * * * performance * * * of contracts", but added an express limitation containing, in effect, the Walsh-Healey Act, the Davis-Bacon Act, the Copeland Act, and the Eight Hour Law, i.e., all other Acts touching on the subject of Government contracts. But the Fair Labor Standards Act was not mentioned. It seems clear that the reason for its omission was because that Act was not deemed to apply to contracts of the nature authorized by

[*] Act of December 18, 1941, c. 593, 55 Stat. 838, 50 App. U. S. C. 601-622.

the First War Powers Act or Executive Order 9001. And the specific definition of contracts set forth in Executive Order 9001 includes contracts of the kind pursuant to which the Arkansas Ordnance Plant was operated.

In an effort to overcome the force of the arguments advanced by the Court of Appeals, petitioners and the Government resort to arguments which, upon analysis, appear to be woefully thin. Thus they contend that Section 18 of the Fair Labor Standards Act gives "affirmative and conclusive evidence" that employees subject to the Walsh-Healey Act are not excluded from the Fair Labor Standards Act because that section provides that nothing in the Fair Labor Standards Act shall be held to excuse non-compliance with any other Federal or State statute. The failacy of this contention becomes transparent when it is considered that the mandate of Section 18 can be completely obeyed by holding that the Walsh-Healey Act excludes the operation of the Fair Labor Standards Act.

The decision in *Walling v. Patton-Tully Transp. Co.*, 134 F. (2d) 945, 948 (6 Cir. 1943) is then invoked. The court in that case announced that it saw no incompatibility between the Eight Hour Law and the Fair Labor Standards Act. The correctness of that decision may be conceded without in any way weakening the force of the argument made by the Court of Appeals in the present case, for the provisions which make the Walsh-Healey Act incongruous with the Fair Labor Standards Act are plainly absent from the Eight Hour Law.

Petitioners and the Government then resort to the fact that Congress has voted appropriations for the enforcement activities of the Administrator with knowledge of the fact that in his annual reports and in testimony given before Congressional Committees he stated that he was

administering the two acts as if they were overlapping. The startling assertion is made that this constitutes "confirmation and ratification" by Congress of the Administrator's interpretation. Without stopping to analyze the decisions of this court, which are cited in support of this remarkable contention, it is sufficient to say that none of them goes to any such length. It would certainly be strange if, in addition to its manifold other responsibilities, Congress were required to take affirmative action to correct every erroneous assumption which may be found in the countless administrative reports and the vast outpouring of testimony of administrative officials which come to the attention of its various committees. Moreover, the judicial function of interpreting legislation has hardly been degraded to the level where courts must follow the opinions of administrators no matter how erroneous unless Congress acts affirmatively to correct them. Even if the doctrine invoked by petitioners and the Government could be supported in some cases, it would be particularly unrealistic to apply it in a case such as the present where, at the time when the Administrator made his reports and gave his testimony, the opinions which he expressed on this particular subject appeared to be entirely academic.

Finally, petitioners point to the amendment to the Walsh-Healey Act which was adopted in 1942. (Act of May 13, 1942, c. 306, 56 Stat. 277, amending 41 U. S. C. 35.) That amendment provided that the provisions of the Walsh-Healey Act should have no application to those employers who had entered into agreements "pursuant to the provisions of paragraph 1 or 2 of subsection (b) of Section 7 of an Act entitled 'Fair Labor Standards Act of 1938'". This, it is argued, proves that the two acts overlap. But it is submitted that it proves nothing of the sort. Obviously, Congress adopted a shorthand method

of describing those employers who had made a certain type of agreement with their employees. Such agreements might well have been made by employers having both governmental and non-governmental work in their plants. Undoubtedly, both Acts would apply to that employer in such a case, unless express provision to the contrary was made.

It may be conceded that the decision of the Court of Appeals rests on a novel ground. It must also be admitted that Government officials generally have always proceeded on the assumption that the two acts overlap, nor has any contractor previously found it worthwhile to raise the issue. But we respectfully submit that a more persuasive refutation than the mere fact of novelty is necessary to meet an argument as powerful as that made in the opinions below.

(b) The Act of July 2, 1940, Excluded the Operation of the Fair Labor Standards Act

Judge Learned Hand in *United States v. Aluminum Co. of America*, 148 F. (2d) 416 (1945), at p. 429, pointed out that "in *United States v. Hutcheson*, 312 U. S. 219 * * * a later statute in pari materia was considered to throw a cross-light upon the Anti-trust Acts, illuminating enough even to override an earlier ruling of the court". Bearing in mind its legislative history, the light which the National Defense Act of July 2, 1940, casts upon the Fair Labor Standards Act of 1938 is considerably more direct than that which the Norris-LaGuardia Act threw upon the Anti-trust Acts; for it appears that in considering the National Defense Act of July 2, 1940, Congress gave careful thought to the regulations which should govern labor conditions in establishments such as the Arkansas Ordnance plant

The Act as it passed the House lacked any provision with regard to labor standards.[35] A companion bill, also passed by the House at the instance of the Navy Department, contained a provision relating to overtime payments which was intended to exclude all work done by contractors with the Navy Department from the operation of the Walsh-Healey Act. Strong protest against this provision was made by representatives of labor organizations and by the Labor Department. Some of the protestants took the view that the application of the Fair Labor Standards Act was also involved.[36]

During the course of the hearings it developed that a serious doubt existed whether the Walsh-Healey Act would, by its terms, have any application to negotiated contracts. As the principal purpose of the bill was to authorize the Secretary of the Navy to negotiate contracts instead of following the customary course of advertisement for bids, the Labor Department and the Navy Department together worked out a proposed amendment which they jointly recommended to the committee.[37] This amendment was adopted, together with a further amendment limiting the overtime provisions of the House Bill to government personnel. In explaining these amendments, the report of the Senate Committee said:

> "In view of the volume and money value of the contracts that may be entered into under the authority to negotiate, the committee considered it desirable to make the provisions of the Walsh-Healey Act applicable to such contracts."[38]

[35] See House of Representatives Report 2261, 76th Cong., 3rd Sess.

[36] See Senate hearing on H. R. 9822, 76th Cong., 3rd Sess., pp. 95, 149, 150.

[37] See hearings cited in preceding footnote, pp. 36-37.

[38] Senate Report 1803, 76th Cong., 3rd Sess. (Committee on Naval Affairs, June 20, 1940) re H. R. 9822, p. 7.

The bill as thus amended was enacted into law and is sometimes known as the National Defense Act of June 28, 1940.[39]

In the meantime, the bill sponsored by the War Department, which, as we have seen, had passed the House with no provision whatsoever relating to overtime payments, came up for consideration on the floor of the Senate. This bill, like the Navy bill, contained broad authority to the Secretary of War to enter into contracts by negotiation rather than by advertisement for bids. Thus it raised the same doubts as to the applicability of the Walsh-Healey Act which had been considered in connection with the Act of June 28, 1940. When the bill came up on the floor, Senator Wagner offered an amendment to deal with this question, in explaining which he said:

> "Unless this amendment is adopted, we would have this anomalous situation: Under a contract entered into with the Government as the result of public bidding, one set of minimum wages, that is, the prevailing wages, would be applied, whereas under another contract entered into as a result of negotiations, a much lower minimum wage would be paid, that is, the flat minimum under the Wage and Hour Act. This situation would present an opportunity for exploitation, since a contractor under a negotiated contract might be paying wages in some instances 25% to 75% below those required under the Walsh-Healey Act. I am sure we would not want to invite any such exploitation. * * * The amendment simply makes it very clear that the minimum wage and other standards under the Walsh-Healey Act shall apply to both types of contracts, because, as I say, there is no difference between them at all except in the matter of advertising."[40]

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[39] C. 440, 54 Stat. 676, 50 (App.) U. S. C. 1151.

[40] Cong. Rec. Vol. 86, Part 7, p. 7924.

On the same day Senator LaFollette offered an amendment from the floor providing for minimum working hours of employees of the War Department, making the statement, inter alia:[11]

> "In the pending bill as it now stands there is no provision covering overtime pay. I have conferred with the chairman of the committee, and he informs me that he is willing to accept the amendment in order that the subject matter may be in conference, and when the final policy is worked out upon the Naval bill it will give the conferees on the Army bill an opportunity to bring the two measures into uniformity so far as the pay of employees who are required to work overtime is concerned."

Conferences between committees of the two Houses of Congress were then held, and conference reports submitted. The only references in the Conference Committee Report to the hours and wage provisions of the bill were as follows:[12]

> "* * * The conference agreement also provides that instead of all contracts under the section being subject to the provisions of the Walsh-Healey Act, no such contract which would otherwise be subject to such act should be exempt from its provisions solely because it was entered into without advertising. * * *"
>
> "Section 4 (b) of the Senate amendment provided that the regular working hours of employees of the War Department and field service should be 8 hours a day and 40 hours per week during the period of any national emergency declared by the President and made provision for overtime payment in excess of 40 hours in any administrative work-week at a rate not less than one and one-half times the regular rate. There was no corresponding provision in the House bill. The conference agreement retains the Senate

[11] Cong. Rec., Vol. 86, Part 7, p. 7925.
[12] Cong. Rec., Vol. 86, Part 8, p. 8901.

provision but modifies it so that it is applicable only to laborers and mechanics employed by the War Department who are engaged in the manufacture or production of military equipment, munitions, or supplies * * *"

After submission of the conference report the following discussion took place in the House:[43]

"Mr. Vinson: Would the gentleman state to the House what disposition was made with reference to time and a half for overtime?

"Mr. May: Yes; I will be glad to do that. Under the Senate Bill the provision required that all employees in the War Department, without regard to civil service or without regard to classification, should be paid for 8 hours' work, and for any overtime they were to be paid time and a half for such overtime. The conference report, as agreed to by the conferees, now provides that that shall apply only to those employees, including mechanics and experts, actually engaged in the production of war materials and supplies in the plants, and it would not apply to thousands of civilian employees who work for the War Department that would be claiming overtime, on a fixed per annum basis or what is known as a fixed salary basis.

"Mr. Vinson: I just want to understand that it does not apply to stenographers and clerks in the War Department either here or out in the field?

"Mr. May: That is right. It is intended to allow wage earners and not salaried persons the benefit of overtime allowances.

"Mr. Vinson: But only to the people who do actual labor?

"Mr. May: Only to the people who do actual labor. It does not apply to the civilian employees of the Corps of Engineers * * *."

[43] Cong. Rec., Vol. 86, Part 8, p. 8902

Thus we see (a) that Congress in enacting the Act of July 2, 1940, specifically understood and intended that contracts entered into pursuant to that act should be subject to the provisions of the Walsh-Healey Act, but made no provision for the application of the Fair Labor Standards Act, and (b) that Congress in fixing overtime policy with respect to government employees was careful to limit it to those classes of employees who, if employed by private contractors, would have come within the scope of the Walsh-Healey Act and to exclude those additional categories which are covered by the Fair Labor Standards Act where that act applies. "That Congress could have extended the coverage of these provisions to these contracts is unquestioned; the fact that it did not do so cannot be disregarded by this Court."[11] The conclusion seems inescapable that Congress intended by the National Defense Act of July 2 1940, to prescribe a complete system of labor relations in Government-owned-privately-operated plants, which system precluded the operation of the Fair Labor Standards Act.

Petitioners and the government argue that the remarks of Senator Wagner quoted above indicate a belief on his part that the Fair Labor Standards Act was applicable to all contracts entered into under the authority of the Act of July 2, 1940. But this, it is submitted, is to place too broad a construction upon his words. Obviously, there are a large number of negotiated contracts to which the Fair Labor Standards Act would ordinarily apply. If it be assumed that the Walsh-Healey Act would have no application, fixed price contracts entered into with private contractors for production of munitions at privately-owned plants where the goods were delivered to the government

[11] Mr. Justice REED in *Muschany v. United States*, 324 U. S. 49 (1945), at p. 58.

after shipment across state lines by the contractor would certainly seem to fall in this category. Senator Wagner's remarks were not directed to the distinction between contracts of that character and management service contracts for the operation of government installations. They were directed toward the distinction between contracts entered into by negotiation and those entered into by award after advertisement.

It will be noticed that Senator Wagner made reference to the incongruity between the standards applicable under the Walsh-Healey Act and those applicable under the Fair Labor Standards Act. As we have seen (supra, pp. 44-46), those incongruities led all seven judges of the Eighth Circuit unanimously to the conclusion that the provisions of the Walsh-Healey Act and the provisions of the Fair Labor Standards Act could not simultaneously apply to the work done by petitioners in the Arkansas Ordnance Plant and similar installations. Certainly, the legislative history of the National Defense Act of July 2, 1940 fully supports the contention that the Walsh-Healey Act was intended by Congress to have exclusive application to the production of munitions of war under contracts negotiated pursuant to the authority of that act. In any event, we are satisfied that the Fair Labor Standards Act is inapplicable to operations such as that in which this respondent was engaged at the Arkansas Ordnance Plant for reasons now to be stated.

IV.

The Petitioners Were Not Engaged in the Production of Goods for Commerce

What has been said in the preceding pages seems to us to demonstrate that petitioners were not engaged in the production of goods for commerce as those words are used in the Fair Labor Standards Act. The trial court so found

for reasons which were stated at length in its opinion (R. 64-79). The conclusion of the trial court that petitioners were not engaged in the production of goods for commerce finds wide support in the decisions of other courts. A reading of the opinions filed in those cases shows that the courts have generally reached the result on one of two principal grounds.

(a) The Shipment by the Government Across State Lines of Government-Owned Munitions of War, Manufactured and Shipped Solely for War Purposes, is not "Commerce" Within the Meaning of the Fair Labor Standards Act

In the brief of the Government, an attempt is made to indicate that the Fifth Circuit stands alone in holding that the shipment by the Government across state lines of Government-owned munitions of war, manufactured and shipped solely for war purposes is not "commerce" within the meaning of the Fair Labor Standards Act (see p. 117 of the Government's Brief). On the contrary, as we shall see, the Court of Appeals of the Second Circuit has stated and applied this principle in a series of cases. The Court of Appeals of the Sixth Circuit has also applied it in a carefully considered opinion. The Court of Appeals of the Eighth Circuit in its opinion below in the *Powell* case has at least by implication indicated its acquiescence in that view.[1] The Court of Appeals of the Ninth Circuit has like-

[1] "Nor are we impressed with the view that Congress intended that when an industry was engaged in producing munitions of war for the United States under a cost-plus-a-fixed-fee contract and failed to pay an employee engaged in such production his proper wages, that the United States should be required to pay him not only his unpaid wages but also an amount equal thereto as liquidated damages, and, in addition, his attorneys' fees, when another method of safeguarding the employees' rights had been provided which does not entail such a penalty against the United States" (App. R. 22).

wise recognized the principle and cited with approval the decisions of the Second and Fifth Circuits, although holding that on the facts then before it, the principle was not applicable. *Joshua Hendy Corp. v. Mills*, 169 F. (2d) 898 (9 Cir. 1948). In fact, in so far as Federal appellate courts are concerned, the only contrary expression is to be found in the case of *Bell v. Porter*, 159 F. (2d) 117 (7 Cir. 1946), cert. denied 330 U. S. 813, where, however the court decided in favor of the contractor on other grounds. Cf. *Deal & Co. v. Leonard*, 210 Ark. 512, 196 S. W. 2d 991 (1946), and *Raymond v. Parrish*, 30 S. E. 2d 669 (Ga. App. 1944) with *Umthun v. Day & Zimmerman*, 235 Iowa 293, 16 N. W. 2d 258 (1944). These citations are believed to include all decisions of appellate courts except *Hartmaier, et al. v. John C. Long, et al.*, Mo. , S. W. 2d , 17 Labor Cas. ¶65,328 (1949) where the court without discussion followed the decisions of the Court of Appeals for the Eighth Circuit in the *Aaron* and *Powell* cases. Many decisions of the lower Federal courts might also be cited. Among the cases accepting the principle stated above are *Ackerman v. Republic Aviation Corp.*, 8 W. H. Cases 518 (E. D. N. Y. 1949); *Anderson v. Federal Cartridge Corp.*, 72 F. Supp. 644 (D. Minn. 1947); *Barksdale v. Ford, Bacon & Davis*, 70 F. Supp. 690 (E. D. Ark. 1947); *Hays v. Hercules Powder Co.*, 13 Labor Cas., ¶64,123 (W. D. Mo. 1947); *Kruger v. Los Angeles Shipbuilding & Drydock Corp.*, 12 Labor Cas., ¶63,660 (S. D. Cal. 1947); *Lynch v. Embry-Riddle Co.*, 63 F. Supp. 992 (S. D. Fla. 1945); *Ritch v. Puget Sound Bridge & Dredging Co.*, 60 F. Supp. 670 (W. D. Wash. 1945), reversed on other grounds, 156 F. (2d) 334 (9 Cir. 1946); *Stewart v. Kaiser Co., Inc.*, 71 F. Supp. 551 (D. Ore. 1947); *Trefs v. Foley Bros., Inc.*, 7 Labor Cas., ¶61,743 (W. D. Mo. 1943); and *Young v. Kellex Corp.*, 82 F. Supp. 953 (E. D. Tenn. 1948).

The development of this doctrine is of considerable interest. In *National Labor Relations Board v. Idaho-Maryland Mines Corp.*, 93 F. (2d) 129 (9 Cir. 1938), the court had to decide whether a company engaged in mining gold and silver was subject to the National Labor Relations Act. It appeared that all of the mining was done in California and the products mined were all delivered to the United States Mint in San Francisco. The court refused to apply the Act, saying (98 F. (2d) at p. 131):

> "Nor is the Board's assumption of jurisdiction warranted by the fact that the United States, after purchasing respondent's product and commingling it with other gold and silver, ships the commingled product from its San Francisco mint to its Denver mint for safe keeping. Respondent does not make these shipments or cause them to be made. We regard such shipments, not as commercial transactions, but as administrative acts of Government."

This distinction between commercial transactions and administrative acts of the Government was recognized in later decisions, some of which dealt with the application of the Fair Labor Standards Act.[16] Notable among the cases applying this doctrine to the transportation of war materiel in time of war is *Selby v. J. A. Jones Const. Co.*, 175 F. (2d) 143 (6 Cir. 1949) where the court said, at p. 146:

> "It is urged that materials designed eventually to become component parts of the bomb, brought from beyond the State to Oak Ridge, there to be processed and sent to destinations beyond the State, were in the field of interstate commerce. This contention does

[16] For the development of the doctrine as applied to the mining of gold, see *N. L. R. B. v. Sunshine Mining Co.*, 110 F. (2d) 780 (9 Cir. 1940); *Fox v. Summit King Mines, Ltd.*, 143 F. (2d) 926 (9 Cir. 1944); *Holland v. Haile Gold Mines*, 44 F. Supp. 641 (W. D. S. Car. 1942); and *Walling v. Haile Gold Mines, Inc.*, 136 F. (2d) 102 (4 Cir. 1943).

violence to the stipulation between the parties. These materials were at all times the property of the United States and under the supervision and control of the Army, and were at no time in the custody of a common carrier. Simply stated, the Government brought its own property, in its own possession and under its own control, to Oak Ridge and there processed it for its own use, in its own establishment, designed and constructed for that purpose by its own agents, and then sent it, for its own purposes, under its own control, beyond the State to destinations fixed by it. No element of interstate commerce was involved. There was no buying or selling of these articles, no commercial intercourse between the United States and third parties; no traffic, no market, and no ultimate consumer except the Government itself. There could be no traffic in bomb materials. None of these activities fall under the commerce clause. See The Pipe Line Cases (United States v. Ohio Oil Co.), 234 U. S. 548, 562; 34 S. Ct. 956, 58 L. Ed. 1459. We think that they were all administrative in character, engaged in by the Government in its effort, as stated in the contract, to 'facilitate the prosecution of the war' and to save the country from impending peril. See N. L. R. B. v. Idaho-Maryland Mines Corp., 9 Cir., 98 F. 2d 129, 131. See full discussion in Barksdale v. Ford, Bacon & Davis, Inc., D. C., 70 F. Supp. 690."

To the same effect is *Clyde v. Broderick*, 52 F. Supp. 533 (D. Col. 1943).[17]

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[17] The Court of Appeals for the Tenth Circuit reversed. *Clyde v. Broderick*, 144 F. (2d) 348 (1944). The court found that "there is nothing in the Fair Labor Standards Act which indicates an intent or purpose to exempt from its coverage employees whose activities relate to the movement in interstate commerce of personally owned goods of an employer or goods moving interstate for the convenience of the United States Government". (See 144 F. (2d) at p. 351.) It is clear from the opinion that the Court of Appeals was not discussing a situation where Government-owned goods were involved.

In *Divins v. Hazeltine Electronics Corp.*, 70 F. Supp. 686 (1946), Judge CAFFEY said (at p. 689):

> "Prosecution of a war is not commerce. War is the negation of commerce. Often the purpose of a war and the result, usually, is to impair or destroy commerce, not to carry it on."

On appeal, this language of Judge CAFFEY was approved. *Divins v. Hazeltine Electronics Corp.*, 163 F. (2d) 100 (2 Cir. 1947). The Court of Appeals, in an opinion by Judge SWAN, held that employees of a private contractor engaged in installing, servicing and maintaining radar and radio equipment on war ships of various kinds were not covered by the Act. The court limited the application of Judge CAFFEY's doctrine to combat vessels as distinct from "armed cargo transports" and "armed transports". See also *Laudadio v. White Const. Co.*, 163 F. (2d) 383 (2 Cir. 1947), and *Scholl v. McWilliams Dredging Co.*, 169 F. (2d) 729 (2 Cir. 1948).

In *St. John's River Shipbuilding Co. v. Adams*, 164 F. (2d) 1012 (5 Cir. 1947), the court, echoing the remarks of Judge CAFFEY, held that employees engaged in building combat tankers were not employed in the production of goods for commerce.[18] See also the opinion of Judge HICKS in *Selby v. J. A. Jones Const. Co.*, 175 F. (2d) 143 (6 Cir. 1949), at pp. 146-147, and particularly the following:

> "The bomb and its component parts were developed for war and not for commerce. The fact, commonly known and judicially recognized, that it was produced secretly and in haste, negatives the idea of commercial intercourse. The use of the bomb as a weapon of war

[18] See also Kennedy v. Silas Mason Co., 164 F. (2d) 1016 (5 Cir. 1947), reversed on other grounds, 334 U. S. 249 (1948), and *Reed v. Murphey*, 168 F. (2d) 257 (5 Cir. 1948), reversed on other grounds, 335 U. S. 865 (1949).

is the antithesis of the regulation of 'Commerce with Foreign Nations'. Such use is not intended to regulate but to destroy commerce."

If the Court of Appeals for the Second Circuit in a series of cases has consistently held to the theory that war activities of the Government itself are not commerce, and if the Courts of Appeals for the Fifth and Sixth Circuits have concurred, and if the Courts of Appeals for the Eighth and Ninth Circuits have, by implication at least, indicated their acquiescence in that view, it may be assumed that there is substance to the contention. Similarly, if the theory of "administrative act" has, over a long period of years, found acceptance not only by the Courts of Appeals for the Sixth and Ninth Circuits, but by other courts as well, it can scarcely be brushed aside as a mere judicial aberration. The fact is that both of these theories may be viewed as different ways of expressing the same central idea and that idea has a hard core of common sense.

When the Government in the prosecution of a war moves combat vessels or atomic bombs or Government-owned munitions across state lines solely for war purposes, the contrast with the movement across state lines of manufactured products in economic competition with other products is so striking that it goes against the grain to throw both activities into the same classification and to hold that an act of Congress, which by its terms was intended to apply only to the latter form of activity, also limits the Government in the performance of a vital function. All of the reasons which lead to the general conclusion that the Fair Labor Standards Act is not applicable to installations such as the Arkansas Ordnance Plant (see supra, pp. 25-39) also support the narrower conclusion that the movement by the Government of the products of such installations to other military installations is not commerce within the meaning of the Fair Labor Standards Act.

(b) Government-Owned Munitions of War Are Not "Goods" Within the Meaning of the Act

This contention may be divided into two general propositions: first, that ammunition produced in plants such as the Arkansas Ordnance Plant is not goods within the general definition of that term used in Section 3(i) of the Act, and second, that such ammunition falls within the exclusory clause in Section 3(i) of the Act, since it was delivered into the actual physical possession of the ultimate consumer prior to the time when petitioners did the work on which they base their claim and prior to shipment across state lines or to foreign ports.

The general definition of "goods" as used in the Act is as follows:

> Section 3:
>
> "As used in this Act—
>
> "(i) 'Goods' means goods (including ships and marine equipment), wares, products, commodities, merchandise, or articles or subjects of commerce of any character, or any part or ingredient thereof, but does not include goods after their delivery into the actual physical possession of the ultimate consumer thereof other than a producer, manufacturer, or processor thereof."

It will be seen that the language used by Congress is of broad scope. "Wares, products and commodities" are flexible terms. But they do not stand alone. The phrase "or articles or subjects of commerce of any character" colors all that has gone before; the general purpose of the Act requires that this be so. Without undertaking to repeat the arguments advanced under point II, *supra*, we earnestly submit that they furnish strong reason for the conclusion that in defining "goods" Congress had in mind commercial

objects moving in the channels of a competitive economy. We particularly call the court's attention to the thoughtful opinion of the District Court for the Eastern District of Tennessee, Northern Division, in the case of *Young v. Kellex Corp.*, 82 F. Supp. 953 (E. D. Tenn. 1948), where this point is thoroughly examined. The products of the Arkansas Ordnance Plant were not "goods" in this sense. No one bought them and no one sold them. They were no more the subject of trade than war vessels,[29] or tankers,[30] or atomic bombs.[31]

But even if primers, fuzes and detonators can be called "goods", they come within the exclusory clause of Section 3(i), since they were in the actual physical possession of the ultimate consumer during the time that petitioners were working on them. The trial court so found. In its brief the Government strenuously argues the contrary, supporting its argument with references to various portions of the records in these three cases. The respondent could easily follow suit. We submit, however, that no useful purpose would be served by doing so. The question of actual physical possession is a complex one requiring a careful examination not only of contractual provisions but of many other relevant facts. In this case the trial court has performed this task and made definite findings. Those findings, as we have seen are amply supported by the record.[32] The finding of the trial court was not disturbed by the Court of Appeals. Under such circumstances it is

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[29] *Divins v. Hazeltine Electronics Corp.*, 163 F. (2d) 100 (2 Cir. 1947); *Kruger v. Los Angeles Shipbuilding & Dry Dock Corp.*, 12 Labor Cas. Para. 63,660 (S. D. Cal. 1947).

[30] *St. John's River Shipbuilding Co. v. Adams*, 164 F. (2d) 1012 (5 Cir. 1947).

[31] *Selby v. J. A. Jones Const. Co.*, 175 F. (2d) 143 (6 Cir. 1949); *Young v. Kellex Corp.*, 82 F. Supp. 953 (E. D. Tenn. 1948).

[32] See footnote 8, *supra*, pp. 14-15.

hardly to be supposed that this court will desire to re-examine this tangled question.

Thus we repeat the statement that throughout the process of manufacture, the materials and components which entered into the finished products of the Arkansas Ordnance Plant were in the actual physical possession of the Government. Petitioners were therefore working on goods "after their delivery into the actual physical possession of the ultimate consumer". Wherever that situation has been brought to the attention of the court, it has been held that the exclusory clause of Section 3(i) is applicable. *Divins v. Hazeltine Electronics Corp.*, 163 F. (2d) 100 (2 Cir., 1947); *Kennedy v. Silas Mason Co.*, 164 F. (2d) 1016 (5 Cir. 1947), reversed on other grounds 334 U. S. 249 (1948); *Crabb v. Welden Bros.*, 164 F. (2d) 797 (8 Cir. 1947); *Lynch v. Embry Riddle Co.*, 63 F. Supp. 992 (S. D. Fla. 1945); *Kruger v. Los Angeles Shipbuilding & Dry Dock Corp.*, 12 Labor Cas. Para. 63,660 (S. D. Cal. 1947); *Anderson v. Federal Cartridge Corp.*, 72 F. Supp. 644 (D. Minn. 1947).[33]

Petitioners seek to escape from the logic of this argument by contending that the exclusory clause of Section 3(i) was intended to apply only to transportation by the ultimate consumer. The real purpose of the clause was, so they argue, to protect from the penalty of Sections 15(a)(1) and 16 persons who might innocently deal with goods that had been produced in violation of the Act.

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[33] There are a number of cases in which it has been held that the Fair Labor Standards Act is applicable in situations substantially similar to that which exists in the present case. *Jackson v. Northwest Air Lines*, 75 F. Supp. 32 (D. Minn. 1947); *Timberlake v. Day & Zimmerman*, 49 F. Supp. 28 (S. D. Iowa 1943); and *Ewthun v. Day & Zimmerman, Inc.*, 235 Iowa 293, 16 N. W. 2d 258 (1944), are perhaps the leading cases. In none of those cases does it appear that consideration was given to the argument made above.

If the petitioners' construction of the statute is correct, it seems remarkable that Congress did not accomplish its purpose by the simple method of writing into Section 15(a) an exemption in favor of the innocent transporter. It is even more remarkable that in recently amending the Fair Labor Standards Act, Congress actually did alter Section 15(a) so as to protect the innocent transporter, while at the same time leaving Section 3(i) undisturbed. (See Section 13(a) of the Act of October 28, 1949, c. 736, public 393, 81st Cong., 1st Sess., et seq.). This recent act is, we submit, a sufficient demonstration of the correctness of the opinion previously expressed by Judge SWAN that there is "nothing * * * in the legislative history to indicate that this was the only purpose or that the statutory definition of 'goods' is not to be given effect in determining the coverage of the Act."[34] On the contrary, we believe that the legislative history makes it abundantly clear that the express object of the exclusory clause of Section 3(i) was not only to exempt work done on goods after their delivery to the ultimate consumer *but likewise to confer immunity on the producer of goods whose product came into the hands of the ultimate consumer before any movement across state lines.*

The Act explicitly says that "after their delivery into the actual physical possession of the ultimate consumer" articles are no longer "goods". Since they are no longer "goods", there are no "goods" moving in commerce. It would certainly seem to follow that no goods are "produced for commerce". Since the record in this case is clear (supra, pp. 14, 15) that the finished products of the Arkansas Ordnance Works were delivered into the actual physical pos-

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[34] *Dizon v. Hazeltine Electronics Corp.*, 163 F. (2d) 100 (2 Cir. 1947) at p. 104.

session of the Ordnance Department prior to shipment from the plant, this fact alone would appear to bring the exclusory clause into operation.

The result achieved by this literal application of the statute accomplishes one of the important objects of this legislation. When the Act is read in its entirety, it is clear that Congress intended to exempt from its requirements business essentially local in character. Such, however, was the sweep of the definition of commerce and of production contained in the Act that it was difficult to imagine any manufacturing business, however petty or local, to which the Act would not apply since in practically every conceivable case some customers in the course of consuming the product might be expected to take it out of the state, and this by itself would bring the Act into operation, however small the fraction of the total product which would move interstate. *Mabee v. White Plains Publishing Co.*, 327 U. S. 178 (1946).

The solution devised by the draftsman of the Act was to exempt those manufacturers whose entire product reached the ultimate consumer in the state of manufacture. It is hard to conceive of a more apt method of exempting local enterprise while at the same time preserving the application of the Act in the field where federal intervention was necessary to achieve the broad purposes of the Act.

It is entirely consistent with this interpretation of the Congressional purpose that the ultimate consumer exemption was later qualified by adding the words "other than a producer, manufacturer or processor thereof". The producer of goods which are thereafter to be transported for the purpose of consuming them in further manufacture in other states is not an essentially local enterprise such as Congress desired to exempt. The fact that delivery is

made to the purchaser before transportation is, in such a case, a fortuitous circumstance.

From the very beginning of the hearings on the Fair Labor Standards Act, Congress was concerned to avoid its application to local business. See *Kirschbaum v. Walling*, 316 U. S. 517 (1942); *Walling v. Jacksonville Paper Co.*, 317 U. S. 564 (1942); *10 East 40th Street Building v. Callus*, 325 U. S. 578 (1945). That such an exemption was contained in the bill as originally presented to Congress by the Administration is shown by the testimony of Assistant Attorney General Robert H. Jackson[*] given at joint hearings before the Senate Committee on Education and Labor and the House Committee on Labor on the original bill from which the Fair Labor Standards Act was derived. The pertinent testimony is as follows:

> "*The Chairman:* * * * Would you explain under just what circumstances and under what circumstances only, it would be possible for the regulation of retail establishments *and small business enterprises* to come under this bill?
>
> "*Mr. Jackson:* I will try to. It was not intended by this bill to apply generally to retailers or to apply to the service trades, such as the filling-station attendant, and the *pants presser and small business generally.* * * *.
>
> "* * *
>
> "But then, there are only two ways in which a retailer, for example, would be affected by this bill as it now stands, * * *. One would be the retailer who is located close to a State line and sold his goods by delivery across a State line, and the other would be the case of a local retailer, who by his labor practices and standards was able to affect the interstate movement of goods. * * *.

[*] Quoted by Mr. Justice BURTON in *Roland Electrical Company v. Walling*, 326 U. S. 657, 670 (1946).

"* * *

"Practically, the situation in which a local merchant might be affected would be *if he* were moving his goods *in the course of delivery* across the State line to a substantial extent so that he were engaging in inter-state commerce; but generally speaking, the policy of the bill is not to include the *service trades* and *small business* and the retailing enterprises." (Italics supplied.)

The report of the Senate Committee on Education and Labor is to the same effect (Sen. Rep. No. 884, 75th Cong., 1st Sess., p. 5):

"The bill carefully excludes from its scope business in the several States that is of a purely local nature. It applies only to the industrial and business activities of the Nation insofar as they utilize the channels of interstate commerce, or seriously and substantially burden or harass such commerce. It leaves to State and local communities their own responsibilities concerning those local service and other business trades that do not substantially influence the stream of interstate commerce. For example, the policy in this regard is such that it is not even intended to include in its scope those purely local and small business establishments that happen to lie near State lines, and solely on account of such location, actually serve a wholly local community trade within two States."

These authoritative expositions of the purposes of the legislation certainly indicate that the Act then under consideration contained provisions adequate to accomplish that purpose. *But as the Act then stood, no provision other than the ultimate consumer clause could have been relied on to accomplish such a result.* The retail and service establishment exemptions were not in the administration bill when the Assistant Attorney General was explaining it to the Committee or when the Committee report was made.

Moreover, those exemptions, as they were embodied in the bill ultimately passed, were not broad enough in scope to justify the statements made in the Committee report. Thus the shoemaker, the tire retreader, the custom tailor, and the baker were neither retail nor service establishment within the meaning of the Act. (See Administrator's Interpretative Bulletin No. 6). Yet these small business men are clearly the very types of that local enterprise to which the Committee had reference.

Moreover, there is no room for doubt that the exclusory clause was actually intended to grant immunity to the producer of goods which were all delivered to the ultimate consumer prior to their movement across state lines; for the application of the Act, as originally drawn, to the producer was wholly dependent upon the subsequent transportation of the goods across state lines in violation of the Act. (See S. 2475 introduced May 24, 1937, 75th Congress, 1st Session.) Section 7, paragraph (a) of the original bill made it unlawful to transport across state lines any goods produced under standards lower than those set by the Act. Paragraph (b) made it unlawful to transport goods into any state if to do so violated labor-standard laws of that state. Paragraph (c), covering producers of goods, provided:

> "It shall be unlawful for any person to employ under any substandard labor conditions any employee engaged in interstate commerce or in the production of goods intended for transportation or sale *in violation of subsection (a) or (b)* of this section."

The "ultimate consumer" clause, which was in the original draft, clearly permitted ultimate consumers to take any goods, however produced, across state lines without violating the Act. But unless it could be shown that goods were produced with the intent that they be transported

across state lines in violation of the Act, the producer was not covered under paragraph (c). This remained equally clear under the coverage provisions as reworded by the Senate Committee. Thus the "ultimate consumer" clause exempted producers precisely as it now would if given the interpretation for which we contend.

Nothing in subsequent legislative history of the act suggests that the purpose of the clause was altered. As Mr. Justice BURTON said of the act in *Roland Electrical Company v. Walling*, 326 U. S. 657 (1946) p. 671:

> "While its language and coverage were changed in details, the Bill did not depart substantially from its original purpose. This purpose remains the key to the meaning of the words defining its coverage and also to those defining exemption from its coverage."

Such changes as Congress made in the exclusory clause support the view that it was intended to exclude from coverage the producer and not the ultimate consumer alone. As originally introduced in the Senate, the definition of "goods" provided that it "shall not mean goods in the possession of the ultimate consumer thereof". (S. 2475, introduced May 24, 1937, 75th Cong. 1st Sess., §2(a)(21)). As passed, however, the exclusion was limited to "goods after their delivery into the actual physical possession" of the ultimate consumer. This was intended to emphasize the fact that the exemption did not apply where the consumer had mere title when the goods moved in commerce. The word "after" was evidently used to make it clear that the producer was not excluded from coverage unless the ultimate consumer got the product before it crossed the state lines.

If, as we contend, the effect of the ultimate consumer clause was to grant immunity to producers whose goods were all delivered to the ultimate consumer prior to their

movement across state lines, there was reason for Congress to be concerned lest the provisions of the Act be evaded on a wholesale scale by the simple process of transferring title prior to interstate shipment. If, on the other hand, petitioners' contention be accepted that the Act confers immunity only on the ultimate consumer, then it is difficult to understand why Congress should have seen fit to limit the exemption to actual possession. No reason appears why Congress should have wished to exempt ultimate consumers who themselves transported "hot goods" while leaving subject to the provisions of the Act ultimate consumers who had mere title to "hot goods" actually transported across state lines by someone else.

It may be conceded that Congress in granting immunity to the producers of goods delivered into the actual physical possession of ultimate consumers prior to transportation across state lines was thinking about business that was small as well as local. The members of Congress certainly did not envisage the possibility that vast quantities of munitions would be produced at Government installations by private contractors and delivered into the actual physical possession of representatives of the Government prior to any movement across state lines. But this argument, which seems to us to have great force, proves too much to be of any help to petitioners, for it leads directly to the conclusion that none of the provisions of the Act should be held to apply to the new and unique operation which the Arkansas Ordnance Plant typifies.

Petitioners assert that the meaning which they ascribe to the ultimate consumer clause has been the consistent interpretation of the Wage and Hour Division and has been upheld by numerous court decisions. This deserves analysis. The interpretation in question appears in Interpreta-

tive Bulletin No. 5. In that interpretation the Administrator gave first place to the contention that a consumer who uses commodities in connection with the production or shipment of goods for commerce is not the ultimate consumer; that "the ultimate consumer of a shoe box is not the manufacturer of the shoes but the man who buys and wears the shoes". In cases in which this reason was sufficient to deny exemption, the Administrator has found support from the decisions. See *Hamlet Ice Co. v. Fleming*, 127 F. (2d) 165 (4 Cir. 1942); *Chapman v. Home Ice Co.*, 136 F. (2d) 353 (6 Cir. 1943). It should be observed that this theory alone restricts the ultimate consumer exemption so narrowly as to make certain that, except where Government purchases and transportation are concerned, no substantial body of employees will be denied the benefits of the Act.

The Administrator, however, was not content with the proposition above stated and sought by interpretation to limit the clause so as to protect the ultimate consumer only. At this point judicial support for the views of the Administrator is noticeably lacking. In addition to the cases previously cited (supra p. 70), see *Walling v. Reuter, Inc.*, 137 F. (2d) 315 (5 Cir. 1943), judgment vacated without passing on the point in question, 321 U. S. 671 (1944).

Moreover, the claim of consistency of interpretation by the Administrator is based on what the Wage and Hour Division has said and not on what it has done. The reported cases reveal no enforcement cases against small local enterprises like the custom tailor whose establishment is covered, under the Government's interpretation of the "ultimate consumer" clause, solely because the tailor knows that his customers sometimes leave the State and wear clothes when they do so. The incongruities to which the Wage and Hour Division's interpretation of the "ultimate consumer"

clause would lead it are not reflected in its enforcement policy, so far as the cases reveal.[*]

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[*] That the Wage and Hour Division must sometimes adopt an uncharacteristic see-no-evil attitude in order to maintain a theoretical consistency is reflected by its answer to the following question:

"Question: A custom tailor in this area is engaged in making uniforms to order for soldiers stationed at a local camp. All the uniforms are delivered locally, but the soldiers who buy them do so with the expectation of transporting them and wearing them outside the state. In paragraph 6 of Interpretative Bulletin No. 5, you hold that employees engaged in building a boat for delivery to the purchaser at the boatyard are covered by the Act if the employer, at the time the boat is being built, intends, hopes, or has reason to believe the purchaser will sail it outside the state [1942 WH Man. 26]. It would seem that the employees of the custom tailor would fall under the same rule.

"Answer (Acting Solicitor of Labor): In our opinion, no coverage should be asserted in this situation. In our memorandum to you dated August 11, we expressed the view that employees of custom tailors are within the general coverage of the Act if they are engaged in work on goods which the employer expects and intends to send out of the state, either in the form of the shipment of the finished product to the customer, or in the form of the shipment of partially processed goods to a manufacturer located outside of the state. We believe that coverage should be limited to these situations, and that a custom tailor making an intrastate shipment of clothes or uniforms to the ultimate customer should not be held within the Act on the ground that the customer might wear the clothes outside the state of manufacture. It would seem that the expectation of an interstate movement of the goods in this case is more conjectural than in the boat-building illustration in paragraph 6 of Interpretative Bulletin No. 5, to which you refer." 1943 Wage and Hour Manual, p. 41.

An Editor's Note in 1942 Wage and Hour Manual 345 states that the Wage and Hour Division's position is that a tire-retreading enterprise is covered if the tires are retreaded "with hope, intent, or reason to believe that they will move in interstate commerce" but that the business is strictly local, and not covered, if all recapped or retreaded tires are sold within the state. The implication appears to be that retreaded tires can be sold to ultimate consumers without any reason to believe that any of them will cross state lines. While the Editor's Note is unofficial information, we find no record of enforcement to show that the Administrator has taken a contrary position.

It is no answer to say that the goods upon which petitioners were working were used to produce other goods. Were the end products objects of commerce, the argument might have force. In that case the goods would be consumed in producing other goods, as they were consumed in shipping other goods in the *Hamlet Ice Company* and other cases cited, *supra*, at page 85. But here, as has been seen, neither the primers, detonators and fuzes were goods, nor the shells into which they were ultimately to be incorporated, just as the war ships in the *Divins* case were not goods, if for no other reason because they themselves were in the actual physical possession of the ultimate consumer before crossing state lines. Thus petitioners were not working on goods which were used to produce other goods. By the same token, the ultimate consumer is not a "producer, manufacturer or processor" within the exception to the exclusory clause. If this were not so, it would be hard to escape the conclusion that the Government was the producer, and hence that petitioners were employees of the Government and therefore not employees within the meaning of the Act.

V.

The Petitioners Were Employees Of The United States

Section 3(d) of the Fair Labor Standards Act provides that the word "employer" as used in the Act "shall not include the United States". Section 3(e) defines an "employee" as "any individual employed by an employer". A majority of the courts which have considered the question have reached the conclusion that employees working in installations such as the Arkansas Ordnance Plant are not employees within the meaning of the Act because their real employer is the United States. See *Kennedy v. Silas*

Mason Co., 164 F. (2d) 1016 (5 Cir. 1947);[7] *Selby v. J. A. Jones Const. Co.*, 175 F. (2d) 143 (6 Cir. 1949); *Crabb v. Welden Bros.*, 164 F. (2d) 797 (8 Cir. 1947).

In *United States v. United Mine Workers*, 330 U. S. 258 (1947), this court had to decide whether coal miners working in mines which had been seized by the Government under the authority of the War Labor Disputes Act were employees of the Government and as such not within the ambit of the Norris-LaGuardia Act. Chief Justice VINSON said (at p. 285):

> "The question with which we are confronted is not whether the workers in mines under Government seizure are 'employees' of the Federal Government for every purpose which might be conceived, but whether, for the purposes of this case, the incidents of the relationship existing between the Government and the workers are those of Governmental employer and employee."

The essentially similar question presented by the present record is whether, for the purposes of this case, the incidents of the relationship existing between the Government and petitioners are those of Governmental employer and employee. Those incidents of the relationship deemed pertinent in the *United Mine Workers* case are at least equally pertinent here. In the *United Mine Workers* case the question was whether the Norris-LaGuardia Act should be construed to permit an injunction against an organized work stoppage impeding a "vital and urgent function of the Government". Although the statutory withdrawal of jurisdic-

[7] Reversed on other grounds, 334 U. S. 249 (1948). See also *Reed v. Murphey*, 168 F. (2d) 257 (5 Cir. 1948), reversed on other grounds, 335 U. S. 865 (1949), and *Creel v. Lone Star Defense Corp.*, 171 F. (2d) 964 (5 Cir. 1949), cert. granted 337 U. S. 923 (1949).

tion from the courts to grant injunctive relief in labor disputes made no express exception where the Government was the employer, this court found that it was not the legislative purpose to impede the Government itself in the accomplishment of its own sovereign purposes. In the light of that purpose, drawn by inference from legislative history, the miners were held to be employees of the United States.

The Fair Labor Standards Act expressly provides that it is not to apply where the United States is employer. The purpose to leave the Government's own sovereign activities free of the restraints of the Act need therefore not be found by inference. Wartime production of ammunition in a Government-owned plant was as vital a Government function as any readily conceived. Yet if the arguments of petitioners are to be accepted, the shipment of ammunition from the plant over state lines was unlawful and subject to injunction under the Fair Labor Standards Act (supra, pp. 38-39). That the question of the Act's coverage arises in a suit for wages should not obscure the issue as it would have been presented if the Administrator had sued to enjoin shipment of ammunition produced in violation of the Act. It is, of course, inconceivable that he should have done so, and yet the fact that the power existed under the Act is a forceful indication that the Act was not intended to cover in these circumstances. To find coverage in this case is to frustrate the purpose of the exemption intended to apply where the Government is employer and to do so because of the merely formal circumstance that respondent was employer in name and in name only.

The facts previously stated (supra pp. 11-15) taken together with the provisions of the contract between respondent and the United States (S. R. 21-73) and the Statement

of Labor Policy (see Appendix B to this brief) and the instructions published from time to time by the War Department add up to a definite pattern of government control in all essential respects equivalent to that which led this court to hold the workers in the seized mines to be employees of the Government. This general conclusion finds detailed support in the record. Thus, before any of the petitioners were employed at the Arkansas Ordnance Plant, the Government approved a list of job classifications and a schedule of wages applicable to each (S. R. 19). Before any employee could be paid, written approval of his employment by the Government was required (S. R. 14). Exhibit 6(a) (S. R. 101) illustrates the strict enforcement of this requirement by the Government.

All changes in status of employees either in classification or in wage rates, required written approval of the Government (S. R. 14, 155, 157). These reservations of authority by the Government were constantly exercised. As an illustration, the contractor experienced difficulty in hiring janitors at the approved rates, yet it could not on its own motion increase the authorized rate and its request to the Government for a change in rates was denied (Ex. 5, S. R. 90-97). Exhibit 6 (S. R. 97-101) is a similar illustration dealing with laborers. These two examples make it evident that the contractor was given no discretion, even on the lowest levels, in the employment of persons to man the plant.

Ordnance Procurement Instruction 9.107.1 (Ex. G, S. R. 164) specifically provides for Government approval of wages. The commanding officer of the Arkansas Ordnance Plant emphasized this fact by letter to the contractor dated November 26, 1942, reading in part as follows:

"3. Your attention is further invited to the fact that all requests or problems pertaining to wage or salary

adjustments are to be submitted to the Commanding Officer, and where his authority is not sufficient to apply, same shall be channeled to higher authority in accordance with previously issued instructions." (Ex. I, S. R. 166).

The control exercised by the Government extended to minutest details. We have mentioned janitors' and laborers' wages. The same approval was required for procurement of additional small items of equipment for the plant. This is exemplified by Exhibit 8 (S. R. 103). On occasion the contractor thought that additional equipment should be installed but the Government in the exercise of its reserved powers refused permission for its installation (Ex. 9, S. R. 105). On the other hand, the Government often required installation of new equipment that its experts recommended even though the contractor may have deemed it unnecessary (Ex. 7, S. R. 102).

The Government's control and supervision did not stop there. It maintained checkers at the clock houses where employees clocked in and out (S. R. 14), it audited and approved each time card (S. R. 14), and even maintained a force of men to observe payroll payments to employees (S. R. 14). Exhibit D-3 (S. R. 159) is a reproduction of two typical time cards and illustrates the Government approval required. Exhibit D-4 (S. R. 161) shows that the Government records were in sufficient detail to enable it to reconstruct a lost time card. Even then, the Government control was not ended. Each payroll had to be approved by the Government (Ex. D-1 and D-2, S. R. 155-157).

Petitioners attach great significance to a provision of the contract which specifies that employees at the plant shall be subject to the control and shall constitute employees of the contractor (S. R. 41), but this court had held such a

contractual provision not to be controlling. *Rutherford Food Corporation v. McComb*, 331 U. S. 722 (1947). In *McComb v. McKay*, 164 F. (2d) 40 (8 Cir. 1947), it was held that certain employees were not within the coverage of the Fair Labor Standards Act because they were employees of a railroad. In that case the Administrator argued that the appellees had entered into a contract to furnish labor which specifically stated that "the contractors are masters in respect to all the work done by them as herein provided, and the contractors' servants and employees are not the servants and employees of the railroad company in any particular whatsoever". Notwithstanding this provision of the contract, the District Court found that the appellees were not independent contractors and the Court of Appeals affirmed in an opinion by Judge SANBORN in which the facts are set out in considerable detail.

We think that a much more significant clause of the contract is to be found in Article VII-N (S. R. 68). That clause provides that the contracting officer shall decide all disputes covering questions of fact arising under the contract, subject to written appeal to the Chief of Ordnance, or, in certain limited cases, to the Secretary of War or his duly authorized representative. It provides that in the meantime the contractor shall diligently proceed with the work as directed. This provision gave to the representatives of the War Department even broader powers than those possessed by the Secretary of the Interior over the seized mines in the *United Mine Workers* case, 330 U. S. 258 (1947).

It is submitted that the present case is controlled by that decision. The similarity between that case and the case presented by the present record may be demonstrated by a comparison in which the facts relied on by this court in the *United Mine Workers* case to support the conclusion

that the miners were employees of the Government are set forth in column 1, and the facts in the present record are set forth in column 2.

Column 1	*Column 2*
1. In operating the seized mines the government was engaged in a "vital and urgent government function".	1. In producing at the Arkansas Ordnance Plant munitions for the protection of the nation in time of war the government was engaged in an even more vital and urgent government function.
2. Congress intended that by government seizure a mine should become, for purposes of production and operation, a government facility in as complete a sense as if the government held full title and ownership.	2. The government actually had full title and ownership of the Arkansas Ordnance Plant, and in addition had title and ownership of all finished products, materials, and work in progress therein.
3. The government provided procedures for adjusting wages and conditions of employment.	3. The government did likewise with respect to the Arkansas Ordnance Plant and retained full control over such matters.
4. Executive Order 9728 authorized the Secretary of the Interior to negotiate with workers	4. Under the respondent's contract the Secretary of War reserved the authority to control

Column 1 (Cont'd.)	*Column 2 (Cont'd.)*
and the Krug-Lewis Agreement related to matters which normally constitute the subject matter of collective bargaining.	every aspect of labor relations, and this authority was exercised in the Statement of Labor Policy which was negotiated with representatives of labor and which covered matters ordinarily the subject of collective bargaining.
5. The opinion points out the fact that Lewis referred to the operators as "strangers to the Krug - Lewis Agreement."	5. By the same token in the Statement of Labor Policy the CIO and AFL recognized government control over the Arkansas Ordnance Plant.
6. Under the regulations, the operating managers could be removed at the discretion of the government.	6. The same is true by contract provision with respect to removal of Ford, Bacon & Davis, Inc. (Art. VI-A (S. R. 59-61)).
7. The government, though utilizing the services of private managers, has neverthless retained ultimate control.	7. The same situation exists at the Arkansas Ordnance Plant by virtue of the contract between the government and Ford, Bacon & Davis, Inc.
8. The government endeavored to operate the mines for the account	8. At the Arkansas Ordnance Plant the government specifically obli-

Column 1 (Cont'd.)	*Column 2 (Cont'd.)*
and at the expense of the owners (a fact somewhat inconsistent with the employer-employee relationship). The court without deciding the issue, questioned the government's right to thus limit its liability.	gated itself for all expenses; and the private managers had no chance for profit or risk of loss.

It is apparent from a comparison of the two columns above that every fact found by the court to exist in the *Mine Workers Case* is present in equal or greater degree in the case at bar. In addition, the Government maintained a multitude of controls at the Arkansas Ordnance Plant that do not appear to have been retained by the Government with respect to the seized coal mines.

In the *United Mine Workers Case*, supra, Mr. Justice BLACK and Mr. Justice DOUGLAS concurred with the majority of the court in holding that the miners became Government employees when the Government took over the mines. They said (330 U. S. at p. 329):

> "The fact that it utilizes the managerial forces of the private owners does not detract from the Government's complete authority. For whatever control Government agents delegated to the private managers, those agents had full power to take away and exercise themselves."

So here, the fact that the Secretary of War saw fit to exercise the power conferred upon him by the Act of June 2, 1940, to operate the Arkansas Ordnance Plant through the agency of a qualified commercial manufacturer under

a contract entered into with that manufacturer does not detract from the Government's complete authority. The Government might at any time have terminated the contract and have operated the Arkansas Ordnance Plant without the benefit of the management services of the respondent. In many substantially similar plants, such as the Pine Bluff Arsenal at Pine Bluff, Arkansas, the Secretary of War deemed private management services unnecessary.

The form which Government takes in the operation of its war plants, and the motives which lead it to conduct its activities through the agency of a private contractor, are wholly irrelevant to the issue of the actual relationship between Government and these petitioners. Compare *Inland Waterways Corp. v. Young*, 309 U. S. 517, 523 (1940); *Cherry Cotton Mills v. United States*, 327 U. S. 536 (1946); *Keifer v. Reconstruction Finance Corp.*, 306 U. S. 381 (1939); *United States v. Wittek*, 337 U. S. 346 (1949).

Liability for the payment of any judgment rendered in favor of these petitioners is upon the Government, to be paid from Government funds. We submit that form should give precedence to fact in resolving the legal incidents of the relationship between Government and the petitioners.

The Government relies mainly on *Alabama v. King & Boozer*, 314 U. S. 1 (1941). The question for decision in that case was whether the Alabama sales tax with which the seller is chargeable but which he is required to collect from the buyer could be collected from a partnership selling lumber to a cost-plus-a-fixed-fee contractor who was engaged in constructing an army camp for the United States. This, in turn, depended on whether the Government "became obligated to pay for the lumber and so was the purchaser whom the statute taxes, but for the claimed immunity." (314 U. S. at p. 10). This court held that the Government was not bound by such

contracts made by the contractor "but was obligated only to reimburse the contractor when the materials purchased should be delivered, inspected and accepted at the site" (314 U. S. 11). After reviewing the evidence showing the very extensive control by the Government over the activities of the contractor, Chief Justice STONE said (314 U. S. at p. 13):

> "But however extensively the Government may have reserved the right to restrict or control the action of the contractors in other respects, neither the reservation nor the exercise of that power gave to the contractors the status of agents of the Government to enter into contracts or to pledge its credit. See *United States v. Algoma Lumber Co.*, 305 U. S. 415, 421; *United States v. Driscoll*, 96 U. S. 421. It can hardly be said that the contractors were not free to obligate themselves for the purchase of material ordered. The contract contemplated that they should do so and that the Government should reimburse them for their expenditures. It is equally plain that they did not assume to bind the Government to pay for the lumber by their order, approved by the Contracting Officer, which stipulated that it did not bind or purport to bind the Government. The circumstance that the title to the lumber passed to the Government on delivery does not obligate it to the contractor's vendor under a cost-plus contract more than under a lump sum contract. Cf. *James v. Dravo Contracting Co., supra; United States v. Driscoll, supra.*
>
> "We cannot say that the contractors were not, or that the Government was, bound to pay the purchase price, or that the contractors were not the purchasers on whom the statute lays the tax."

We think the irrelevance of this case to the issues now before this court is apparent. Whether a transaction is constitutionally immune from state taxation is an extremely complex question involving considerations of a very special character. Cf. *United States v. Allegheny*

County, 322 U. S. 174 (1944). Nor does the result arrived at in the *King & Boozer* case, that for purposes of pledging its credit the contractor was not an agent of the Government, throw much light on the problem here. As Chief Justice STONE pointed out, the extent of control in other respects was not in issue in the *King & Boozer* case.

To avoid repetition, it may simply be said that *Curry v. United States*, 314 U. S. 14 (1941), which applied the doctrine of *King & Boozer* to uphold a state tax on the use of materials in the construction of the same army camp, is distinguishable for similar reasons. In that case, as the court pointed out, the statute was not applied to transactions of the contractor on the camp site (314 U. S. p. 18).

Buckstaff Co. v. McKinley, 308 U. S. 358 (1939), upon which the Government relies, is even more evidently distinguishable. The corporation which there sought to enjoin collection of a tax imposed pursuant to a state unemployment compensation law was engaged in the operation for profit of a bath house on a Government reservation. The court held that the corporation was not, within the meaning of the Social Security Act, an instrumentality of the United States. Mr. Justice DOUGLAS said (308 U. S. at p. 362):

> "The mere fact that a private corporation conducts its business under a contract with the United States does not make it an instrumentality of the latter. *Fidelity & Deposit Co. v. Pennsylvania*, 240 U. S. 319. Petitioner's lease from the Secretary of the Interior did not convert it into such an instrumentality. Petitioner 'is engaged in its own behalf, not the government's, in the conduct of a private business for profit.' See *Federal Compress & Warehouse Co. v. McLean*, 291 U. S. 17, 23. Though it acts with the Government's permission and has received a privilege from

the Government, it does not exercise that privilege on behalf of the latter. See *Broad River Power Co. v. Query*, 288 U. S. 178, 180. The control reserved by the Government for protection of a governmental program and the public interest is not incompatible with the retention of the status of a private enterprise. See *Federal Compress & Warehouse Co. v. McLean, supra.* That control, being wholly supervisory, is not to be differentiated from the type of control which the United States may reserve over any independent contractor without transforming him into its instrumentality. See *James v. Dravo Contracting Co.*, 302 U. S. 134, 149. In effect, petitioner concedes the point by admitting its liability under the Social Security Act."

In *National Labor Relations Board v. E. C. Atkins & Co.*, 331 U. S. 398 (1946), the determination that the guards at a private plant engaged in war production were still employees of the respondent within the meaning of the National Labor Relations Act involved wholly different issues. There the only basis for the contrary claim was that the guards had been "militarized". In all other respects the private employer appeared to have retained the normal measure of control over its employees. Mr. Justice MURPHY said (331 U. S. 398 at p. 413):

> "In this setting, it matters not that respondent was deprived of some of the usual powers of an employer, such as the absolute power to hire and fire the guards and the absolute power to control their physical activities in the performance of their service. Those are relevant but not exclusive indicia of an employer-employee relationship under this statute. As we have seen, judgment as to the existence of such a relationship for purposes of this Act must be made with more than the common law concepts in mind. That relationship may spring as readily from the power to determine the wages and hours of another, coupled with the obligation to bear the financial burden of those wages and the receipt of the benefits of the hours worked,

as from the absolute power to hire and fire or the power to control all the activities of the worker. In other words, where the conditions of the relation are such that the process of collective bargaining may appropriately be utilized as contemplated by the Act, the necessary relationship may be found to be present."

As we have seen, in the present case it is the government which determines wages and hours and which bears the burden of the wages and receives the benefit of the hours worked.

VI.

Petitioners' Claims Were Barred by the Portal-to-Portal Act of 1947

The complaint makes it clear that petitioners' claim is essentially one for walking time and other activities preliminary and postliminary to scheduled working hours. Nowhere in the complaint is there an allegation of the existence of any written agreement or of any custom pursuant to which such time is compensable. The affidavits filed in support of the motion for summary judgment negative the existence of any such contract or custom. The affidavits filed in support of the response to the summary judgment, while creating some uncertainty as to the exact nature of the work upon which the claim is based, are insufficient to establish the existence of any such contract or custom. Applying the plain language of Section 2 of the Portal-to-Portal Act of 1947, the petitioners' claim is barred, and the judgment of the trial court should be affirmed on this ground alone.

Similarly, the affidavits filed in support of respondent's motion for summary judgment clearly established reliance in good faith on rulings of the Ordnance Department as the basis on which petitioners were paid compensation. Section 9 of the Portal-to-Portal Act of 1947 thus affords an additional bar to the claim of petitioners.

Conclusion

The overwhelming majority of the courts which have considered the question have found it impossible to conclude that the provisions of the Fair Labor Standards Act have application to the production by the Government of war materiel in its own munition plants, even though the services of private contractors may have been used to operate the plants. There is simply no sensible reason why the Act should be held to apply in such a situation. The attempt to invoke literal definitions of the statute for the purpose of achieving a result clearly not intended by Congress is self-defeating, for those definitions, if strictly applied, lead to the conclusion that the products of these plants are not technically "goods" within the meaning of the Act.

It does not follow that petitioners and those in like position were without protection against exploitation. The control which the Government was in a position to exercise and did exercise over the wage scale paid in these plants was comprehensive, and the provisions of the Walsh-Healey Act were expressly made applicable to those who worked there. Apart from these considerations, the thrusts of a war economy were alone sufficient to guarantee that every munitions worker would receive either in overtime pay or in salary the equivalent of time and a half for all overtime actually worked. The record in this case leaves no doubt that petitioners were compensated on that basis and that their claim is without substantial merit.

It is therefore respectfully submitted that the decision of the court below should be affirmed.

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APPENDIX A

THE PERTINENT PROVISIONS OF THE WALSH-HEALEY PUBLIC CONTRACTS ACT OF JUNE 30, 1936, (C. 881, 49 STAT. 2036; 41 U. S. C. §35, ET SEQ.) ARE AS FOLLOWS:

Section 1:

"That in any contract made and entered into by any executive department, independent establishment, or other agency or instrumentality of the United States, * * * for the manufacture or furnishing of materials, supplies, articles, and equipment in any amount exceeding $10,000, there shall be included the following representations and stipulations:

"(a) That the contractor is the manufacturer of or a regular dealer in the materials, supplies, articles, or equipment to be manufactured or used in the performance of the contract;

"(b) That all persons employed by the contractor in the manufacture or furnishing of the materials, supplies, articles, or equipment used in the performance of the contract will be paid, without subsequent deduction or rebate on any account, not less than the minimum wages as determined by the Secretary of Labor to be the prevailing minimum wages for persons employed on similar work or in the particular or similar industries or groups of industries currently operating in the locality in which the materials, supplies, articles, or equipment are to be manufactured or furnished under said contract;

"(c) That no person employed by the contractor in the manufacture or furnishing of the materials, supplies, articles, or equipment used in the performance of the con-

tract shall be permitted to work in excess of eight hours in any one day or in excess of forty hours in any one week: * * *"

Section 2:

"That any breach or violation of any of the representations and stipulations in any contract for the purposes set forth in section 1 hereof shall render the party responsible therefor liable to the United States of America for liquidated damages, in addition to damages for any other breach of such contract, the sum of $10 per day for each male person under sixteen years of age or each female person under eighteen years of age, or each convict laborer knowingly employed in the performance of such contract, and a sum equal to the amount of any deductions, rebates, refunds, or underpayment of wages due to any employee engaged in the performance of such contract; and, in addition, the agency of the United States entering into such contract shall have the right to cancel same and to make open-market purchases or enter into other contracts for the completion of the original contract, charging any additional cost to the original contractor. Any sums of money due to the United States of America by reason of any violation of any of the representations and stipulations of said contract set forth in section 1 of this Act may be withheld from any amounts due on any such contracts or may be recovered in suits brought in the name of the United States of America by the Attorney General thereof. All sums withheld or recovered as deductions, rebates, refunds, or underpayments of wages shall be held in a special deposit account and shall be paid, on order of the Secretary of Labor, directly to the employees who have been paid less than minimum rates of pay as set forth in such contracts and on whose account such sums were withheld or recovered: *Provided*, That no claims by employees for such payments shall be entertained unless made within one year

from the date of actual notice to the contractor of the withholding or recovery of such sums by the United States of America."

Section 5:

"* * * on complaint of a breach or violation of any representation or stipulation as herein provided, the Secretary of Labor, or an impartial representative designated by him, shall have the power to hold hearings and to issue orders requiring the attendance and testimony of witnesses and the production of evidence under oath. * * * and shall make findings of fact after notice and hearings, which findings shall be conclusive upon all agencies of the United States, and if supported by the preponderance of the evidence, shall be conclusive in any court of the United States; and the Secretary of Labor or authorized representative shall have the power, and is hereby authorized, to make such decisions, based upon findings of fact, as are deemed to be necessary to enforce the provisions of this Act."

Section 6:

"Upon a written finding by the head of the contracting agency or department that the inclusion in the proposal or contract of the representations or stipulations set forth in section 1 will seriously impair the conduct of Government business, the Secretary of Labor shall make exceptions in specific cases or otherwise when justice or public interest will be served thereby. Upon the joint recommendation of the contracting agency and the contractor, the Secretary of Labor may modify the terms of an existing contract respecting minimum rates of pay and maximum hours of labor as he may find necessary and proper in the public interest or to prevent injustice and undue hardship. The Secretary of Labor may provide rea-

sonable limitations and may make rules and regulations allowing reasonable variations, tolerances, and exemptions to and from any or all provisions of this Act respecting minimum rates of pay and maximum hours of labor or the extent of the application of this Act to contractors, as hereinbefore described. Whenever the Secretary of Labor shall permit an increase in the maximum hours of labor stipulated in the contract, he shall set a rate of pay for any overtime, which rate shall be not less than one and one-half times the basic hourly rate received by any employee affected: *Provided*, That whenever in his judgment such course is in the public interest, the President is authorized to suspend any or all of the representations and stipulations contained in section 1 of this Act."

Section 9:

"This Act shall not apply to purchases of such materials, supplies, articles, or equipment as may usually be bought in the open market; * * *"

THE PERTINENT PROVISIONS OF THE FAIR LABOR STANDARDS ACT OF 1938 [ACT OF JUNE 25, 1938, C. 676, 52 STAT. 1060, 29 U. S. C. §201, ET SEQ.] ARE AS FOLLOWS:

Section 2:

"(a) The Congress hereby finds that the existence, in industries engaged in commerce or in the production of goods for commerce, of labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers (1) causes commerce and the channels and instrumentalities of commerce to be used to spread and perpetuate such labor conditions among the workers of the several States; (2) burdens commerce and the free flow of goods in commerce;

(3) constitutes an unfair method of competition in commerce; (4) leads to labor disputes burdening and obstructing commerce and the free flow of goods in commerce; and (5) interferes with the orderly and fair marketing of goods in commerce.

"(b) It is hereby declared to be the policy of this Act, through the exercise by Congress of its power to regulate commerce among the several States, to correct and as rapidly as practicable to eliminate the conditions above referred to in such industries without substantially curtailing employment or earning power."

Section 3:

"As used in this Act—

"(b) 'Commerce' means trade, commerce, transportation, transmission, or communication among the several States or from any State to any place outside thereof."

"(d) 'Employer' includes any person acting directly or indirectly in the interest of an employer in relation to an employee, but shall not include the United States or any State or political subdivision of a State, or any labor organization (other than when acting as an employer), or anyone acting in the capacity of officer or agent of such labor organization."

"(e) 'Employee' includes any individual employed by an employer."

"(i) 'Goods' means goods (including ships and marine equipment), wares, products, commodities, merchandise, or articles or subjects of commerce of any character, or any part or ingredient thereof, but does not include goods after their delivery into the actual physical possession of the ultimate consumer thereof other than a producer, manufacturer, or processor thereof."

"(j) 'Produced' means produced, manufactured, mined, handled, or in any other manner worked on in any State; and for the purposes of this Act an employee shall be deemed to have been engaged in the production of goods if such employee was employed in producing, manufacturing, mining, handling, transporting, or in any other manner working on such goods, or in any process or occupation necessary to the production thereof, in any State."

Section 6:

"(a) Every employer shall pay to each of his employees who is engaged in commerce or in the production of goods for commerce wages at the following rates—

"(3) after the expiration of seven years from such date, not less than 40 cents an hour, * * *.

Section 7:

"(a) No employer shall, except as otherwise provided in this section, employ any of his employees who is engaged in commerce or in the production of goods for commerce—

"(3) for a workweek longer than forty hours after the expiration of the second year from such date, unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed."

Section 15:

"(a) After the expiration of one hundred and twenty days from the date of enactment of this Act, it shall be unlawful for any person—

"(1) to transport, offer for transportation, ship, deliver, or sell in commerce, or to ship, deliver, or sell with knowledge that shipment or delivery or sale thereof in commerce

is intended, any goods in the production of which any employee was employed in violation of section 6 or section 7, * * * "

Section 16:

"(a) Any person who willfully violates any of the provisions of section 15 shall upon conviction thereof be subject to a fine of not more than $10,000, or to imprisonment for not more than six months, or both. No person shall be imprisoned under this subsection except for an offense committed after the conviction of such person for a prior offense under this subsection.

"(b) Any employer who violates the provisions of section 6 or section 7 of this Act shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages. Action to recover such liability may be maintained in any court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated, or such employee or employees may designate an agent or representative to maintain such action for and in behalf of all employees similarly situated. The court in such action shall, in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney's fee to be paid by the defendant, and costs of the action."

Section 17:

"The district courts of the United States and the United States courts of the Territories and possessions shall have jurisdiction, for cause shown, and subject to the provisions of section 20 (relating to notice to opposite party) of the Act entitled 'An Act to supplement existing laws against unlawful restraints and monopolies, and for other pur-

poses', approved October 15, 1914, as amended (U. S. C. 1934 edition, Title 28, sec. 381), to restrain violations of section 15."

Section 18:

"No provision of this Act or of any order thereunder shall excuse noncompliance with any Federal or State law or municipal ordinance establishing a minimum wage higher than the minimum wage established under this Act or a maximum workweek lower than the maximum workweek established under this Act, and no provisions of this Act relating to the employment of child labor shall justify noncompliance with any Federal or State law or municipal ordinance establishing a higher standard than the standard established under * * *."

THE PERTINENT PROVISIONS OF THE NATIONAL DEFENSE ACT OF JULY 2, 1940 (C. 508, 54 STAT. 712, 50 U. S. C. APP. §§1171, 1172 AND 5 U. S. C. §189(A).

"An Act

To expedite the strengthening of the national defense

"*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That (a) in order to expedite the building up of the national defense, the Secretary of War is authorized, out of the moneys appropriated for the War Department for national-defense purposes for the fiscal year ending June 30, 1941, with or without advertising, (1) to provide for the necessary construction, rehabilitation, conversion, and installation at military posts, depots, stations, or other localities, of plants, buildings, facilities, utilities, and appurtenances thereto (including Government-owned facili-

ties at privately owned plants and the expansion of such plants, and the acquisition of such lands, and the purchase or lease of such structures, as may be necessary), for the development, manufacture, maintenance, and storage of military equipment, munitions, and supplies, and for shelter; (2) to provide for the development, purchase, manufacture, shipment, maintenance, and storage of military equipment, munitions, and supplies, and for shelter, at such places and under such conditions as he may deem necessary; and (3) to enter into such contracts (including contracts for educational orders, and for the exchange of deteriorated, unserviceable, obsolescent, or surplus military equipment, munitions, and supplies for other military equipment, munitions, and supplies of which there is a shortage), and to amend or supplement such existing contracts, as he may deem necessary to carry out the purposes specified in this section: *Provided*, That the limitations contained in sections 1136 and 3734 of the Revised Statutes, as amended, and any statutory limitation with respect to the cost of any individual project of construction, shall be suspended until and including June 30, 1942, with respect to any construction authorized by this Act: *Provided further*, That no contract entered into pursuant to the provisions of this section which would otherwise be subject to the provisions of the Act entitled 'An Act to provide conditions for the purchase of supplies and the making of contracts by the United States, and for other purposes', approved June 30, 1936 (49 Stat. 2036; 41 U. S. C. secs. 35-45), shall be exempt from the provisions of such Act solely because of being entered into without advertising pursuant to the provisions of this section: *Provided further*, That the cost-plus-a-percentage-of-cost system of contracting shall not be used under this section; but this proviso shall not be construed to prohibit the use of the

cost-plus-a-fixed-fee form of contract when such use is deemed necessary by the Secretary of War.

"(b) The Secretary of War is further authorized, with or without advertising, to provide for the operation and maintenance of any plants, buildings, facilities, utilities, and appurtenances thereto constructed pursuant to the authorizations contained in this section and section 5, either by means of Government personnel or through the agency of selected qualified commercial manufacturers under contracts entered into with them, and, when he deems it necessary in the interest of the national defense, to lease, sell, or otherwise dispose of, any such plants, buildings, facilities, utilities, appurtenances thereto, and land, under such terms and conditions as he may deem advisable, and without regard to the provisions of section 321 of the Act of June 30, 1932 (47 Stat. 412). * * *

"Sec. 4(b). Notwithstanding the provisions of any other law, the regular working hours of laborers and mechanics employed by the War Department, who are engaged in the manufacture or production of military equipment, munitions, or supplies shall be eight hours per day or forty hours per week during the period of any national emergency declared by the President to exist: *Provided*, That under such regulations as the Secretary of War may prescribe, such hours may be exceeded, but compensation for employment in excess of forty hours in any work-week, computed at a rate not less than one and one-half times the regular rate, shall be paid to such laborers and mechanics."

THE PERTINENT PROVISIONS OF THE PORTAL-TO-PORTAL ACT OF 1947 [ACT OF MAY 14, 19.., C. 52, 61 STAT. 84, 29 U. S. C. §251, ET SEQ.] ARE AS FOLLOWS:

Section 1:

"(a) The Congress hereby finds that the Fair Labor Standards Act of 1938, as amended, has been interpreted judicially in disregard of long-established customs, practices, and contracts between employers and employees, thereby creating wholly unexpected liabilities, immense in amount and retroactive in operation, upon employers with the results that, if said Act as so interpreted or claims arising under such interpretations were permitted to stand, (1) the payment of such liabilities would bring about financial ruin of many employers and seriously impair the capital resources of many others, thereby resulting in the reduction of industrial operations, halting of expansion and development, curtailing employment, and the earning power of employees; (2) the credit of many employers would be seriously impaired; (3) there would be created both an extended and continuous uncertainty on the part of industry, both employer and employee, as to the financial condition of productive establishments and a gross inequality of competitive conditions between employers and between industries; (4) employees would receive windfall payments, including liquidated damages, of sums for activities performed by them without any expectation of reward beyond that included in their agreed rates of pay; (5) there would occur the promotion of increasing demands for payment to employees for engaging in activities no compensation for which had been contemplated by either the employer or employee at the time they were engaged in; (6) voluntary collective bargaining would be interfered with and industrial disputes between employees and employers

and between employees and employees would be created; (7) the courts of the country would be burdened with excessive and needless litigation and champertous practices would be encouraged; (8) the Public Treasury would be deprived of large sums of revenues and public finances would be seriously deranged by claims against the Public Treasury for refunds of taxes already paid; (9) the cost to the Government of goods and services heretofore and hereafter purchased by its various departments and agencies would be unreasonably increased and the Public Treasury would be seriously affected by consequent increased cost of war contracts; and (10) serious and adverse effects upon the revenues of Federal, State, and local governments would occur.

"The Congress further finds that all of the foregoing constitutes a substantial burden on commerce and a substantial obstruction to the free flow of goods in commerce.

"The Congress, therefore, further finds and declares that it is in the national public interest and for the general welfare, essential to national defense, and necessary to aid, protect, and foster commerce, that this Act be enacted. * * *

"(b) It is hereby declared to be the policy of the Congress in order to meet the existing emergency and to correct existing evils: (1) to relieve and protect interstate commerce from practices which burden and obstruct it; (2) to protect the right of collective bargaining; and (3) to define and limit the jurisdiction of the courts."

Section 2:

"(a) No employer shall be subject to any liability or punishment under the Fair Labor Standards Act of 1938, as amended, the Walsh-Healey Act, or the Bacon-Davis Act (in any action or proceeding commenced prior to or on or

after the date of the enactment of this Act), on account of the failure of such employer to pay an employee minimum wages, or to pay an employee overtime compensation, for or on account of any activity of an employee engaged in prior to the date of the enactment of this Act, except an activity which was compensable by either—

"(1) an express provision of a written or nonwritten contract in effect, at the time of such activity, between such employee, his agent, or collective-bargaining representative and his employer; or

"(2) a custom or practice in effect, at the time of such activity, at the establishment or other place where such employee was employed, covering such activity, not inconsistent with a written or nonwritten contract, in effect at the time of such activity, between such employee, his agent, or collective-bargaining representative and his employer.

"(b) For the purposes of subsection (a), an activity shall be considered as compensable under such contract provision or such custom or practice only when it was engaged in during the portion of the day with respect to which it was so made compensable.

"(c) In the application of the minimum wage and overtime compensation provisions of the Fair Labor Standards Act of 1938, as amended, of the Walsh-Healey Act, or of the Bacon-Davis Act, in determining the time for which an employer employed an employee there shall be counted all that time, but only that time, during which the employee engaged in activities which were compensable within the meaning of subsections (a) and (b) of this section.

"(d) No court of the United States, of any State, Territory, or possession of the United States, or of the District

of Columbia, shall have jurisdiction of any action or proceeding, whether instituted prior to or on or after the date of the enactment of this Act, to enforce liability or impose punishment for or on account of the failure of the employer to pay minimum wages or overtime compensation under the Fair Labor Standards Act of 1938, as amended, under the Walsh-Healey Act, or under the Bacon-Davis Act, to the extent that such action or proceeding seeks to enforce any liability or impose any punishment with respect to an activity which was not compensable under subsections (a) and (b) of this section."

Section 9:

"In any action or proceeding commenced prior to or on or after the date of the enactment of this Act, based on any act or omission prior to the date of the enactment of this Act, no employer shall be subject to any liability or punishment for or on account of the failure of the employer to pay minimum wages or overtime compensation under the Fair Labor Standards Act of 1938, as amended, the Walsh-Healey Act, or the Bacon-Davis Act, if he pleads and proves that the act or omission complained of was in good faith in conformity with and in reliance on any administrative regulation, order, ruling, approval, or interpretation, of any agency of the United States, or any administrative practice or enforcement policy of any such agency with respect to the class of employers to which he belonged. Such a defense, if established, shall be a bar to the action or proceeding, notwithstanding that after such act or omission, such administrative regulation, order, ruling, approval, interpretation, practice, or enforcement policy is modified or rescinded or is determined by judicial authority to be invalid or of no legal effect."

APPENDIX B

Statement of Labor Policy Governing Government-Owned, Privately-Operated Plants.

Congress has charged the War and Navy Departments with the responsibility for the operation of nearly 100 giant Government-owned munitions plants, the backbone of the Nation's armament program. Under the terms of the Congressional Mandate, the War and Navy Departments had the option of themselves operating the plants or operating them through the agency of selected qualified commercial contractors. In order fully to utilize the labor and management resources of the Nation and to minimize encroachment upon the country's industrial structure, the two Departments chose the latter course. The industrial units thus created are unique.

All are owned outright by the United States, and all but a very few are located upon military reservations. All are engaged solely in war production—the manufacture and loading of explosives and ammunition, the assembly of bombers and the fabrication of guns and other munitions. In all of the plants the work performed is of a secret or confidential nature, and in many of them it is highly hazardous. All are operated by private contractors under "Management Service" contracts, any of which may at any time be terminated by the Government if it should decide either to operate the plant itself or to entrust its operation to another contractor. The normal factors which go to make up commercial profit are lacking. The Government had title to the product at all times. It pays the contractor a fixed fee for its services which fee is unaffected by wages or other costs, production delays or stoppages. The Gov-

ernment reimburses the contractor for all costs, including wages, and in most instances must approve such costs, including wage scales, in advance. The Army or Navy officer in charge may direct the discharge of any employee if he deems it to be in the public interest. These plants embody a new and unique tripartite relationship among Government, labor, and management. They are sufficiently different from traditional Government establishments so that existing Government policies regulating labor relations are not entirely suitable.

Recognizing these facts, and desiring to preserve the greatest freedom of organization and collective bargaining by the employees which is compatible with the necessary discharge by the War and Navy Departments of their responsibility for maximum production and the safe and efficient operation of these plants, the War Department and the Navy Department have established the following labor policies to which the American Federation of Labor and the Congress of Industrial Organizations have agreed after assisting in their preparation. It is recognized that these policies do not cover all aspects of labor relations in these plants, and experience may indicate the desirability of modifying, adding to, or otherwise amending this statement of policy.

1. No employee or person seeking employment shall be discriminated against by reason of race, color, creed, or sex.

2. The recognition of an exclusive bargaining agent for the employees in any appropriate bargaining unit within any plant will be deferred until a majority of the estimated total of that unit has been hired, unless special circumstances shall justify an earlier designation of such exclusive bargaining agent. The War and Navy Departments will undertake to estimate with reasonable promptness the total employee complement of the appropriate unit.

3. While no recognition shall be accorded any organization as the exclusive representative of any group of employees until the proper collective bargaining agency shall have been determined under the conditions described above, provision will be made for the handling of grievances and other disputes, and the elimination of friction between employees and management during the period pending such determination. These procedures should be approved by the representative of the Army or Navy in charge of operations at the plant.

4. Seniority shall be a determining factor in matters affecting layoff and reemployment, transfers, demotions and promotions only if other factors of ability and aptitude are equal.

5. (a) Discharges directed by the War or the Navy Departments for suspicion of subversive activities will be handled in accordance with the provisions of the "Joint Memorandum on Removal of Subversives from National Defense Projects of Importance to Army or Navy Procurement", dated January 10, 1942.

(b) Discharges directed by the Army or Navy Officer in charge in the interest of plant security will be handled in the following manner: (1) the Officer, or his representative will direct the contractor to suspend the employee in question immediately; (2) the employee will be advised in detail of the specific reasons for his suspension and of his right to a hearing; (3) if requested, a hearing will be held by the Officer, or his representative, within a reasonable period and at such hearing the suspended employee will have an opportunity to produce witnesses and present evidence and to be assisted by counsel; (4) based on such hearing, the Officer, or his representative, will direct the reinstatement (with authority to grant back pay) or the

discharge of such employee; (5) an employee so discharged will have the right, upon request, to have his case reviewed by the War or Navy Department.

6. No agreement between the management and its employees, or their representatives, except those which affect the safety and health of employees, may be entered into, or action taken, which, in the opinion of either the Secretary of War or the Secretary of the Navy, will have the effect of restricting or hampering maximum output.

7. (a) Anti-sabotage, anti-espionage and plant protective measures, including access into the plant, approved or prescribed by the War and Navy Departments, or their representatives, shall be binding upon management, employees, and their representatives.

(b) Measures designed to guard against sabotage, espionage, subversive activities and other plant protective measures which are ordered or approved by the Army or Navy representatives shall insofar as practicable be prominently posted throughout the plant and otherwise made available to employee. Violations of any of these rules or regulations shall be grounds of disciplinary action, including immediate dismissal.

8. (a) The War and Navy Departments in most instances, have contractual responsibility for the approval of all costs including payroll costs. These Departments therefore will from time to time jointly agree upon the policies to govern the exercise of these contractual responsibilities to approve or disapprove proposed wage scales at these plants.

(b) Before operations commence at any plant, the contractor will prepare a wage scale to apply upon the commencement of operations and submit the same for approval

to the War or Navy Department through the local Army or Navy representative at the plant, who will forward these with their own comments regarding the appropriateness of the proposed scale. Any subsequent adjustments in the initial wage scale at any plant shall be worked out by the contractor and the employees through established procedures, provided only that the approval of the War or Navy Department must be obtained before such adjustments may become effective.

9. This statement of policy shall be applicable to all such plants except that where any provision of the statement conflicts with a provision in an existing contract, such contract will not be altered except by mutual consent.

APPENDIX C

COPY

14 June 1944

The Honorable,
The Attorney General.

Attention: Mr. Francis M. Shea.

Dear Mr. Attorney General:

Reference is made to the letter of this Department dated 8 May 1944 relative to actions instituted under the Fair Labor Standards Act of 1938 by employees of cost-plus-a-fixed-fee contractors engaged in the production of Government-owned goods, particularly munitions, in situations where any subsequent interstate or foreign transportation of the goods is effected by the Government.

Several conferences have been held between representatives of the War and Navy Departments with respect to these cases. The difference of opinion which previously existed between the two Departments concerning the policy under which the cases should be handled has been eliminated, and the joint views of the two Departments have been reduced to writing. Inclosed is a copy of a statement of such views.

Sincerely yours,

(signed)

MYRON C. CRAMER
Myron C. Cramer,
Major General
The Judge Advocate General.

1 Incl.: Copy of Stmt.

PRODUCTION OF GOODS FOR COMMERCE

Statement of Army and Navy Views

The War and Navy Departments agree that:

1. A strong argument can be made, supported, among other things, by substantial judicial authority, that the interstate shipment of Government-owned goods by the Government does not constitute "commerce" and the production of war materials, supplies, and equipment by private cost-plus-a-fixed-fee contractors for subsequent interstate or foreign transportation by the Government only does not constitute a "production of goods for commerce" within the meaning of the Fair Labor Standards Act.

2. The successful assertion of this argument as a defense in numerous cases, now pending or prospective, against cost-plus-a-fixed-fee contractors, in which the War and Navy Department have a potential aggregate liability which might exceed $75,000,000, may, however, result in an impairment of the jurisdiction of the National Labor Relations Board over war plants or cause a substantial legal doubt to be cast upon such jurisdiction. The defense should be asserted if, in the opinion of the Attorney General, it would not impair or cast substantial legal doubt upon such jurisdiction of the National Labor Relations Board, but it should not be asserted if, in the opinion of the Attorney General, it would result in casting substantial legal doubt upon or impairing such jurisdiction.

3. It is recognized that the National Labor Relations Board regards the shipment of Government-owned goods by the Government as "interstate commerce" within the meaning of the National Labor Relations Act, and desires to be heard, and should be heard, in connection with the policy of the Government's litigation position in cases arising out of the Fair Labor Standards Act.

OFFICE OF THE ATTORNEY GENERAL
Washington, D. C.

July 12, 1944.

The Honorable
The Secretary of War
War Department
Washington, D. C.

My dear Mr. Secretary:

Reference is made to letters dated May 8 and June 14, 1944, from the War Department, letters dated May 8 and June 17, 1944, from the Navy Department, and letters dated June 17 and June 27, 1944, respectively, from the General Counsel of the National Labor Relations Board and the Solicitor of the Department of Labor. This correspondence concerns the applicability of the Fair Labor Standards Act to employees of cost-plus-a-fixed-fee contractors engaged in the manufacture and production of war materials for delivery to the Government at the plant site. It has been suggested that it be asserted as a defense in cases involving actions under the Act by such employees that neither the production nor the subsequent interstate transportation of such goods constitute "production of goods for commerce" or "commerce" within the meaning of the Act. The War and Navy Departments' joint statement of views transmitted to this Department following conferences between representatives of the War, Navy, Labor and Justice Departments, recommends the assertion of such defense "if in the opinion of the Attorney General it would not impair or cast substantial legal doubt" upon the jurisdiction of the National Labor Relations Board over war plants. On the other hand, the War and Navy Departments recommend that such defense not be asserted if it would result in impairing or casting substantial legal doubt upon such jurisdiction.

It is my considered opinion that a Supreme Court holding that interstate shipment by the Government of War goods produced by contractors but delivered to the Government before shipment does not constitute "commerce" or "production of goods for commerce" would substantially impair and cast serious legal doubt upon the jurisdiction of the National Labor Relations Board over the labor relations of cost-plus contractors. Both statutes define "commerce" to include "transportation". Nothing in their respective legislative histories evidences a congressional intent to exclude from coverage manufacturers or producers of articles for the Government. Under such circumstances a precedent involving the Fair Labor Standards Act would clearly merit and be accorded great weight in the interpretation of similar questions under the National Labor Relations Act. The Solicitor of the Labor Department and the General Counsel of the National Labor Relations Board concur in this point of view.

You have indicated that you consider it inappropriate to raise this defense in such circumstances and I share your opinion. Entirely apart from that basis of decision, I feel that the defense lacks substantial merit. Despite the possibility of its successful assertion in some lower courts, I do not believe that it would be sustained in the Supreme Court. The statutory definition of "commerce" in the Act covers "trade, commerce, transportation, transmission or communication". I find nothing in the statute which supports the argument that war products are beyond the scope of the statute because they are not designed to enter ordinary competitive commercial channels. The mere fact of transportation provides sufficient basis for coverage. Furthermore, the statutory exemption of persons in employment relationship with the Government is specifically limited by Section 3(d) to persons directly employed by

the United States and cannot reasonably be extended to employees of Government contractors producing materials designed for sale to and subsequent transportation by the Government. Since, if I fairly appraise its weight, the defense will not ultimately serve the Government's financial advantage, the consequences are likely to be only confusion and uncertainty in accounting and the management of labor relations in war plants—a result obviously detrimental to the best interests of the Government. I assume that the decision which has been reached in this matter will be communicated to the field representatives of your Department.

Your Department has already been furnished with copies of Mr. Maggs' views in the matter. In order to complete your files, I am enclosing herewith copy of a letter which I received from the General Counsel of the National Labor Relations Board with respect to his position.

Respectfully,

(sgd) FRANCIS BIDDLE
The Attorney General

COPY

March 26, 1946

The Honorable
The Attorney General

Dear Mr. Attorney General:

Reference is made to the "Memorandum of Agreement on Procedures for Handling Fair Labor Standards Act Claims Against Cost-Plus-a-Fixed-Fee Contractors" which was entered into and executed by the respective parties thereto, including the Department of Justice and the War Department, as of November 1, 1945. The agreement evidenced by that memorandum modified substantially a pre-

vious similar agreement between the same parties, dated December 23, 1943. The purposes of the revised agreement are stated sufficiently in Article 2 of the aforementioned memorandum.

As you know, the revised agreement provides, in substance, that Government counsel will not be furnished to defend claims against cost-plus contractors except in special cases as therein defined. Under the terms of the agreement private counsel has plenary control of the litigation, including full right to settle the litigation, subject to the qualification that it is the duty of private counsel to advise the appropriate United States Attorney of his proposed plan of defense or his proposed course of settlement. If the United States Attorney is satisfied that the proposed plan of defense or course of action of the private attorney represents sound litigating judgment and is in the best interests of the United States, he so advises private counsel and private counsel thereupon proceeds as proposed. If the United States Attorney is not in agreement with the proposed plan of action, he reports to the Department of Justice his recommendation as to whether the Department should seek to participate in the proceedings, a right which the Department expressly reserved.

It has come to the attention of this Department that in several suits of the nature covered by the agreement of November 1, 1945, private counsel, in preparing defense of the litigation, have included in the proposed plan of defense submitted to the appropriate United States Attorney certain defenses which the United States Attorneys do not consider meritorious. Briefly, the defenses in question are that (a) the employees of a cost-plus-a-fixed-fee contractor are not engaged in interstate commerce within the meaning of the Fair Labor Standards Act; (b) the employees of a cost-plus-a-fixed-fee contractor are not engaged in the

production of goods for commerce within the meaning of the Fair Labor Standards Act; (c) a cost-plus-a-fixed-fee contractor operating, in many cases, a Government-owned facility and manufacturing war materials from materials owned and supplied by the Government and for delivery to the Government is acting as an instrumentality of the Government and is not an employer within the meaning of the Fair Labor Standards Act; and (d) defenses which challenge the validity of a regulation of the Wage and Hour Administrator.

As a result of various United States Attorneys advising private counsel of certain contractors that they regard such defenses not to be meritorious, the contractors have pointed out to the War Department that under their contracts with the Department they are required to use their best efforts to protect and subserve the best interests of the United States. They contend that until the United States Supreme Court holds such defenses to be invalid they would not be using their best efforts to protect and subserve the best interests of the United States, as required by their contracts, unless they present to the courts and vigorously prosecute every available defense which to them appears meritorious.

These contractors point out that several trial courts have rendered conflicting rulings regarding the validity of certain of these questioned defenses and they contend that in the event courts of competent jurisdiction should hold subsequently that such defenses are valid a failure to present the defenses in a given case might prejudice whatever rights the contractor would have under his contract to reimbursement for an adverse judgment and expense incident thereto. Contractors insist that if these defenses are not to be raised the War Department through its contracting offices direct the contractors in writing not to present

such defenses and in addition assure them that they will not be precluded thereby from any reimbursement otherwise proper under the contract in the event of an adverse judgment. So far as presently can be estimated the extent of existing suits and potential suits under the Fair Labor Standards Act involving War Department contractors may in the aggregate exceed $250,000,000, substantially all of which will be reimbursable to the contractors. In view of the large amounts involved and the present unsettled state of judicial authority on the matter the War Department is reluctant to direct its contractors to limit their defenses in these actions without the advice of your office.

The question of what defenses should be considered meritorious in suits of the nature considered herein previously was discussed with your office early in 1944 and culminated in a letter dated July 12, 1944, from the Attorney General, replying to previous communications from this Department. In those communications the War Department advised the Attorney General that because of certain considerations connected with the prosecution of the war, more fully recited in letters dated May 8 and June 14, 1944, it had concluded that it would be advisable, if the Attorney General believed that such action would be proper, "to concede in litigated cases that the manufacture of munitions for the Government by employees of cost-plus-a-fixed-fee contractors at Government arsenals constitutes 'the production of goods for commerce' and establishes the basic applicability of the Fair Labor Standards Act to such employees." The Attorney General in his letter dated July 12, 1944, stated that he shared that opinion. He stated further that entirely apart from that basis of decision he felt that the defense lacked substantial merit.

Since that time, however, the policy considerations which it was thought warranted such a conclusion have changed

substantially in view of the termination of hostilities. Also, as indicated above, several trial courts have expressed opinions to the effect that the production of munitions by employees of cost-plus-a-fixed-fee contractors is not "the production of goods for commerce" and, therefore, is not subject to the provisions of the Fair Labor Standards Act. Accordingly, some concern is felt by this Department over the question whether the War Department, as an administrative matter, properly may advise its contractors at this time that the raising of the defenses that employees of a cost-plus-a-fixed-fee contractor are not engaged in commerce or in the production of goods for commerce within the meaning of the Act would not serve the best interests of the United States and accordingly that these defenses should not be raised. The War Department feels that it has a serious obligation to advise its contractors as to their proper course of action in this matter. Accordingly, in view of the substantial change in circumstances since July 1944, the apparent unsettled state of judicial authority on the question, the considerable number of suits with which War Department contractors are and may be faced in this matter and the considerable amount involved in such suits, it is requested that you advise this Department whether the best interests of the Government require the War Department at this time to direct its contractors not to raise these defenses.

The War Department has always felt that the defense that a cost-plus-a-fixed-fee contractor is acting as an instrumentality of the Government and is not an employer within the meaning of the Fair Labor Standards Act is without merit and that defenses which challenge the validity of a regulation of the Wage and Hour Administrator do not subserve the best interests of the Government. Accordingly, the Department proposes, if you concur, to ad-

vise its contractors that the raising of these defenses will not subserve the best interests of the Government and, accordingly, that the Department will not regard as a reasonable and proper cost any part of the counsel fee in cases in which these defenses are introduced.

Sincerely yours,

(sgd) ROBERT P. PATTERSON
Secretary of War.

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In the Supreme Court of the United States

OCTOBER TERM, 1948

No. 809

JULIA RHODA AARON, ETC., ET AL., PETITIONERS

v.

FORD, BACON AND DAVIS, INCORPORATED

No. 836

R. M. POWELL, ET AL., PETITIONERS

v.

THE UNITED STATES CARTRIDGE COMPANY

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE

The United States respectfully requests the Court to grant the petitions for certiorari in the above

cases. The cases involve suits by employees of Government cost-plus contractors for overtime compensation claimed to be due under the Fair Labor Standards Act, and are similar to *Kennedy* v. *Silas Mason Co.*, 334 U. S. 249, which this Court last term remanded to the district court, without ruling on the merits, "for reconsideration and amplification of the record," and to *Creel v. Lone Star Defense Corporation*, No. 746, this Term, certiorari granted June 6, 1949. The *Powell* case, however, unlike the *Silas Mason* case, was not disposed of in a summary judgment proceeding, but was decided after a full trial of the merits. Subsequent to this Court's decision in the *Silas Mason* case, the Court of Appeals set the instant cases for reargument, pointing out that the issues presented here were the same as those involved in the *Silas Mason* case, and that while the *Silas Mason* case had been remanded because the record was "not sufficiently complete," in the *Powell* case there had been a full trial and the record "would seem to be sufficient to warrant the consideration of the question as to the applicability, if any, of the above enumerated acts of Congress."

The district court, in the *Powell* case, after trial and findings of fact, ruled that defendant was engaged in production of goods for commerce within the scope of the Act and that it was the employer of the plaintiffs within the meaning of the Fair Labor Standards Act. (R. 916-920.) The Court of Appeals reversed this judgment on the wholly novel ground

that the Walsh-Healey Public Contracts Act (49 Stat. 2036, 41 U. S. C. 35) and the Fair Labor Standards Act (52 Stat. 1060, 29 U. S. C. 201) are mutually exclusive and that only the Walsh-Healey Act is applicable here. Holding that the employees could not maintain the suit under the Walsh-Healey Act, the Court of Appeals ordered the action dismissed. In the *Ford, Bacon and Davis* case, the district court had granted judgment for the defendant, and this decision was affirmed by the Court of Appeals.

These cases involve the same questions which this Court in the *Silas Mason* case characterized as "extremely important" (334 U. S. at 256), and as to which certiorari was granted in the *Lone Star* case. And the new point, upon which the court below rested its decision, is of even greater consequence to the administration of the Fair Labor Standards Act. For the holding that contractors covered by the Walsh-Healey Act are thereby exempt from the Fair Labor Standards Act applies not only to cost-plus war contractors, but apparently to all peacetime contractors with the Government as well.

We believe that the decision below that contractors subject to the Walsh-Healey Act are not covered by the Fair Labor Standards Act is contrary to the clear legislative intent and to the consistent construction of these statutes throughout the more than ten years of their existence, not only by the Administrator, but by the courts, and indeed

by all government agencies concerned.[1] This is illustrated by the explicit notice to employees in the instant cases that they would be paid in accordance with the Fair Labor Standards Act *and* the Walsh-Healey Act. (See opinion below, pp. 8-9). There is also a conflict between this decision and the decision of the Sixth Circuit in *Walling* v. *Patton-Tulley Transp. Co.*, 134 F. 2d 945, which held the Fair Labor Standards Act applicable to government contractors as against an argument based on the Eight Hour Law similar to that accepted by the court below with respect to the Walsh-Healey Act.

1. While the coverage of the Fair Labor Standards Act and the Walsh-Healey Act may overlap, there is nothing inconsistent in the application of both statutes, where both are applicable by their terms. There is nothing in either statute "which provides for exclusiveness of remedy" or "for an election of remedies." Cf. *Brooks* v. *United States*, Nos. 388 and 389—October Term, 1948, decided May 16, 1949. On the contrary, "the language, framework and legislative history" (*ibid.*) require the conclusion that the acts were not intended to be mutually exclusive but rather mutually reenforcing.

The fact that the two acts would overlap in certain circumstances was appreciated from the outset. Prior to the enactment of the Fair Labor Standards Act, the Secretary of Labor drew the

[1] The absence of other litigation on this point indicates that this has been the general understanding of employers as well.

attention of Congress to the fact that the bill (Fair Labor Standards) "overlaps to some extent the administrative functions performed with respect to Government contracts under the Walsh-Healey Act" (81 Cong. Rec. Appendix 1484, 75th Cong., 1st sess., June 15, 1937). The Secretary recommended that the Walsh-Healey Act nevertheless "should be continued in full force and effect" for the reason, but obviously only for the reason, of taking advantage of the Walsh-Healey Act to the extent that it covered certain businesses which it was thought could not constitutionally be regulated under the commerce power (e. g., it might be applied to "certain distributive concerns engaged in intrastate business"), and to the extent that its labor standards might in some cases be higher (*ibid.*).

There was clearly no intent and no suggestion was ever made that the retention of the Walsh-Healey Act would operate to exclude employees working under Government contract from the broader coverage and the more effective remedies provided in the Fair Labor Standards Act. On the contrary, an affirmative measure was incorporated in Section 18 of the Act to insure against any such result. Section 18 provides that nothing in the Act "shall excuse noncompliance with any Federal or State law or municipal ordinance establishing * * * a higher standard than the standard established under this Act;" this would clearly seem to cover the Walsh-Healey Act. Furthermore, Congress

was very explicit when it wished to exclude employees from the Fair Labor Standards Act because they were regulated by other possibly overlapping Federal statutes. See Section 13(a)(4) exempting employees subject to regulation under the Railway Labor Act, and Section 13(b)(1) and (2) exempting employees subject to regulation by the Interstate Commerce Commission. These factors together show that there was no intent to exempt employees because they might be subject to the Walsh-Healey Act.

Since the original enactment of the Fair Labor Standards Act, Congress has frequently recognized that both Acts were applicable to Government cost-plus contracts. Each annual report since 1942 has expressly brought to the attention of the Congress the Administrator's view that most employers subject to the Public Contracts Act are also subject to the Fair Labor Standards Act, as well,[2] and detailed schedules of the Administrator's inspection activities showing the enforcement of that view.[3] The reports also show that in a number of cases administrative proceedings under the Walsh-Healey Act have been accompanied by criminal prosecutions under Section 16(a) of the Fair Labor Standards

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[2] 1943 Annual Report, p. 9; 1944 Annual Report, p. 10; 1945 Annual Report, p. 2; 1946 Annual Report, p. 14; 1948 Annual Report, p. 5.

[3] 1943 Annual Report, p. 2; 1944 Annual Report, p. 37; 1945 Annual Report, p. 17; 1946 Annual Report, pp. 18, 20; 1947 Annual Report, p. 69; 1948 Annual Report, p. 31.

Act.[4] On the basis of these reports Congress each year has voted appropriations for such enforcement without the slightest hint of criticism that the money was being expended in enforcement activities not contemplated in the basic statutes. In analogous situations such action has been held to constitute Congressional confirmation and ratification of an administrative interpretation of long-standing and consistent application. *Brooks* v. *Dewar,* 313 U. S. 354, 361; *Fleming* v. *Mohawk Co.,* 331 U. S. 111, 116; see also *Wells* v. *Nickles,* 104 U. S. 444, 447; *Isbrandtsen-Moller Co.* v. *United States,* 300 U. S. 139, 147.

In addition, the Portal-to-Portal Act of 1947 (61 Stat. 84, 29 U. S. C. (1946 ed., Supp. I) § 251) shows that Congress believed that the Fair Labor Standards Act applied to government contractors. One of the stated purposes of the Portal Act was to invalidate portal-to-portal claims by employees under the Fair Labor Standards Act because of the "increased cost of war contracts" by virtue of liabilities to cost-plus contractors from such claims. This statement would have been meaningless if all government contractors were exempt from the Act, as would be true if all persons covered by the Walsh-Healey Act were exempt.

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[4] See Administrator's Annual Report for 1948, p. 9. The records of the United States District Courts show at least 20 criminal cases in which defendants had been convicted and fined for violations under the Fair Labor Standards Act where those same defendants were found liable in administrative proceedings under the Walsh-Healey Act.

2. That both statutes may apply to employees of Government contractors has been the consistent administrative construction of these statutes throughout the more than ten years of their existence, by the Department of Justice and by the Wage and Hour Administrator. In 1942 the Secretary of War was apparently of the same opinion. And it is to be observed that in the *Silas Mason* case the Department of the Army did not suggest even the possibility of a defense based upon the Walsh-Healey Act. See also opinion of the Comptroller General dated September 28, 1942, 22 Comp. Gen. Decisions 277. The statement in the opinion below that the two Acts could not apply at one and the same time without "attending confusion in computing wages and the collection of claims therefor" (op., p. 14) is simply not borne out by the more than ten years' experience in the practical administration and enforcement of these acts.

CONCLUSION

For the above reasons, the Government submits that the petitions for writs of certiorari should be granted, and the cases set down for argument with *Creel v. Lone Star Defense Corporation*, No. 746, certiorari granted, June 6, 1949.

Respectfully submitted,

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Solicitor General.

WILLIAM S. TYSON,
Solicitor of Labor.

JUNE, 1949.

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No. 246

In the

Supreme Court of the United States

OCTOBER TERM, 1949

ROY CREEL, *et al.*,

Petitioners,

v.

LONE STAR DEFENSE CORPORATION,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT, AND BRIEF IN SUPPORT THEREOF.

LINCOLN & KENNEDY,
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No.....

In the

Supreme Court of the United States

OCTOBER TERM, 1949

ROY CREEL, *et al.*,

Petitioners,

v.

LONE STAR DEFENSE CORPORATION,

Respondent.

PETITION FOR WRIT OF CERTIORARI

Comes now Roy Creel, et al., hereinafter styled petitioner, and applying for writ of certiorari to the United States Court of Appeals, Fifth Circuit, respectfully shows:

STATEMENT OF FACTS

Petitioners filed their complaint for overtime compensation, penalties and attorney's fees due them under the Fair Labor Standards Act *(29 U. S. C. A. 201)* from the Lone Star Defense Corporation. The Lone Star Defense Corporation first constructed the plant and thereafter operated it under "cost-plus-a-fixed-fee" contract, and it was the involved facility wherein your petitioners were engaged.

A motion for summary judgment was filed by respondent which in substance states that the Government owned

title to the plant's facilities in question and to the raw materials shipped into Texas to the respondent, and also title to the finished products which were afterwards shipped out of Texas; and that such products were munitions of war used for the prosecution of the war.

Such motion for summary judgment was sustained by letter of Judge Randolph Bryant, United States District Judge for the Eastern District of Texas (R. 93) wherein Judge Bryant, quoting from an opinion of Judge Lemley of the Western District of Arkansas, held:

> "The goods in question were munitions of war and were manufactured for the purpose of being consumed by the United States in the prosecution of the war. Hence, the United States, in our opinion, was the ultimate consumer thereof within the meaning of the Act and the plaintiff was not engaged in the 'production of goods for commerce'."

and Judge Bryant further held that in performing the functions as were performed the United States was not engaged in commerce or the production of goods for commerce, but was simply performing an administrative act.

The contract, pursuant to which the respondent constructed and operated the plant under a "cost-plus-a-fixed-fee" contract, contemplated compliance by respondent with various federal and state regulatory statutes applicable to private employers. (Original Exhibit "A", Motion for Summary Judgment.)

The goods and raw materials shipped to respondent from numerous states into the State of Texas were transported and shipped in interstate commerce. The war munitions

and instruments of war produced at the plant of respondent were transported and shipped in interstate commerce.

The Fifth Court of Appeals held:

(1) The petitioners were not engaged in the production of goods for commerce within the meaning of the Fair Labor Standards Act;

(2) The respondent was not an independent contractor;

(3) Your petitioners were not actually employees of the defendant;

(4) The respondent was acting as an agency of the United States Government;

(5) The United States Government was the producer and ultimate consumer of the goods;

(6) The respondent was exempt from the operation of the Fair Labor Standards Act, under the facts of this cause.

JURISDICTION

The jurisdiction of this court is invoked under Title 28, U. S. C. A. 347 (a) and (b). The above said opinion of the Fifth Court of Appeals having been handed down on the 18th day of January, 1949, and the petition for rehearing having been denied on the 7th day of February, 1949, the following special and important questions are presented:

QUESTIONS PRESENTED

1. Whether a "cost-plus-a-fixed-fee" contractor with the Government manufacturing goods under such contract, the raw materials of which are shipped to such contractor from without a state and the ultimate products manufactured are shipped without the state, is engaged in

"commerce" within the meaning of the Fair Labor Standards Act.

2. Whether a "cost-plus-a-fixed-fee" contractor with the Government, a private corporation, wherein the Government is the owner of the raw materials shipped to such contractor from without the state, and the Government is the owner of the finished products shipped without the state, is a governmental agency exempt from the operation of the Fair Labor Standards Act.

3. Whether the respondent is engaged in the production of goods for commerce within the meaning of the Fair Labor Standards Act.

4. Whether the United States Government, owning plant facilities, raw materials prior to processing and after processing, which materials were processed by a "cost-plus-a-fixed-fee" contractor with the Government and subsequently shipped without the state for use in the prosecution of the war, is a producer and the ultimate consumer of such goods within the meaning of the Fair Labor Standards Act.

5. Whether the United States Government is the employer and is exempt from the operation of the Fair Labor Standards Act under the facts of this case.

6. Whether your petitioners were actually employees of the respondent.

REASONS RELIED UPON FOR ALLOWANCE OF WRIT

1. The issues presented in this cause are of special and outstanding importance for the reason that the products

involved herein were produced by a "cost-plus-a-fixed-fee" contractor under similar conditions to goods produced by many other "cost-plus-a-fixed-fee" contractors involving many necessary items and products transported in commerce essential to the prosecution of the war, and which production of similar goods has been uniformly held subject to the Fair Labor Standards Act. There are many litigants involved in other cases urging similar claims against "cost-plus-a-fixed-fee" contractors.

2. The decision of the Fifth Circuit Court which respondent seeks this court to review is contrary to the decision of the Seventh Circuit in *Bell v. Porter, 159 F. (2d) 117*, wherein the Seventh Circuit specifically held that munitions produced and transported in commerce under similar facts were "goods" within the meaning of the Fair Labor Standards Act and specifically held that employees engaged in the production and transportation of such goods effected by the Government were not exempt from the operation of the Fair Labor Standards Act.

3. The opinion of the Court of Appeals for the Fifth Circuit below is in conflict with the decisions of this Honorable Court in holding that a "cost-plus-a-fixed-fee" contractor is a mere agency of the United States Government. *Alabama v. King & Boozer, 310 U. S. 1; Buckstaff v. McKinley, 308 U. S. 358; Curry v. United States, 314 U. S. 14; Penn Dairies v. Milk Control Commission, 318 U. S. 361.*

4. Your petitioners were entitled to the benefits of the Fair Labor Standards Act while working for the "cost-plus-a-fixed-fee" contractor, respondent.

WHEREFORE, your petitioners respectfully pray that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the United States Court of Appeals for the Fifth Circuit, commanding that Court to certify and send to this Court for its review and determination, on a day certain to be named therein, a full and complete transcript of the record and all proceedings in the case No. 12,182, entitled on its docket Roy Creel, et al., Appellants v. Lone Star Defense Corporation, Appellee, and that said judgment of said Court of Appeals for the Fifth Circuit be reversed by this Honorable Court, and that your petitioners have such other and further relief as the court may deem proper.

Respectfully submitted,

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7

No.....

In the

Supreme Court of the United States

OCTOBER TERM, 1949

ROY CREEL, *et al.*,

Petitioners,

v.

LONE STAR DEFENSE CORPORATION,

Respondent.

SUPPORTING BRIEF

To the Honorable Supreme Court of the United States:

The opinion of the United States Court of Appeals for the Fifth Circuit appears in the transcript of the record.

Jurisdiction is invoked under Title 28, U. S. C. A., Section 47 (a) and (b). The opinion of the United States Court of Appeals for the Fifth Circuit was filed on the 18th day of January, 1949, and the petition for rehearing filed by your petitioners was overruled on February 7, 1949.

STATEMENT OF THE CASE

We herewith adopt the statement of the case as made in the foregoing petition for certiorari and do not restate the same here. We do point out that this case is similar and corollary to the *Silas Mason case* returned to the trial

court by this Honorable Court for enlargement and amplification of the record, and by reason of the fact that this Honorable Court was unable to base an opinion under the limited facts in that case. Therefore, we may expressly state that the aforesaid *Silas Mason case* is to be set for an early hearing in the Western District of Louisiana at Shreveport, wherein it is anticipated that a full and complete statement of facts will be agreed upon and adopted by counsel, and which record will be before this Court for determination in the not too distant future. Now, in the event the facts as related in the opinion of the United States Court of Appeals for the Fifth Circuit adopted below are sufficient to warrant an opinion by this Honorable Court, your petitioners herewith adopt those facts, except insofar as such facts conflict with the contention of coverage by virtue of the manufacture of munitions of war by the respondent, and insofar as such facts conflict with the allegations of your petitioners for overtime as prayed for.

ARGUMENT

1. During the last war the Government expended Forty Billion Dollars to obtain war supplies through the medium of "cost-plus-a-fixed-fee" contractors, all of which were similar to the contracts in this case. The lower courts have engaged in the disposition of some of these cases with the idea that the Fair Labor Standards Act was appropriately applicable to the employees of such "cost-plus-a-fixed-fee" contractors. Some of such courts have adopted the attitude of refusing to place the burden of the Wage and Hour Law upon the Government engaging in the production of

munitions through "cost-plus-a-fixed-fee" contractors, which munitions are calculated to be deadly and destructive as compared with other vital and necessary items of war, such as food, clothing and motor vehicles. The thinking or ideology that places "cost-plus-a-fixed-fee" contractors engaged in producing munitions upon a different basis than contractors engaged in producing food, clothing and motor vehicles for the war is fallacious. There pends in the Federal Trial Courts numerous cases wherein litigants contend for overtime against "cost-plus-a-fixed-fee" contractors. These cases demand the special attention of this Honorable Court to the ascertainment of whether such employees occupy a different position, provided they are working upon lethal and deadly munitions of war, rather than upon ordinary but necessary instruments of war. We respectfully refer this Honorable Court to numerous cases illustrative of the points herein urged.

Umthen v. Day & Zimmerman, Inc., 16 N. W. (2d) 258;

Timberlake v. Day & Zimmerman, Inc., 49 F. Supp. 28;

Lasater v. Hercules Powder Co., 7 W. H. Cases 150;

Adams v. St. Johns River Shipbuilding Co., 69 F. Supp. 989;

Barksdale v. Ford, Baker & Davis, 70 F. Supp. 690;

Deal & Co. v. Leonard, 196 S. W. (2d) 991;

Steward v. Kaiser Co., 71 F. Supp. 551;

Anderson v. Federal Cartridge Corp., 7 W. H. Cases 1;

Matlock v. Sanderson & Porter, 6 Wage Hour Report 917;

Crabb v. Welden Bros., 65 F. Supp. 369.

No more far-reaching decision might or would affect more people directly engaged in the occupation and production of war materials than this decision. We are unable to distinguish between those employees such as your petitioners and the numerous and overwhelming number of employees similarly engaged who may and will have had the benefit of the Fair Labor Standards Act.

2. Every "cost-plus-a-fixed-fee" contract entered into with the Government by a private contractor has certain aspects of control. However, every such contract has specific provisions with reference to the compliance with employment, sanitation, health and wage and hour laws of the State and Federal Governments. It seems clear that "cost-plus-a-fixed-fee" contractors are not agents or instrumentalities of the United States Government, but instead are independent contractors.

Alabama v. King & Boozer, 310 U. S. 1;
Buckstaff Co. v. McKinley, 308 U. S. 358;
Curry v. United States, 314 U. S. 14;
Penn Dairies v. Milk Control Commission, 318 U. S. 361.

We herewith refer to the contract between the Government and your respondent, being Exhibit "A" of your respondent's motion for a summary judgment, which clearly calls for independent management service, including the sub-contracting and many services of construction and in-

stallation of equipment and, in fact, the operation of the entire ordnance facility. We are unable to ascertain any difference between the contract between your respondent and the Government and any other "cost-plus" contract with the exception of the provision wherein the Government assumes liability by virtue of the dangerous and hazardous occupation in which your respondent was engaged in manufacturing, processing and assembling explosives. The contract clearly points out that but for the assumption of such risks the contractors could not have been engaged, the work being particularly hazardous, and fraught with a danger of great loss. The explanation of the insertion of this provision is clear on page 31 of the contract, being Title VII (a), Sections 1 and 2. We do not believe that the insertion of this provision changes the status of your respondent insofar as the applicability of the Wage and Hour Law to your petitioners is concerned.

Your petitioners were employees of your respondent; your petitioners were continuously engaged in working upon materials imported into the State of Texas, and in the manufacture of products within the State of Texas, and in the continuous exportation of the finished products outside of the State of Texas. To hold that such employees as your petitioners were not engaged in "commerce" within the meaning of the Fair Labor Standards Act, is an arbitrary exclusion of your petitioners from the operation of the Act, which is not provided within the Act, and no apparent basis exists for any exception or exclusion of your petitioners from the Act.

No basis in fact and no language within the statute authorizes the exclusion of the finished products, including the fertilizer made by your respondent on the plant facilities within the State of Texas, from the term "goods" as defined in the Fair Labor Standards Act. Your petitioners were simply engaged in employment by a "cost-plus-a-fixed-fee" contractor, just as hundreds of thousands of other American citizens and employees were so engaged during the war; all of whom were subject to the express provisions of the Fair Labor Standards Act.

National Labor Relations Board v. Carroll, 120 F. (2d) 457 (C. C. A. 1.);

Thompson v. Daugherty, 40 F. Supp. 279 (D. Md.);

Magann v. Long's Baggage Transfer Co., 39 F. Supp. 742 (W. D. Va.);

Adams v. St. Johns River Shipbuilding Co., 69 F. Supp. 989 (S. D. Fla.);

Cf. National Labor Relations Board v. E. C. Atkins & Co., 67 S. Ct. 1265;

National Labor Relations Board v. Jones & Laughlin Steel Corp., 67 S. Ct. 1274.

The numerous decisions previously referred to, which held Government contractors subject to the provisions of the Fair Labor Standards Act, presumably assumed that the employees were not employees of the United States. In the *Carroll case* the employees were required by the contract to take the oath of the Post Office, to furnish bond for faithful performance, to meet age and education qualifications, to wear standardized caps or badges and to

load and unload mail under direction of representatives of the Post Office Department. The contractor was also required to suspend employees for inefficiency or delinquency and his vehicles were under the control of the postmaster and operated under fixed schedule. The Court of Appeals nevertheless held "that the respondent is an independent contractor and that the truck drivers hired by him are his employees and not employees of the United States." *120 F. (2d) at 458.* To the same effect see *Fleming v. Gregory, supra.* The facts here warrant the same conclusion with the result that Section 3 (d) has no application.

3. We believe that the "ultimate consumer" exclusion under the Fair Labor Standards Act was intended solely to protect the purchasing consumer who intended to appropriate the goods to his own use and benefit, and could not conceivably have meant the use of the goods by the United States Government in the prosecution of the war such as has just been determined. The restrictive definition of goods so far as it excepts the "ultimate consumer" was intended not to excuse the United States Government or any producer of goods, or your respondent, a "cost-plus-a-fixed-fee" contractor, but to excuse an innocent, unsuspecting private individual who carried with him personal articles produced in violation of the statute from one state to another. The only purpose of the "ultimate consumer" provision of the Fair Labor Standards Act was to exempt such private individual as the ultimate pur-

chaser from any criminal liability for interstate transportation of such goods as he might engage in. The "ultimate consumer" clause was not intended to limit the scope of the Act as to any producer of goods intended for shipment in interstate commerce.

Chapman v. Home Ice Co., 136 F. (2d) 353, 355 (C. C. A. 6), certiorari denied, 320 U. S. 761;

Similarly, in *Hamlet Ice Co. v. Fleming, 127 F. (2d) 165, 170, 171 (C. C. A. 4), certiorari denied, 317 U. S. 634.*

4. There is almost conclusive evidence that Congress intended the Act to apply to goods produced for transportation by the United States to be found in the subsequent legislative history in which Congress recognized that the Fair Labor Standards Act applies to workers employed in plants producing armaments and other vital war materials for the Government. Both the offer and the rejection of various amendments designed to exempt such workers from the Act were predicated on the premise that they were within the existing coverage provisions. Some eighteen bills were introduced for the purpose of suspending or restricting the overtime provisions of the Act for the war's duration. Such amendments would have been largely unnecessary had the existing Act not applied to workers producing war goods for the Government. By their rejection Congress clearly indicated its desire that the Act continue to be applied to employees engaged in these activities.

Cf. Apex Hosiery Co. v. Leader, 310 U. S. 469; United States v. Delaware & Hudson Co., 213 U. S. 366, 414; Alabama v. King & Boozer, supra. Furthermore, any possible doubt as to the applicability of the Fair Labor Standards Act to employees of "cost-plus-a-fixed-fee" contractors with the Government is removed by the enactment of the Portal-to-Portal Act of 1947, Public Law 49, 80th Congress, Chap. 52, 1st Session, Section 1 (a) (9) of the Portal Act contains the Congressional finding that if certain liabilities under the Fair Labor Standards Act were permitted to stand, "the cost to the Government of goods and services heretofore purchased by its various departments and agencies would be unreasonably increased and the Public Treasury would be seriously affected by consequent increased cost of war contracts." The Committee Reports of both Houses of Congress referred to the added cost to the Government by virtue of liabilities to "cost-plus" contractors if the Portal-to-Portal suits by employees were successfully prosecuted. See S. Rept. 48 (Calendar No. 44) 80th Congress, 1st Session, pp. 32-39, and H. Rept. 71, 80th Congress, 1st Session, pp. 4-6. Accordingly, we see that Congress, both during and after the war, never doubted that the Act covers employees of "cost-plus" contractors with the Government who were engaged in the production of munitions of war and by the Portal Act indicated the full extent to which it believed the liability of the Government and others should be limited.

We believe the petition should be granted and the case reversed.

Respectfully submitted,

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No. 58

In the

Supreme Court of the United States

OCTOBER TERM, ~~1948~~ 1949

ROY CREEL, *et al.*,

Petitioners,

v.

LONE STAR DEFENSE CORPORATION,

Respondent.

RESPONDENT'S OPPOSING BRIEF TO PETITION FOR WRIT OF CERTIORARI

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No. 746

In the

Supreme Court of the United States

OCTOBER TERM, 1948

ROY CREEL, *et al.*,

Petitioners,

v.

LONE STAR DEFENSE CORPORATION,

Respondent.

RESPONDENT'S OPPOSING BRIEF TO PETITION FOR WRIT OF CERTIORARI

STATEMENT OF THE CASE

The adoption by petitioners of the facts related in the opinion of the United States Court of Appeals

> "except insofar as such facts conflict with the contention of coverage * * * and except insofar as such facts conflict with the allegations of petitioners for overtime as prayed for"

is incongruous and amounts to no statement at all, necessitating, therefore, the following full statement by respondent, and to the extent that petitioners' statement conflicts with the following, it is not accepted.

This is a suit by petitioners for overtime compensation, liquidated damages and attorneys' fees, under the Fair

Labor Standards Act.' After issue was joined on the pleadings, respondent filed motion for summary judgment, with supporting affidavits, and the motion was not controverted, hence the facts stated in the supporting affidavits are taken as true. The facts thus uncontroverted are:

Respondent was incorporated under the laws of Ohio in 1941 for the sole purpose of fulfilling and performing Contract W-ORD-516, DA-W-ORD-3, as amended, to avail the Government of the key personnel, industrial organization, mass production, "know-how", and industrial technique of The B. F. Goodrich Company, the services of which, along with other large manufacturing concerns, representatives of the United States Ordnance Department stated, in conference with Goodrich officials, were essential to the War Department's vast plans for national security. (Para. 1, Original Affidavit supporting Motion for Summary Judgment.)

The Lone Star Ordnance Plant was an ordnance facility owned by the United States Government. It was constructed during the war for the production of munitions, such as aerial bombs, cluster aerial bombs, 105 mm. shells, 50 mm. shells, detonators, fuses, etc., for use by the Government in the prosecution of the war. (Paragraphs 1-4, inclusive, Original Affidavit supporting Motion for Summary Judgment.)

The United States, by written contract (see Exhibit "A" attached to Original Affidavit) retained respondent to recruit labor and other personnel for, and to manage

[illegible] 52 Stat. 1060, 29 U. S. C. 201-219.

the operation of, the Ordnance Plant. Respondent was paid a fixed fee for this service, and all costs of operation, including the cost of labor and materials, which costs exceeded $10,000.00, were at the Government's expense. (Page 1, Exhibit "A" attached to Original Affidavit); (see also Paragraph 2, Original Affidavit and supporting Motion for Summary Judgment.) At all times involved, the premises upon which petitioners were employed, the tools and equipment furnished or supplied to them by respondent which they, and all others working on the premises were using in their employment, and the property and products with which they dealt in such employment, were all in their entirety the property of the United States. (Paragraphs 3 and 5, Original Affidavit supporting Motion for Summary Judgment.)

By the terms of the Contract, the title to all materials, tools, machinery, equipment, supplies, and all other property of, upon, located at, and used by the Plant, including all parts, components, explosives and materials from which the respondent assembled munitions under its Contract, was in the United States Government, and title to all items purchased by the respondent immediately vested in the Government at the point of shipment. (Paragraph 5, Original Affidavit supporting Motion for Summary Judgment.)

Under the Contract, the Government furnished, supplied, and caused to be shipped to the Plant, all parts, components, explosives and materials used in the assembling and loading of ammunition, except such small quantities of small metal

parts (inconsequential in amount) as the Contracting Officer from time to time directed respondent to furnish, and under said Contract, the title to such Plant purchased material immediately vested in the Government at the point of shipment. (Paragraph 26, Original Affidavit in support of Motion for Summary Judgment.)

Respondent did not ship finished ammunition from the Plant; all such shipments were made by the Ordnance Department, on Government bills of lading. (Paragraph 36, Original Affidavit supporting Motion for Summary Judgment.)

Respondent at no time had title to the finished products of the Plant, and at no time had title to any of the component parts of such products, or of the materials, supplies, machinery, equipment, or other property used in connection with the contract, title thereto and possession thereof being at all times in the United States and subject to its sole control. (Para. 1, Supplemental Affidavit Motion for Summary Judgment, R. 79-80.)

The Government did not purchase munitions from the respondent. (Paragraph 2, Supplemental Affidavit Motion for Summary Judgment, R. 80.)

The respondent did not sell munitions to the Government, or to any other party. (Paragraph 3, Supplemental Affidavit Motion for Summary Judgment, R. 80.)

No munitions or other products were manufactured or processed at the Ordnance Plant except from materials belonging to the Government, and all such munitions and

other products were by the Government used in the prosecution of the war. (Paragraph 4, Supplemental Affidavit Motion for Summary Judgment, R. 80.)

The United States furnished and shipped to the Ordnance Plant approximately 90-95 per cent of all materials, supplies, machinery, equipment, and other property used in connection with the Management Service Contract for the operation of such Plant. The remainder (approximately 5 per cent) of the materials, supplies, etc., were purchased by respondent. The bulk of all such purchases (approximately 95 per cent of the purchased material) was approved by the Government prior to the issuance of a purchase order by respondent. Title to such purchased materials vested in the United States at their points of origin, and such materials were shipped to the Ordnance Plant on Government bills of lading marked "Government property for Military Use." The remainder of the materials purchased by respondent, which were not shipped on Government bill of lading, consisted of less than car lot shipments and purchases in an amount less than $500.00; title to these purchases, however, also vested in the United States. (Para. 5, Supplemental Affidavit Motion for Summary Judgment, R. 80-81.)

A Governme.. Finance Officer in Washington, D. C., paid the freight on the Government bills of lading. (Para. 6, Supplemental Affidavit Motion for Summary Judgment, R. 81.)

The United States had title to and possession of all materials, supplies, machinery, equipment, and other prop-

erty used in connection with the Management Service Contract for operation of Lone Star Ordnance Plant at all times relevant hereto. (Para. 7, Supplemental Affidavit Motion for Summary Judgment, R. 81.) The United States maintained an Accountable Property Officer to be accountable for all property used in connection with the Contract between the Government and the respondent. (Para. 8, Supplemental Affidavit Motion for Summary Judgment, R. 81.)

Prior to the time the Plant actually began operations, the United States advanced to respondent a large sum of money to defray anticipated operating expenses. As money was withdrawn from this fund, it was replenished by the Government. Respondent was not required to use any of its own money in the operation of Lone Star Ordnance Plant. (Para. 9, Supplemental Affidavit Motion for Summary Judgment, R. 81-82.)

The Government contracted for electric power, gas, telephone, telegraph and teletype service at the Plant, and paid such bills directly. Respondent acted as an agent of the Government for the purpose of causing official business messages to be transmitted. (Para. 10, Supplemental Affidavit Motion for Summary Judgment, R. 82.)

In the operation of the Plant, the Ordnance Department specified the various items which it desired to have loaded and supplied production schedules which set forth the quantities of the various items that it desired loaded each month. The quantities specified in the production schedules were revised by the Ordnance Department from month to

month, and it was a frequent and common occurrence that the schedule would be increased or decreased in the month, due to the fluidity of the war and resulting demand for different ordnance items, or for larger or smaller quantities of particular items. During the operation of the Plant, the indicated quantities of the particular ammunition items were loaded in the Plant's various load lines. (Para. 29A, Affidavit in Support of Motion for Summary Judgment.)

The Plant was under the control and supervision of the Chief of Ordnance, United States Army. A Commanding Officer appointed by the Chief of Ordnance was on duty at Lone Star Ordnance Plant at all times relevant hereto, and had complete control over the property and the installations thereon. (Para. 11, Supplemental Affidavit Motion for Summary Judgment, R. 82.)

By deed, Honorable Coke Stevenson, as Governor of the State of Texas, ceded jurisdiction over the Lone Star reservation to United States Government for all purposes except the service of civil process upon respondent, and the United States Government had exclusive jurisdiction over the premises embracing the Lone Star Ordnance Plant. (Para. 12, Supplemental Affidavit Motion for Summary Judgment, R. 82.)

The Government retained the right to dismiss any employee at the Plant which the Contracting Officer should deem incompetent or whose retention was by him deemed not to be in the public interest. (Para. 13, Supplemental Affidavit Motion for Summary Judgment, R. 82-83.)

The Government approved all wage and salary rates. The Government also required that no key employees and their principal assistants be hired or assigned to service until there had been submitted and approved by the Contracting Officer a statement of the previous salary, proposed salary, qualifications and experience of the persons selected for such assignment. (Para. 14, Supplemental Affidavit Motion for Summary Judgment, R. 83.)

All munitions processed at the Plant were processed under the direct supervision and control of the Government (Para. 15, Supplemental Affidavit Motion for Summary Judgment, R. 83.)

The Government specified the loading processes to be used. It directed the type and quantity of munitions, the specifications thereof, and the rate of production. Inspections were made by the Government during the various steps of their processing. Detailed rules and regulations governing safety and methods of production were promulgated by the Government. Respondent was required to comply with such rules and regulations and to meet specifications, and Government officers and employees were present to report on compliance. (Para. 16, Supplemental Affidavit Motion for Summary Judgment, R. 83.) The Government, from time to time, sent to respondent production schedules directing respondent to produce munitions of certain designated specifications. Respondent was required to meet these schedules. It had no discretion as to the type of munitions to be made, the quantity thereof, or the method or process used in their manufacture, and respondent

produced no munitions except as required by Government directive. (Para. 17, Supplemental Affidavit Motion for Summary Judgment, R. 83-84.)

On occasions the Government transferred production schedules from other ordnance plants to the Lone Star Ordnance Plant for completion. In such cases, if the original plant had made any contracts for materials and supplies on account of such schedules, respondent was required to take over such supply contracts and to pay the vendors in accordance therewith from funds supplied to respondent by the Government. (Para. 18, Supplemental Affidavit Motion for Summary Judgment, R. 84.)

Respondent was not penalized if the materials processed at the Plant did not meet specifications and could not be used. Under the Contract between respondent and the Government, respondent was allowed all costs of reworking rejected munitions and all costs of material finally rejected. (Para. 19, Supplemental Affidavit Motion for Summary Judgment, R. 84.)

Of the direct materials used in the manufacture of munitions, the Government furnished materials of the approximate value of $503,393,000.00. Respondent purchased and paid for with Government money materials of the approximate value of $32,514,139.66. (Para. 20, Supplemental Affidavit Motion for Summary Judgment, R. 84.)

Government employees employed by the Ordnance Department audited the respondent's time cards and payrolls, and during a part of the time, witnessed the actual payments to respondent's employees, and during the re-

mainder of the time, witnessed actual payments to a sufficient number of the employees to satisfy the Government that their actual payments were being made, as indicated by respondent's payroll records. (Para. 21, Supplemental Affidavit Motion for Summary Judgment, R. 85.)

Respondent paid wages and salaries of employees by check against a bank account, the funds of which were furnished by the Government, and were subject to withdrawal by the Government. (Para. 22, Supplemental Affidavit, Motion for Summary Judgment, R. 85.)

No sales tax was paid by respondent on materials purchased for use at Lone Star Ordnance Plant, no ad valorem taxes on real or personal property at Lone Star Ordnance Plant was paid to the State or the County, and no license or registration fees were paid on motor vehicles used in connection with the operation of the Plant. (Para. 23, Supplemental Affidavit, Motion for Summary Judgment, R. 85.)

Under Article VII-B of the Management Service Contract under which respondent operated the Lone Star Ordnance Plant, provision was made for changes in it, the work to be performed, and the method for effecting such changes, following which was the following conclusion:

> "* * * but nothing provided in this Article shall excuse the Contractor from proceeding with the prosecution of the work so changed." (Page 31, Exhibit "A", Management Service Contract.)

Article VII-E(4) of such contract provided that the Government should prescribe procedures to be followed by

the Contractor in accounting, checking and auditing functions, and that "* * * if in the opinion of the Contracting Officer, the number of employees engaged in checking, auditing and accounting work is excessive, the Contractor shall make such reductions in force as the Contracting Officer deems necessary." (Page 33, Exhibit "A", Management Service Contract.)

Article VII-F (7) of such contract provides that the Contractor shall "At all times use its best efforts in all acts hereunder to protect and subserve the interest of the Government." (Page 34, Exhibit "A", Management Service Contract.)

By Change Order No. 4, dated July 9, 1943, Section 4, of Article V-A, of Title 5, was changed to give the Government the right to pay directly to the persons concerned all sums due from the Contractor for labor, material, or other charges, which was reaffirmed by and incorporated in Supplement 8 to the Contract. (See Page 7, Supplement 8.)

By Change Order No. 7, dated October 12, 1943, respondent was directed to perform, at the Navajo Ordnance Depot, Bellemont, Arizona, all work necessary or incident to the reworking and renovating of certain ammunition, and these provisions were reaffirmed by and incorporated in Supplement 8 to the Contract. (See page 4, Supplement 8.)

By Change Order No. 9, dated April 3, 1944, and Change Order No. 10, dated April 7, 1944, the terms of both of which were included in Supplement 11 dated June

30, 1944, it was provided that the Contractor "* * * shall, as directed, from time to time by the Contracting Officer, receive, inspect (including X-raying), assort, screen, segregate, load, renovate, recondition, rehabilitate, * * * any ammunition (including components and containers) even though it is not specifically mentioned in this Contract, *regardless of its origin*, in such quantities as may be directed by the Contracting Officer;" (Emphasis supplied.)

Sub-section 1, of Article VI-A, of Title 6, of the Management Service Contract, provides that "The Government may terminate this contract at any time by a notice in writing from the Contracting Officer to the Contractor. Such termination shall be effective in the manner and upon the date specified in said notice * * *. Upon receipt of such notice, the Contractor shall, unless the notice directs otherwise, immediately discontinue all work * * *."

Notice of termination of work under such Contract was given on behalf of the Government "for the convenience of the Government" by the Contracting Officer for the Chief of Ordnance on October 18, 1945, to be effective midnight October 6, 1945. (Notice of termination, part of Exhibit "A", Management Service Contract.)

The claims of all petitioners all originated during the time the Plant was under operation. The operation of the Plant is controlled by Title IV, of the Management Service Contract, and by such provisions of Titles V, VI and VII as may be applicable to the work under Title IV.

Article IV-D of Title 4 of the Management Service Contract (see pages 16 and 17 of Exhibit "A" attached to Affidavit supporting Motion for Summary Judgment) specifically provided that the provisions of the Walsh-Healey Act should apply *to the operation of the Plant* under Title IV of this contract.

The Fair Labor Standards Act is not mentioned in Title IV of the contract.

PREFACE TO ARGUMENT

This Court, in *Kennedy v. Silas-Mason Company*,[2] did not condemn Summary Judgment procedure; it only disapproved it in this case because of the fact deficiencies in the record. The United States Court of Appeals, in writing the opinion in the case at bar, had in mind this Court's opinion in the *Kennedy case*, as also the Court's decision in *Murphy v. Reed*,[3] and meticulously pointed out that the record in this case supplied the deficiencies, and concluded that such record met the requirements of the Summary Judgment Rule,[4] as interpreted by this Court.

SUMMARY OF ARGUMENT

I.

The Lone Star Ordnance Plant was operated by the Government through the "agency" of respondent, under a Management Service Contract entered into pursuant to the

[2] *334 U. S. 249.*

[3] *335 U. S. 865.*

[4] *Rules 56(b), (c), (d) and (e), Federal Rules of Civil Procedure.*

Act of July 2, 1940 (c. 508, 54 Stat. 712) amended under First War Powers Act of December 18, 1941 (50 App. U. S. C. A. 611) and Executive Order 9001 of December 17, 1941 (6 F. R. 6787), hence respondent was not an independent contractor, and petitioners were employees of the Government, and excluded under Section 3(d) of the Fair Labor Standards Act.

II.

The Management Service Contract under which respondent operated the Plant was entered into by the War Department with respondent for "the manufacture of supplies, articles and equipment (munitions of war) in an amount exceeding $10,000:00." The Walsh-Healey Public Contracts Act (49 Stat. 2036, 41 U. S. C. A. Secs. 35-45) rather than, and to the exclusion of the Fair Labor Standards Act, fixed and determined the labor standards, hours of work and overtime compensation of petitioners, even if respondent were considered an independent contractor.

III.

The application of the Fair Labor Standards Act was excluded and superseded by the Act of June 28, 1940 (54 Stat. 676, c. 440, 50 U. S. C. A. App., Sec. 1151, et seq.), pertaining to the Naval and Coast Guard Services, and the Act of July 2, 1940, relating to the War Department. Said Acts provided for a new system for the production of munitions, military equipment and supplies, which innovation was neither private enterprise nor Government operation, but an amalgamation of the two. The First War

Powers Act, and Executive Order 9001 promulgated pursuant thereto authorized the Secretary of War, regardless of any previous law, to make contracts for the operation of munitions plants, preserving, however, in their proper fields, the application of the Walsh-Healey Act, the Bacon-Davis Act, the Copeland Act, and the Eight Hour Law, pursuant to which the labor standards of the Walsh-Healey Act were applied to such operations, to the exclusion of all other Federal laws regulating wage payments.

IV.

Neither petitioners nor respondent was engaged in interstate commerce, nor in the production of goods for commerce, within the meaning of the Fair Labor Standards Act, because:

(a) The transportation by the Government of the munitions and ammunition components owned by it was an administrative act of the Government in its soverign capacity, and not an act of commerce.

(b) The munitions of war involved here were not instrumentalities of commerce nor subjects of commerce, within the meaning of the Fair Labor Standards Act.

V.

Neither petitioners nor respondent was engaged in the production of goods for commerce within the meaning of the Act, because the components, explosives, etc., from which the ammunition was assembled, had come into the actual physical possession of the United States Govern-

ment as the ultimate consumer, and had therefore been withdrawn from commerce, prior to petitioners' having worked on or handled them; hence, such components, explosives, etc., were not "goods" within the meaning of the Fair Labor Standards Act.

ARGUMENT

I.

The Lone Star Ordnance Plant was operated by the Government through the "agency" of respondent, under a Management Service Contract entered into pursuant to the Act of July 2, 1940, amended under First War Powers Act of December 18, 1941, and Executive Order 9001 of December 17, 1941, hence respondent was not an independent contractor, and petitioners were employees of the Government, and excluded under Section 3(d) of the Fair Labor Standards Act.

Under the Act of July 2, 1940, the Secretary of War was given power, with or without advertising, to provide for the manufacture of munitions, military equipment, etc., to purchase or construct munitions plants, as well as to provide Government-owned facilities at privately owned plants. Under Sub-section (b) of the Act, the Secretary of War was authorized with or without advertising, to provide for the operation of any such plants or facilities "either by means of Government personnel or *through the agency* of

[5] P. 598, 54 Stat. 712.
[6] 50 App. U. S. C. A. 611.
[7] 6 F. R. 6787.

selected, qualified commercial manufacturers under contracts entered into with them, and to make such contracts, amendments or supplements to existing contracts as he may deem necessary to carry out such purposes." (Emphasis supplied.)

The Secretary of War chose to operate many munitions plants, including its Lone Star Ordnance facility, through the "agency" of selected, qualified commercial manufacturers, as is evidenced by "statement of labor policy" issued jointly by Under Secretary of War Robert P. Patterson, and Assistant Secretary of the Navy Ralph A. Bard, on July 18, 1942, with the approval of William Green, President of the American Federation of Labor, and Philip Murray, President of Congress of Industrial Organizations. This complete statement of labor policy is attached as Appendix "A" to this brief, but the following excerpts from it are pertinent at this point:

> "Under the terms of the Congressional mandate, the War and Navy Departments had the option of themselves operating the plants or operating them through the agency of selected qualified commercial contractors. In order fully to utilize the labor and management resources of the nation * * * the two departments chose the latter course.
>
> "All are owned outright by the United States * * *. All are engaged solely in war production * * *. All are operated by private contractors under '*management service*' contracts, *any* of which *may at any time* be terminated by the Government * * *. The normal factors which go to make up *commercial profit* are *lacking* * * *. It pays the contractor a fixed fee for its services which fee is unaffected by wages or other costs, production delays or stoppages. The Government

reimburses the contractor for all costs, including wages, and in most instances must approve such costs, including wage scales, in advance. The Army or Navy *officer in charge may direct the discharge of any employee.*" (Emphasis supplied.)

While respondent was designated in the Contract as an Independent Contractor, nevertheless, as has been pointed out under the statement, the Government retained and exercised the right to control respondent in the minutest details in the operation of the Plant. Respondent was economically unaffected by any costs of labor, materials, tools, or equipment, receiving the fixed fee for its management services as designated in the Contract. While the Management Service Contract related only to the manufacture of munitions at the Lone Star Ordnance Plant, yet the Government, by Change Orders, required respondent to perform services, without additional fee or other compensation, at the Navajo Ordnance Depot, Bellemont, Arizona, *as directed by the Contracting Officer.* (Change Order No. 7 dated October 12, 1943, attached to and part of Exhibit "A.") All munitions processed were processed under the direct supervision and control of the Government, which specified the loading processes to be used, the type, quantity and specifications, and rate of production; detailed rules and regulations governing safety and methods of operation were promulgated by the Government, and Government inspectors were present to see that they were complied with. Ordnance personnel audited the time cards and payrolls, and witnessed actual payments to petitioners and all other employees. No ad valorem taxes on real or personal property were paid by respondent to the State or

County, and no license or registration fees were paid on motor vehicles used in connection with the operation of the Plant.

Respondent's discretion with respect to the work to be done, the methods to be pursued in the manufacture of munitions, the nature of, or the disposition of the munitions the Government directed to be produced, was so limited and circumscribed as to amount to no discretion at all. In fact, production schedules from other ordnance plants were transferred to the Lone Star Ordnance facility for completion, and respondent was required to pay from moneys furnished by the Government obligations on all contracts made by such other ordnance plants.

We have pointed out in the general statement many other significant facts clearly showing respondent was not an independent contractor, but was the mechanism through which the Secretary of War provided for the operation of the Plant. Of major significance is the fact that the Management Service Contract effectuating the plan of operation of the munitions facility, contained the provision that the contract could be terminated at any time by the Government merely by giving notice in writing to the Contractor, and that such termination would be "effective in the manner and upon the date specified in said notice." In fact, as pointed out in the statement of the case, all work under the Contract was terminated by notice in writing on October 18, 1945, to be effective midnight October 26, 1945, "for the convenience of the Government."

It is elementary that the right of control is a primary factor distinguishing an agent or servant from an independent contractor. From an analysis of the plan by which the Secretary of War provided for the furnishing of munitions to the Government, it is submitted that respondent was employed for a fixed fee as a service agent of the Government, and was in fact itself a corporate agent or employee of the Government until the time the Government, in the prosecution of the war, no longer needed such munitions, and such an agent which the Government could discharge, as it in fact did, by mere notice in writing, when for the Government's convenience, its services were no longer needed nor desired. It is apparent from the facts that the function of respondent in executing the plan provided by the Secretary of War for the production of munitions, was in every feature controlled by and subject to the right of control by the Contracting Officer representing the Government, with respondent the conduit through which the Government directives of what was to be done, when and how the same should be done, and finally, by whom it should be done, were translated into results.

The facts that (1) petitioners were paid their wages with money furnished by the Government; (2) petitioners' wages and salary rates were controlled by the Government; (3) the hiring and assigning to duties of key employees and their principal assistants, as well as their salaries, had to be first submitted to and approved by the Government; (4) the Government retained the right to dismiss any employee it, through the Contracting Officer, deemed incompetent or not "in the public interest" and, (5) the

Government could dismiss respondent itself by mere notice, considered together with the abundance of facts showing that the Government controlled and directed what work petitioners performed, when and how they performed it, and that all their work was on Government-owned materials, with Government-owned tools and equipment, at the Government-owned plant, shows conclusively that petitioners were employees of the Government, furnishing Government-owned munitions to the Government in the development of the National Defense and the prosecution of the war.

It is submitted that the mere fact respondent was designated as an "Independent Contractor" in the Management Service Contract, is not binding upon the Court.

Rutherford Food Corp. v. McComb, 331 U. S. 722;
N. L. R. B. v. Hearst Publications, 322 U. S. 111;
Bartels v. Birmingham, 322 U. S. 126;
McComb v. McKay (C. C. A. 8th), 164 Fed. (2d) 40.

This Court, in *Rutherford Food Corporation v. McComb, supra*, stated:

> "Where the work done, in its essence, follows the usual path of an employee, putting on an 'independent contractor' label does not take the worker from the protection of the Act."

It is also believed by respondent that the decision of this Court in *United States v. United Mine Workers of America, 330 U. S. 258*, is controlling of the question here.

The facts in the case last cited are so well known to this Court we will not refer to them in this brief, other than to point out the significant fact that the regulations

for the operation of the mines by the Coal Mines Administrator provided for the retention of the private managers to assist in the realization of the objects of Government seizure and operation. The Court said, with reference to this fact:

> "* * * The Government, though utilizing the services of the private managers, has nevertheless retained ultimate control."

It was contended in that case also that the regulations which provided that none of the earnings or liabilities resulting from the operation of the mines; while under seizure, were for the account or at the risk or expense of the Government, and that the companies continued to be liable for all Federal, State, and local taxes, and remained subject to suit, constituted the miners employees of the mine owners, rather than the Government; the Court nevertheless held that the employees at the mines were employees of the Government.

See also *Crabb v. Welden Bros.*, *164 Fed. (2d) 797*, involving claims under the Fair Labor Standards Act of employees of cost-plus-fixed-fee contractors in the construction of the Alcan Highway. In that case, the Government furnished the materials and exercised control comparable to that involved here. The Court held that such contractors were not independent contractors, saying, in part, that "The associated contractors, however, were *mere supervisors, employees and representatives* of the Public Roads Administration", and held the Fair Labor Standards Act inapplicable.

The United States Court of Appeals for the Fifth Circuit affirmed the trial court's judgment in the instant case upon this theory, following its decisions in the cases of *Kennedy v. Silas Mason Company, 164 Fed. (2d) 1016* and *Reed v. Murphy, 168 Fed. (2d) 257*, (reversed by this Court because of the inadequacy of the record.)

It is submitted that all of the uncontradicted facts demonstrate that the Secretary of War for the Government, through the agency of respondent, was the employer of petitioners.

II.

The Management Service Contract under which respondent operated the Plant was entered into by the War Department with respondent for "the manufacture of supplies, articles and equipment (munitions of war) in an amount exceeding $10,000.00." The Walsh-Healey Public Contracts Act, rather than, and to the exclusion of the Fair Labor Standards Act, fixed and determined the labor standards, hours of work and overtime compensation of petitioners, even if respondent were considered an independent contractor.

The question here is not so much whether or not petitioners were entitled to be compensated for overtime, but rather which act or acts of Congress providing for the payment of overtime compensation applies.

The Fair Labor Standards Act under which petitioners claim in this case provides for the payment of time and

(49 Stat., 2036, 41 U. S. C. A., Secs. 35-45.)

a half for all hours worked in excess of forty during one administrative work week.

The Walsh-Healey Act presently to be discussed provides that employees engaged in such plants as the Lone Star Ordnance Plant should be paid a minimum of time and a half for all hours in excess of eight in one day, or in excess of forty in one week, and obviously is more advantageous to the employee than the benefits accruing under the Fair Labor Standards Act. For instance, if the employee worked four consecutive days at ten hours each, under the Walsh-Healey Act, he would be paid straight time for thirty-two of the forty hours, and time and a half for the remaining eight hours; whereas under the Fair Labor Standards Act, he would receive only straight time for the forty hours during that administrative work week.

The Walsh-Healey Act was passed by Congress, not in the exercise by it of its right to regulate interstate commerce, but under its inherent right to govern the internal affairs of the Federal Government, and provides the terms and conditions upon which such a manufacturer or contractor may do business with the Government. It was made to apply to all contracts entered into with any agency or instrumentality of the Government for "the manufacture of supplies, articles and equipment in an amount exceeding $10,000.00." That the Contract under which respondent operated the Ordnance Plant is just such a Contract could not be logically questioned; that it was intended to apply and govern the operation of this Plant in the "manufacture of supplies, etc.," is clearly made to appear by the following

provisions of Sec. IV-D of the Management Service Contract: "The following representations and stipulations pursuant to the Walsh-Healey Public Contracts Act shall apply to the operation of the Plant under this Title IV of this Contract." There then follows the representation that the contractor is a manufacturer, etc., and that all persons employed by the contractor shall be paid wages as determined by the Secretary of Labor, etc., prohibiting any person employed by the contractor to work in excess of eight hours in any one day, or in excess of forty hours in any one week, unless paid the applicable overtime rate as set by the Secretary of Labor; a provision prohibiting the employment of minors or convict labor, etc., such representations and provisions under Sec. IV-D being in the identical language of Sections 35 and 36, Title 41, U. S. C. A.

As was said in the case of *Endicott-Johnson Corporation v. Perkins, 317 U. S. 501*, "The purpose of the Walsh-Healey Act was to raise labor standards for the segment of industry *doing business with the Government*", whereas, the Fair Labor Standards Act had its conception in the fertile mind of President Roosevelt when, in submitting this Act to Congress by his message, he said in part: "Competition ought not to cause bad social consequences which * * * react upon the profits of business * * * we must seek to build up * * * minimum wage standards of fairness and reasonableness * * * having due regard to local and geographical diversities and to the effect of unfair labor conditions *upon competition in interstate trade.*" (Emphasis supplied.)

As was pointed out by this Court in *United States v. Darby, 312 U. S. 100,* "The motive and purpose of the present regulations are plainly to make effective the Congressional conception of public policy that interstate commerce should not be made the instrument of *competition* in the distribution of goods produced under sub-standard labor conditions, which *competition* is injurious to commerce"; and as was pointed out by the Eighth Circuit in the case of *United States Cartridge Company v. Powell, 16 Labor Cases (C. C. H.), Para. 65,085.* "It (F. L. S. A.) was designed and intended to affect private industry engaged in interstate commerce. Its provisions relative to minimum wages and hours of labor for those employed in making goods for the United States were unnecessary, as provision therefor equal or more advantageous to labor had already been made by the Walsh-Healey Act." (Emphasis supplied.)

It is significant also to note that employees of those doing business with the Government, such as the employees of a manufacturer of supplies, munitions, etc., were entitled to be compensated for overtime under the provisions of the Walsh-Healey Act, irrespective of whether or not their activities amounted to, in the strict sense, "commerce", or the "production of goods for commerce." The Walsh-Healey Act became law two years before the Fair Labor Standards Act was passed, and by it, employees of contractors doing business with the Government were protected against exploitation by their employers. There was then left that segment of industry engaged in competition with each other in the production of goods for interstate commerce that had not been regulated, and the obvious fact that

employers in some sections of the country were producing goods for interstate commerce under sub-standard labor conditions, in competition with employers in other sections of the country producing the same type of goods for interstate commerce under standard labor conditions, thereby burdening the channels of interstate commerce with unfair competition, was the economic condition (and not a Government operation) which the Fair Labor Standards Act was designed to correct.

At the time Congress had under consideration the National Defense Act of July 2, 1940, the employees of private industry engaged in interstate commerce, or in the production of goods for interstate commerce, were protected by the Fair Labor Standards Act; the Eight Hour Law, as supplemented, the Bacon-Davis Act,* and the Walsh-Healey Act, protected employees of manufacturers or contractors doing business with the Government, whether in interstate commerce or not, but there remained unprotected those employees working directly for the Government as "Government personnel", except only that they were not required to work in excess of eight hours in one day, without limitation as to the number of hours they could be required to work in one week, and with no provision for the payment to "Government personnel" of any overtime for hours worked in excess of forty in one week.

When Congress had under consideration the Act of July 2, 1940, authorizing munitions and other war plants to be operated "by means of Government Personnel", or

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*(40 U. S. C. A. 276A-276B.)

"through the agency of commercial manufacturers under contracts, etc.," it was appropriate, of course, to provide equal protection to employees of "Government Personnel", and employees of the "agency" or commercial manufacturers, so they extended equal protection to both classes by providing that if such munition plants were operated by means of "Government Personnel", such Government Personnel, working as laborers and mechanics, should be paid time and a half for all hours of work in excess of forty in one administrative work week,[10] and that if such Plants were operated through the "agency" of commercial manufacturers, the provisions of the Walsh-Healey Act, requiring the payment of overtime compensation, should apply. Thus, the Act of July 2, 1940, secured overtime compensation to all persons employed in such munition plants, regardless of which of the two methods the War Department chose to operate them.

It is noted that by supplement 8 to the Management Service Contract (dated March 24, 1944), the Government again unequivocally specified that the Walsh-Healey Act, and the Walsh-Healey Act alone, governed and determined labor standards of employees engaged in the *operation* of Lone Star Ordnance Plant.

The development of labor standards by the various Acts of Congress, beginning with the Eight Hour Law of August 1, 1892, to the end of the war, is interesting, and very persuasive of the contention made under this section of the brief. To avoid unnecessary repetition, this step by step

[10] *Sec. 4(b), Act July 2, 1940, 5 U. S. C. A. 189a.*

development is discussed under the next succeeding Point III, and we invite the Court's consideration of the development there set out in connection with the point now under discussion.

It is therefore submitted that the Walsh-Healey Act, to the exclusion of the Fair Labor Standards Act, applied to this type of operation before the war-time legislation, and that such war-time legislation continued its application, with the exception that it made advertising unnecessary in expediting National Defense and the prosecution of the war.

III.

The application of the Fair Labor Standards Act was excluded and superseded by the Act of June 28, 1940,[11] pertaining to the Naval and Coast Guard services, and the Act of July 2, 1940, relating to the war department. Said Acts provided for a new system for the production of munitions, military equipment and supplies, which innovation was neither private enterprise nor Government operation, but an amalgamation of the two. The First War Powers Act, and Executive Order 9001 promulgated pursuant thereto authorized the Secretary of War, regardless of any previous law, to make contracts for the operation of munitions plants, preserving, however, in their proper fields, the application of the Walsh-Healey Act, the Bacon-Davis Act, the Copeland Act, and the Eight Hour Law, pursuant to which the labor standards of the Walsh-Healey Act were applied to such operations, to the exclusion of all other Federal laws regulating wage payments.

[11] (54 Stat. 676, c. 440, 50 U. S. C. A. App., Sec. 1151, et seq.).

It is respondent's position, as discussed under Point II next above, that the Walsh-Healey Act, by its very terms, applied to the operation of respondent under its Contract with the Government for the furnishing of supplies, material and equipment to the Government; or, as we will presently discuss, under the National Defense Act of July 2, 1940, the First War Powers Act, and the President's Exective Order 9001, the labor standards of the Walsh-Healey Act were applied to such operations to the exclusion of all other Federal laws regulating wage payments.

Over a period of time, beginning with the first Eight Hour Law passed in 1892, to the enactment of the Fair Labor Standards Act in 1938, Congress had been in the process of developing a labor policy toward establishing an eight hour day and a forty hour work week, as an examination of the Chronology set out in Appendix "B" to this brief will reflect.

A brief reference to this development is considered pertinent here.

To begin with, the Eight Hour Law was passed in 1892, applicable only to laborers and mechanics employed by the Government, or a contractor on Government public works, absolutely prohibiting such employees from working in excess of eight hours in one day; it was supplemented in 1912 by requiring every Contract with the Government involving or requiring employment of laborers and mechanics to specifically limit working hours to an eight-hour day; it was again supplemented in 1917 by authorizing the President, in an emergency, to suspend the Eight Hour day on

Government contracts, provided time and a half was paid for hours in excess of eight. The Bacon-Davis Act was then passed in 1931, insuring a living wage scale by requiring public works contracts with the Government to stipulate a wage scale as set by the Secretary of Labor. The Government was authorized to withhold funds to insure compliance. The means of enforcement of Congressional policy, as shown in the Act, were adeptly furnished through the purse strings which the Government held on moneys due on any contract. Legislation of this type gave certain rights to laborers and mechanics under the circumstances enumerated, but Congress thought that enforcement of these rights could more appropriately and effectively be handled by its control of the moneys expended under the contracts. It is apparent that the Government had by then set a labor policy limiting the day's work to eight hours, and made provision to insure to labor that its policy would be enforced in the field of labor standards it had chosen to regulate.

By the passage of the Walsh-Healey Act, Congress expanded its pattern of labor standards or labor policies to a field not theretofore covered, by providing that Government contracts "for the manufacture of supplies, articles and equipment in an amount exceeding $10,000.00" should contain stipulations that minimum wages would be paid as set by the Secretary of Labor, and prohibiting an employee of a Government contractor on such contracts from working in excess of eight hours in one day and forty in one week, except in instances where the Secretary of Labor, in the public interest, made variations and exemptions, and

when such variations and exemptions were made by the Secretary of Labor, the contractor was required to pay a minimum of time and a half for hours worked in excess of eight in one day and forty in one week. Less than three months after the effective date of the Walsh-Healey Act, the Secretary of Labor, by Regulation 504,[12] entered an order permitting employees of contractors with the Government under the Walsh-Healey Act to work in excess of eight hours per day and forty hours per week, provided they were paid time and a half for the hours worked in excess of eight in one day and forty in one week. The Government carried forward its program to insure that the policy established by the Walsh-Healey Act would be enforced, by providing penalties for a violating contractor, and permitting the Government to recover unpaid overtime at its own expense, for the use and benefit of the employees entitled thereto, as well as continued the right to withhold funds due the contractor.

Thus, with the passage of the Walsh-Healey Act, provision had been made by Congress in the field of activity over which it had the unquestioned right to control. As has been pointed out, these rights were exercised, not by virtue of its power to regulate commerce, but by reason of its inherent right to control the affairs of the Government it represented, and to provide the terms and conditions upon which persons may do business with the Government.

If such a cost-plus-fixed-fee contract as is under consideration here had then been authorized and entered into, it

[12] 41 C. F. R. 202.

appears that there could be no question but what the employees of respondent, as the Contractor with the Government, would have been entitled to the wages and overtime provided by the Walsh-Healey Act, and Regulation 504 of the Secretary of Labor.

Thus, the field of Government activity had been covered, insofar as labor standards were concerned, when Congress took up for consideration the necessity of regulating labor standards in private industry not connected or concerned with Government contracts, resulting in the passage of the Fair Labor Standards Act. Obviously, the power of Congress to regulate this field rested exclusively in its power to regulate interstate commerce.

With the threat of war, the National Defense Act of July 2, 1940 (following the Act of June 18, 1940, covering Naval and Coast Guard Services), was passed, authorizing the Secretary of War, with or without advertising, to construct, and, after construction, operate military facilities, and provided that no contract which would otherwise be subject to the Walsh-Healey Act would be exempt from it solely because entered into without advertising, and authorizing such plants to be operated through the agency of commercial contractors, or by means of Government Personnel, and if operated in the latter manner, fixing the hours of laborers and mechanics employed by the Department of War to eight hours a day and forty hours per week, with a minimum of time and a half for hours worked in excess of such limitations.

While the operations authorized by the Act of July 2, 1940, and the previous Act relating to the Naval and Coast Guard Services created an innovation in Government contracting, nevertheless it preserved, in all of its essentials, the Walsh-Healey Act as respects labor standards, even though the contracts were entered into without advertising.

At the time the National Defense Act of July 2, 1940, was passed, the facilities then owned by the Government for the production of instrumentalities of war were wholly inadequate to meet the war emergency. The National Defense Act referred to authorized a virtual mobilization of all the American industries. The key personnel of these industries possessed invaluable experience and knowledge in mass production and industrial technique, with little or no experience, however, in the production of ammunition; on the other hand, the Ordnance Department possessed the technical knowledge essential to the development and production of high explosives, ammunition, and other implements of war. A combination of the knowledge and skill of Ordnance Personnel, and the experience of the key personnel of private industry, and a coördination of the two into a joint activity, was desirable—indeed, essential—to carry out the vast plans for National Defense, and a merger of the two by the National Defense Acts was made possible.

That the operations under these two Acts were unique, is best evidenced by the statement of labor policy reproduced in full in Appendix "A" to this brief, in part as follows:

> "These plants embody a new and unique tripartite relationship among Government, labor and manage-

ment. They are sufficiently different from traditional Government establishments so that *existing* Government policies *regulating labor relations* are not entirely suitable." (Emphasis supplied.)

After giving the Secretary of War the powers indicated next above, the Act of July 2, 1940, contained the further general provision (see Sec. 1) authorizing him to make such contracts or amendments or supplements to existing contracts "as he may deem necessary to carry out the purposes specified in this section." These were extra-ordinary and plenary powers granted only during the emergency of war.

Following this Act, the First War Powers Act[13] was passed, which provided inter alia: "The President may authorize any department or agency of the Government exercising functions in connection with the prosecution of the war effort, in accordance with regulations prescribed by the President, for the protection of the interests of the Government, to enter into contracts and into amendments or modifications of contracts heretofore or hereafter made, and to make advance, progress and other payments thereon, *without regard to the provisions of law* relating to the making, *performance*, amendment, or modification of *contracts* whenever he deems such action would facilitate the prosecution of the war." (Emphasis supplied.)

Thus, the President was empowered to authorize any department or agency of the Government to make contracts pursuant to the First War Powers Act, without regard to the provisions of any existing law, with reference to advertising, labor standards, or otherwise, and he exercised such

[13] *50 App. U. S. C. A. 611.*

authority when he promulgated Executive Order 9001, authorizing the Secretary of War to enter into contracts, etc., without regard to the provisions of law relating to the making, performance, etc., of such contracts, with the limitation that no contract or modification or amendment should be exempt from the provisions of the Walsh-Healey Act, because of being entered into without advertising and competitive bidding, also providing that the Walsh-Healey Act, the Bacon-Davis Act, the Copeland Act,[14] and the Eight Hour Law, "if otherwise applicable" should apply to contracts made and performed pursuant to the order.

It is respondent's contention that the Walsh-Healey Act governed and controlled the performance of the Management Service Contract under consideration here by the very terms of the Walsh-Healey Act itself, and the nature and purpose of the operation for which the Contract was entered into with the Government. Whether the Walsh-Healey Act applied for these reasons, or, as has been suggested, was selected as the labor standards governing the production of munitions for the Government under plenary powers given the Secretary of War by the Act of July 2, 1940, it is unquestioned that the Walsh-Healey Act was the standard adopted in the Management Service Contract executed on July 23, 1941. It is plain by the provisions of the First War Powers Act, that the President was given such plenary power to disregard any prior existing law, whether related to labor, advertising, or otherwise, and in his proclamation authorizing the Secretary of War to

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[14] *38 App. U. S. C. A. 611.*

[15] *48 Stat. 948, Title 40 U. S. C. A. 276 (b) and (c).*

carry out the purposes of the First War Powers Act, the Walsh-Healey Act was expressly retained as the labor standards governing existing contracts and amendments, or modifications thereof. The Management Service Contract under consideration here was amended by Supplement No. 1 September 16, 1942, and by Supplement No. 8 March 24, 1944, under the authority of the First War Powers Act, and the Presidential Proclamation 9001, in both instances expressly reaffirming and reincorporating into said Contract the labor standard of the Walsh-Healey Act.

That the utilization of the combination of Government, industry, and labor under the National Defense Acts and the First War Powers Act was unique is recognized by the statement of labor policy previously referred to, and for all parties concerned in this tripartite arrangement, the standard of labor set by the Walsh-Healey Act was the most desirable and the procedures of the Walsh-Healey Act the most logical to be applied; this because for labor it provided a greater income for the same number of hours, and for the Government, it held the purse strings and had the means of enforcement. Moreover, by adopting the Walsh-Healey Act as the labor standards, there was secured to all employees on contracts authorized, whether in interstate or intrastate commerce, the same labor standards.

There was no danger of spreading substandard labor conditions in this "unique" industry, so long as the Government paid the bill, first because there was no element

of competition in the manufacture of ammunition, and secondly because there was a declared policy of Congress that all persons employed in these plants should receive such additional compensation for overtime. With the shields of protection emanating from the war time legislation and the executive orders promulgated pursuant to it, and the strict supervision of labor in them, there was no chance of an unscrupulous employer, acting as a Government agency, exploiting labor. For example, Executive Order 9240[9] required payment of double time to an employee working on the seventh consecutive day.

The Walsh-Healey Act contains a special and complete labor policy of its own, which was expressly designed to cover the class of employees performing labor under this type Contract. Whatever rationale may be employed, the conclusion is inevitably reached that the wage-hour standards of the Walsh-Healey Act were applied to respondents' operation to the exclusion of the Fair Labor Standards Act.

IV.

Neither petitioners nor respondent was engaged in interstate commerce nor in the production of goods for commerce within the meaning of the Fair Labor Standards Act, because:

(a) The transportation by the Government of the munitions and ammunition components owned by it was an administrative act of the Government in its sovereign capacity, and not an act of commerce.

[9] 7 F. R. 7759.

(b) The munitions of war involved here were not instrumentalities of commerce nor subjects of commerce, within the meaning of the Fair Labor Standards Act.

From petitioners' pleadings, it is apparent they make no real contention that they or respondent were engaged in commerce. This is because the movement of all component parts of the ammunition was caused to be made by the Government after it had already acquired title and possession thereof; the same is true as to the finished product. The common carriers moving these component parts from the point of origin to the plant site, and after processing to its military facilities, could not be regarded as the agent of any one other than the Government.

The Government, it is submitted, in the exercise of rights and prerogatives delegated to it as a Federal Union, knows no state lines, and any movement by it of its own property across state lines is not commerce nor a commercial transaction, but instead is an administrative act of the Government exercised by it in its sovereign capacity.

The term "commerce", as used in the Fair Labor Standards Act,[1] is considerably more restricted than the term as applied in the National Labor Relations Act, and we regard the decision of the Ninth Circuit Court of Appeals in *N. L. R. B. v. Idaho-Maryland Mines Corporation, 98 Fed. (2d) 129*, as authority for the proposition that the transportation of these munitions was an administra-

[1] 29 U.S.C.A., Sec. 151, et seq.

tive act of the Government, and not "commerce" within the meaning of the Act under consideration. See

Holland v. Haile Gold Mines, 44 Fed. Supp. 641;

Walling v. Haile Gold Mines, Inc., 136 Fed. (2d) 102 (4th Cir.);

Fox v. Summit-King Mines, 143 Fed. (2d) 926 (9th Cir.).

The decision of *Bell v. Porter, 159 Fed. (2d) 117*, cited by petitioners, is not authority for the position they maintain because respondent conceded in the trial court that the complaining employees were covered by the Act. See *Bell v. Porter (N. D.), 66 Fed. Supp. 49.*

That the activities of petitioners were neither "commerce" nor "production of goods for commerce" is held in the cases of *Kennedy v. Silas-Mason Company, 164 Fed. (2d) 1016; St. Johns River Ship Building Company v. Adams, 164 Fed. (2d) 1012* (both by the 5th Cir.); *Divins v. Hazeltine Electronics Corporation, 163 Fed. (2d) 100 (2nd Cir.); Barksdale v. Ford, Bacon & Davis (W. D. Ark.), 70 Fed. Supp. 690*, and *Lynch v. Embry-Riddle Company (D. C. Fla.), 63 Fed. Supp. 992.*

The statement on page 11 of the petition for certiorari, that petitioners were engaged "in the continuous exportation of the finished products outside of the State of Texas" is not only not supported by the record, but is contrary to it. (See Para. 5, Supplemental Affidavit, Motion for Summary Judgment, R. 80-81.)

The statement on page 12 of the petition that respondent was engaged in the manufacture or production of "fertilizer" at the Plant, is not supported by the record. There are no pleadings to that effect, and this statement does not appear in the record in any place, except in the so-called "response" to respondent's Motion for Summary Judgment, which the United States Court of Appeals in this case held was not entitled to consideration.

V.

Neither petitioners nor respondent was engaged in the production of goods for commerce within the meaning of the Act, because the components, explosives, etc., from which the ammunition was assembled, had come into the actual physical possession of the United States Government as the ultimate consumer, and had therefore been withdrawn from commerce prior to petitioners' having worked on or handled them; hence, such components, explosives, etc., were not "goods" within the meaning of the Fair Labor Standards Act.

The term "goods", as used in the Fair Labor Standards Act, is defined in Section 111 to be:

> "'Goods' means goods (including ships and marine equipment), wares, products, commodities, merchandise, or articles or subjects of commerce of any character, or any part or ingredient thereof, but does not include goods after their delivery into the actual physical possession of the ultimate consumer thereof,

other than a producer, manufacturer, or processor thereof."

We reassert that the Government owned the reservation, the munitions plant, and furnished the component parts from which the munitions were assembled, taking title thereto at the point of origin, shipping them to the Plant site under Government bill-of-lading, had the munitions inspected by the Government's employees at the Plant site, and its Army Officers shipped the finished ammunition from the Plant site under Government bill-of-lading, marked "Government Property for Military Use."

That petitioners' activities were exempt under Section III has been many times held.[18] Petitioners seem to have ignored the obvious fact that when goods come into the hands of the ultimate consumer, they are withdrawn from commerce, and what the consumer does with such goods, or where he thereafter carries them, is of no consequence. This section does not exclude the "ultimate consumer" as such, but excludes the persons employed by him who work on "goods" after their delivery into his actual physical possession. See illustrations given in *Divins v. Hazeltine Electronics Corporation, supra.*

Petitioners' contention that the exclusionary clause was intended solely to protect the purchasing consumer from

[18] *Crabb v. Webber Bros.*, 164 Fed. (2d) 797; *Divins v. Hazeltine Electronics Corporation*, 163 Fed. (2d) 100; *Barksdale v. Ford, Bacon & Davis*, 70 Fed. Supp. 649; *Kennedy v. Silas-Mason Company*, 164 Fed. (2d) 401.

being subjected to the penalties imposed by Section 15A(1) has been rejected. *Divins v. Hazeltine Electronics Corporation, supra; Kennedy v. Silas-Mason Company, supra.* It will be noted that the penalties under Section 15 can be imposed only when there has been a *willful* violation.

The ultimate consumer exclusionary clause is inapplicable only when the ultimate consumer is a producer, manufacturer, or processor of such goods; hence, one of two things is certain: If the Government *was not* a producer, manufacturer or processor of such goods, petitioners' work upon them was excluded by Section 3; or, if the Government *was* a producer, manufacturer, or processor, so as to make Section 3 inapplicable, then it is because the Government was such producer, manufacturer or processor through the "*agency*" of the respondent contractor, in which event the Walsh-Healey Act (discussed under Points II and III of the Argument), to the exclusion of the Fair Labor Standards Act, fixed the labor standards, hours of work, and overtime compensation for petitioner-type employees.

CONCLUSION

The United States Court of Appeals affirmed the trial court's judgment upon the principle announced under Point I. Respondent presents that it could have upheld the lower court's judgment upon any one or more, or a combination of the points set forth in the Summary of Argument.

It is respectfully submitted that the record supports the judgment entered in the Courts below, and that the petition should be denied.

Respectfully submitted,

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APPENDIX A

Congress has charged the War and Navy Departments with the responsibility for the operation of nearly 100 giant Government-owned munitions plants, the backbone of the Nation's armament program. Under the terms of the Congressional Mandate, the War and Navy Departments had the option of themselves operating the plants or operating them through the agency of selected qualified commercial contractors. In order fully to utilize the labor and management resources of the Nation and to minimize encroachment upon the country's industrial structure, the two Departments chose the latter course. The industrial units thus created are unique.

All are owned outright by the United States, but all but a very few are located upon military reservations. All are engaged solely in war production—the manufacture and loading of explosives and ammunition, the assembly of bombers and the fabrication of guns and other munitions. In all of the plants the work performed is of a secret or confidential nature, and in many of them it is highly hazardous. All are operated by private contractors under "Management Service" contracts, any of which may at any time be terminated by the Government if it should decide either to operate the plant itself or to entrust its operation to another contractor. The normal factors which go to make up commercial profit are lacking. The Government had title to the products at all times. It pays the contractor a fixed fee for its services which fee is unaffected by wages or other costs, production delays or stoppages. The Govern-

ment reimburses the contractor for all costs, including wages, and in most instances must approve such costs, including wage scales, in advance. The Army or Navy officer in charge may direct the discharge of any employee if he deems it to be in the public interest. These plants embody a new and unique tripartite relationship among Government, labor and management: They are sufficiently different from traditional Government establishments so that existing Government policies regulating labor relations are not entirely suitable.

Recognizing these facts, and desiring to preserve the greatest freedom of organization and collective bargaining by the employees which is compatible with the necessary discharge by the War and Navy Departments of their responsibility for maximum production and the safe and efficient operation of these plants, the War Department and the Navy Department have established the following labor policies to which the American Federation of Labor and the Congress of Industrial Organizations have agreed after assisting in their preparation. It is recognized that these policies do not cover all aspects of labor relations in these plants, and experience may indicate the desirability of modifying, adding to, or otherwise amending this statement of policy.

1. No employee or person seeking employment shall be discriminated against by reason of race, color, creed, or sex.

2. The recognition of an exclusive bargaining agent for the employees in any appropriate bargaining unit within

any plant will be deferred until a majority of the estimated total of that unit has been hired, unless special circumstances shall justify an earlier designation of such exclusive bargaining agent. The War and Navy Departments will undertake to estimate with reasonable promptness the total employee complement of the appropriate unit.

3. While no recognition shall be accorded any organization as the exclusive representative of any group of employees until the proper collective bargaining agency shall have been determined under the conditions described above, provision will be made for the handling of grievances and other disputes, and the elimination of friction between employees and management during the period pending such determination. These procedures should be approved by the representative of the Army or Navy in charge of operations at the plant.

4. Seniority shall be a determining factor in matters affecting layoff and reemployment, transfers, demotions and promotions only if other factors of ability and aptitude are equal.

5. (a) Discharges directed by the War or the Navy Departments for suspicion of subversive activities will be handled in accordance with the provisions of the "Joint Memorandum on Removal of Subversives from National Defense Projects of Importance to Army or Navy Procurement," dated January 10, 1942.

(b) Discharges directed by the Army or Navy Officer in charge in the interest of plant security will be handled in the following manner: (1) The Officer, or his represen-

tative will direct the contractor to suspend the employee in question immediately; (2) the employee will be advised in detail of the specific reasons for his suspension and of his right to a hearing; (3) if requested, a hearing will be held by the Officer, or his representative, within a reasonable period and at such hearing the suspended employee will have an opportunity to produce witnesses and present evidence and to be assisted by counsel; (4) based on such hearing, the Officer, or his representative, will direct the reinstatement (with authority to grant back pay) or the discharge of such employee; (5) an employee so discharged will have the right, upon request, to have his case reviewed by the War or Navy Department.

6. No agreement between the management and its employees, or their representatives, except those which affect the safety and health of employees, may be entered into, or action taken, which, in the opinion of either the Secretary of War or the Secretary of the Navy, will have the effect of restricting or hampering maximum output.

7. (a) Anti-sabotage, anti-espionage and plant protective measures, including access into the plant, approved or prescribed by the War and Navy Departments, or their representatives, shall be binding upon management, employees, and their representatives.

(b) Measures designed to guard against sabotage, espionage, subversive activities and other plant protective measures which are ordered or approved by the Army or Navy representatives shall insofar as practicable be prominently posted throughout the plant and otherwise made

available to employees. Violations of any of these rules or regulations shall be grounds for disciplinary action, including immediate dismissal.

8. (a) The War and Navy Departments in most instances, have contractual responsibility for the approval of all costs including payroll costs. These Departments therefore will from time to time jointly agree upon the policies to govern the exercise of these contractual responsibilities to approve or disapprove proposed wage scales at these plants.

(b) Before operations commence at any plant, the contractor will prepare a wage scale to apply upon the commencement of operations and submit the same for approval to the War or Navy Department through the local Army or Navy representatives at the plant, who will forward these with their own comments regarding the appropriateness of the proposed scale. Any subsequent adjustments in the initial wage scale at any plant shall be worked out by the contractor and the employees through established procedures, provided only that the approval of the War or Navy Department must be obtained before such adjustments may become effective.

9. This statement of policy shall be applicable to all such plants except that where any provision of the statement conflicts with a provision in an existing contract, such contract will not be altered except by mutual consent.

APPENDIX B

CHRONOLOGY OF ACTS OF CONGRESS
(Fixing Wage-Hour Standards)

August 1, 1892 Eight Hour Law (40 U. S. C. A. 321, 322)—Unlawful to require or permit employees of Government or contractor on public works to work in excess of eight-hour day.

June 19, 1912 Eight Hour Law Supplemented (40 U. S. C. A. 324, 325)—Every Government contract involving or requiring employment shall specifically limit working hours to eight-hour day.

March 4, 1917 Eight Hour Law Supplemented (40 U. S. C. A. 326)—President authorized in emergency to suspend eight-hour day under Government contracts provided time and one-half paid for overtime.

March 3, 1931 Bacon-Davis Act (40 U. S. C. A. 276 a, 276 a-b)—Public works contract to stipulate wage scale set by Secretary of Labor and permit Government to withhold funds to insure compliance.

June 13, 1934 Copeland Act (40 U. S. C. A. 276 b, c)—Kickbacks prohibited as condition of employment where Government contract or money is involved.

June 30, 1936 Walsh-Healey Act (41 U. S. C. A. 35-45)—Government contracts for supplies and equipment are to expressly limit labor in excess of eight-hour day and forty-hour week. Minimum wages to be set by Secretary of Labor, who in the public interest is authorized to make

variations and exemptions in wage scales and maximum hours, provided that time and one-half shall be paid for the overtime permitted at the discretion of the Secretary of Labor. Government may withhold payment or sue contractor for failure to comply.

September 14, 1936 Regulation 504 of Secretary of Labor (41 C. F. R. 201)—Section 201.103 permits employees manufacturing supplies and equipment for Government to work in excess of eight hours per day and forty hours per week if paid time and one-half for overtime.

June 25, 1938 Fair Labor Standards Act (29 U. S. C. A. 201-219)—Provides for minimum wages and maximum hours (unless overtime is paid) for employees engaged in interstate commerce or in the production of goods for commerce. Civil suit for double amount of underpayment plus attorneys' fees may be brought by employees. Overtime computed solely on basis of excess over forty hours in one work week.

June 28, 1940 Eight Hour Law Partially Supplemented [50 U. S. C. A. App. 1155 (b)]—During national emergency declared by President on September 8, 1939, provisions of law prohibiting more than eight-hour work day by persons engaged in work on Army, Navy and Coast Guards contracts suspended.

July 2, 1940 National Defense Contract Act (Public Law 703, 76th Congress) (Title 50 App., U. S. C. A. 1171, 1172)—Secretary of War authorized, with or without advertising, to enter into and to amend contracts (including cost-plus-fixed-fee contracts) for the construction of military

facilities and the manufacture of military equipment, munitions, etc.; provided that no contract which would otherwise be subject to the Walsh-Healey Act would be exempted from the Walsh-Healey Act solely because entered into without advertising.

The Act also provided (5 U. S. C. A. 189-a) that the hours of laborers and mechanics employed by the Department of War in the production of munitions and other military equipment should be eight hours a day and forty hour per week during national emergency, provided, however, the Secretary of War was authorized to allow such hours to be exceeded, in which event, time and one-half should be paid for all hours over forty.

September 9, 1940 Eight Hour Law Amended (40 U. S. C. A. 325-A)—Wages of laborers covered by Act of June 19, 1912 (40 U. S. C. A. 324, 325) to be computed on eight-hour day but overtime permitted where time and one-half paid for more than eight hours worked in any given day.

December 18, 1941 First War Powers Act (50 App. U. S. C. A. 611)—President may authorize war effort Government contracts, amendments or modifications without regard to previous laws and regulations governing same.

December 27, 1941 Executive Order 9001 Pursuant to War Powers Act (58 App. U. S. C. A. 611)—Title I. Secretary of War authorized to enter into and amend war effort contracts.

Title II, Sec. 8 provides:

"No contract or modification or amendment thereof shall be exempt from the provisions of the Walsh-Healey Act because of being entered into without advertising or competitive bidding, and the provisions of such act, the Bacon-Davis Act, as amended, the Copeland Act, as amended, and the eight-hour law, as amended September 9, 1940, if otherwise applicable shall apply to contracts made and performed under the authority of this order."

May 13, 1942 Amendment to Walsh-Healey Act (41 U. S. C. A. 35)—Walsh-Healey Act amended to exempt application of eight-hour day and forty-hour week under certain conditions where collective bargaining contracts were on an annual or semi-annual basis.

June 12, 1942 Regulation 504 by Secretary of Labor Amended (Title 41, Part 201, C. F. R.)—Amended pursuant to Act of May 13, 1942. The regulation as to public contracts supplemented to conform to amendment of Walsh-Healey Act of May 13, 1942.

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No. 58

In the Supreme Court of the United States

OCTOBER TERM, 1949

ROY CREEL AND ALL OTHER PLAINTIFFS LISTED IN THE COMPLAINT AND AMENDMENT TO THE COMPLAINT IN THE DISTRICT COURT IN CIVIL ACTION No. 191,

Petitioners,

vs.

LONE STAR DEFENSE CORPORATION,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF RESPONDENT

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WILLIAM L. MARBURY,
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WHEELER, NEWBERRY
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Of Counsel.

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Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF RESPONDENT

The Record

The record in this case is printed in two volumes. The first volume is denominated "Transcript of Record", and pages 1-233, inclusive, of this volume, comprised the only record that was printed for use in the United States Court of Appeals; pages 234-237, inclusive, of this volume, include the proceedings in the United States Court of Appeals. This volume will be referred to herein as "R". The other volume of the record is denominated "Volume II, Transcript of Record", and will be referred to as "R-II", and was printed for use in this court pursuant to a stipulation and addition to the record appearing at pages 248-250. Aside from the stipulation, this volume consists of respondent's Motion for Summary Judgment and the affidavits and exhibits

attached to and accompanying said motion. This was not printed for use in the United States Court of Appeals, but the original, in lieu of a printed copy thereof, was sent to the appellate court pursuant to petitioners' motion (R. 75-77) and an order of the trial court granting it (R. 77-78).[1] The case was heard below on the record reflected by the two volumes on file here.

The Opinions Below

The opinion of the District Court is in the form of a letter addressed to the attorneys for the respective parties dated September 23, 1947 (R. 93-95), and is not officially reported. The opinion of the United States Court of Appeals is printed in the record (R. 234-242) and reported in 171 Fed. (2d) 964.

Jurisdiction

The judgment of the Court of Appeals was entered on January 18, 1949 (R. 243), the petition for certiorari was granted on June 6, 1949 (R. 247), 69 S. Ct. 1170. The jurisdiction of this court is invoked under Title 28 U. S. C. 347 (a) and (b), now Section 1254 of the Revised Judicial Code (28 U. S. C. 1254).

Questions Presented

1. Did the coverage of the Fair Labor Standards Act extend to those who, during the recent war, were engaged in the production of munitions at Government-owned ordnance plants operated through the agency of private contractors by authority of the National Defense Act of July 2, 1940?

2. Were such persons engaged in the production of goods for commerce within the meaning of the Fair Labor Standards Act?

[1] Rule 75 (i) Rules of Civil Procedure

3. Were such persons "employees" within the meaning of the Fair Labor Standards Act?

4. Alternatively, if this court should determine that the decision of the Court of Appeals cannot be affirmed upon any of the theories within the scope of the order of this court granting the writ of certiorari, whether or not this case should be remanded to the United States Court of Appeals, Fifth Circuit, for a determination of the issue of payment pleaded by respondent and presented by it to, but not decided by the Court of Appeals.

Statutes Involved

In the interest of brevity, reference is made to Appendix A of the brief of respondent in Aaron, et al. v. Ford, Bacon & Davis, No. 79, October Term, 1949, where the pertinent statutory provisions will be found.

Statement

Petitioners have filed no brief, and their statement of the case as contained in their petition for the writ of certiorari is so barren of the controlling facts that respondent feels impelled to write a full statement; and to the extent that petitioners' statement as contained in said petition conflicts with the following, it is not accepted.

The Proceedings Below

The facts upon which petitioners based their claim are set out in their amended complaint filed February 6, 1946, in the District Court of the United States for the Eastern District of Texas, Texarkana Division (R. 3-13). In this amended complaint, petitioners allege that during the weeks beginning August 1, 1941, and ending on the date of filing their complaint, they were each employed by respondent at various times in the manufacture, production and processing of ammunition and goods for interstate

commerce (R. 9), and that after such manufacture, etc., the goods were shipped outside the State of Texas (R. 10), and that during their employmer they performed labor for respondent in excess of forty hours per week for which they have not been compensated (R. 11). They further alleged that each has a cause of action against respondent arising out of their employment for overtime wages due them under the provisions of the Fair Labor Standards Act of 1938 as amended for the amount of such overtime wages, an equal amount as liquidated damages, and attorney's fees, and that the amount due each thereunder was in excess of $1,000.00 (R. 8). Petitioners filed a Bill of Particulars (R. 24-75) pursuant to an order of the court directing them to do so (R. 22-24), after which respondent filed its answer which, so far as relevant here, consisted of a general denial (R. 15-16), and a statement that neither petitioners nor respondent was engaged in commerce or in the production of goods for commerce within the meaning of the Fair Labor Standards Act (R. 16-17), and that the sums of money paid petitioners as compensation for all regular and overtime hours of work were greater in amount and in excess of the amount respondent would have been required to pay them under and as computed by the requirements of the Fair Labor Standards Act, even if such Act had been applicable (R. 16). Prior to the time respondent's answer was filed, respondent had been instructed by the Department of Justice not to present in its pleadings the defense that the respondent enjoys sovereign immunity as an agent of the United States. However, the defense was presented to the trial court in argument supporting respondent's Motion for Summary Judgment (R. 182-184). Respondent also presented the defense in argument in support of its Motion for Summary Judgment that the transportation of government-owned munitions of war across State

lines was an administrative act of the Government in its sovereign capacity and not commerce (R. 184), and the applicability of the Walsh-Healey Act, to the exclusion of the Fair Labor Standards Act, was likewise mentioned in argument (R. 212).

Respondent filed its Motion for Summary Judgment (R. 2-250), and the following grounds, among others not relevant here, were presented:

> "(a) Plaintiffs were not engaged in commerce, nor in the production of goods for commerce, within the meaning and intendment of the Fair Labor Standards Act, while they were in the employ of the defendant."
>
> "(b) Defendant was not engaged in commerce, nor in the production of goods for commerce, within the meaning and intendment of the Fair Labor Standards Act, during the time plaintiffs were employed by it."
>
> "(c) Defendant has paid all plaintiffs all moneys which it owed them, and each of them, for the services performed by them, and each of them, for the defendant, in accordance with their contracts of hire, and all laws, statutes and lawful regulations issued pursuant thereto, as applied to all plaintiffs and their employment with defendant, and the sums of money paid said plaintiffs, each respectively, by defendant, were sums equal to, or greater in amount, and in excess of the sums of money which this defendant would have been required to pay plaintiffs, each respectively, and which they would have been entitled to receive, computed in accordance with the provisions of the Fair Labor Standards Act, had said Act been applicable to defendant, and plaintiffs' employment with defendant." (R-II, 251).

Attached to and supporting the Motion for Summary Judgment were the affidavits of the Contracting Officer's Representative, the Government's Field Auditor, and various officials and employees of respondent, each having

personal knowledge of the facts sworn to by him, and being able to give competent testimony of the truth thereof (R-II, 252-285), and there was attached to this motion, as Exhibit "A", the Management Service Contract W-ORD-516, DA-W-ORD-3, entered into between respondent and the Government (R-II, 285-340), and the supplements to the contract (R-II, 340-425). Subsequently, and before a hearing on the Summary Judgment, respondent, with leave of the court, filed a supplemental affidavit in support of its motion for Summary Judgment (R. 79-87). The original and supplemental affidavits and the exhibits attached to and supporting the Motion established the facts set forth in the next section of this brief, captioned "The Facts".

A hearing was had on respondent's Motion for Summary Judgment in the District Court, which, after considering "the pleadings in the action, defendant's said Motion for Summary Judgment, and the affidavits of John T. Murchison, William A. Bailey, A. Kelly, J. S. Herbert, K. M. Prichard, K. E. Huffman, A. C. Sprague, R. W. Ells and C. E. Jones, accompanying and in support of said Motion for Summary Judgment, and there being no controverting or opposing affidavit, or other evidence in opposition to defendant's Motion for Summary Judgment and said accompanying affidavit; and the court having found that there is no genuine or material issue or controversial question of fact to be submitted to the court on the trial of this cause", granted respondent's motion and entered summary judgment thereon, directing that the cause be dismissed (R. 95-96). The trial court based its judgment primarily upon the conclusion that the activities conducted at the Lone Star Ordnance Plant did not amount to the production of goods for commerce within the meaning of the Fair Labor Standards Act (R. 93).

Petitioners appealed from this judgment to the United States Court of Appeals, Fifth Circuit, and after argument there, the Court of Appeals, in an opinion by Judge Holmes, affirmed the judgment of the trial court, holding (a) that the facts set forth in the affidavits and exhibits accompanying respondent's Motion for Summary Judgment were not controverted either by opposing affidavits or testimony; and (b) that respondent was not an independent contractor, but instead was "acting merely as a Government agency." (R. 334-242).

The Facts

The facts are as follows:

1. Respondent was incorporated under the laws of Ohio in 1941 for the sole purpose of fulfilling and performing Contract W-ORD-516, DA-W-ORD-3, as amended, to avail the Government of the key personnel, industrial organization, mass production "know-how", and industrial technique of The B. F. Goodrich Company, the services of which, along with other large manufacturing concerns, representatives of the United States Ordnance Department stated, in conference with Goodrich officials, were essential to the War Department's vast plans for national security (R-II, 254-255).

2. The respondent, pursuant to the contract referred to in the next preceding paragraph, and under the direction of the United States Government, designed, constructed, equipped and staffed the Lone Star Ordnance Plant, a new ordnance facility, upon a Government reservation comprising approximately twenty-two thousand acres, and trained key personnel to operate this facility for the loading of fixed rounds, shells, bombs, boosters, fuses, detonators, artillery primers, and other similar ordnance items for use by the Government in the prosecution of the late

war (Paragraphs 1-4, original affidavit supporting Motion for Summary Judgment, R-II, 254-255).

3. The United States, by written contract (R-II, 285-328) retained respondent to recruit labor and other personnel for, and to manage the operation of, the ordnance plant. Respondent was paid a fixed fee for this service, and all costs of operation, including the cost of labor and materials, which costs exceeded ten thousand dollars, were at the Government's expense (R-II, 255 and 285). At all times involved, the premises upon which petitioners were employed, the tools and equipment furnished or supplied to them by respondent which they, and all others working on the premises were using in their employment, and the property and products with which they dealt in such employment, were all in their entirety the property of the United States (Paragraphs 3 and 5, original affidavit supporting Motion for Summary Judgment, R-II, 255-256).

4. By the terms of the Contract, the title to all materials, tools, machinery, equipment, supplies, and all other property of, upon, located at, and used by the Plant, including all parts, components, explosives and materials from which respondent assembled munitions under its Contract, was in the United States Government, and title to all items purchased by respondent immediately vested in the Government at the point of shipment (Paragraph 5, original affidavit supporting Motion for Summary Judgment, R-II, 256).

5. Under the Contract, the Government furnished, supplied, and caused to be shipped to the Plant, all parts, components, explosives and materials used in the assembling and loading of ammunition, except such small quantities of small metal parts (inconsequential in amount) as the Contracting Officer from time to time directed respondent

to furnish, and under said Contract, the title to such Plant-purchased material immediately vested in the Government at the point of shipment (Paragraph 26, original affidavit in support of Motion for Summary Judgment, R-II, 263).

6. Respondent did not ship finished ammunition from the Plant; all such shipments were made by the Ordnance Department, on Government bills of lading (Paragraph 36, original affidavit supporting Motion for Summary Judgment, R-II, 268).

7. Respondent at no time had title to the finished products of the Plant, and at no time had title to any of the component parts of such products, or of the materials, supplies, machinery, equipment, or other property used in connection with the contract, title thereto and possession thereof being at all times in the United States and subject to its sole control (Paragraph 1, supplemental affidavit supporting Motion for Summary Judgment, R. 79-80).

8. The Government did not purchase munitions from the respondent (Paragraph 2, supplemental affidavit supporting Motion for Summary Judgment, R. 80).

9. Respondent did not sell munitions to the Government, or to any other party (Paragraph 3, supplemental affidavit supporting Motion for Summary Judgment, R. 80).

10. No munitions or other products were manufactured or processed at the Ordnance Plant except from materials belonging to the Government, and all such munitions and other products were by the Government used in the prosecution of the war (Paragraph 4, supplemental affidavit supporting Motion for Summary Judgment, R. 80).

11. The United States furnished and shipped to the Ordnance Plant approximately 90-95 percent of all materials, supplies, machinery, equipment, and other property

used in connection with the Management Service Contract for the operation of such Plant. The remainder (approximately five percent) of the materials, supplies, etc., were purchased by respondent. The bulk of all such purchases (approximately ninety-five percent of the purchased material) was approved by the Government prior to the issuance of a purchase order by respondent. Title to such purchased materials vested in the United States at their points of origin, and such materials were shipped to the Ordnance Plant on Government bills of lading marked "Government property for Military Use". The remainder of the materials purchased by respondent which were not shipped on Government bill of lading, consisted of less than car lot shipments and purchases in an amount less than Five Hundred Dollars; title to these purchases, however, also vested in the United States (Paragraph 5, supplemental affidavit supporting Motion for Summary Judgment, R. 80-81).

12. A Government Finance Officer in Washington, D. C. paid the freight on the Government bills of lading (Paragraph 6, supplemental affidavit Motion for Summary Judgment, R. 81).

13. The United States maintained an Accountable Property Officer to be accountable for all property used in connection with the contract between the Government and the respondent (Paragraph 8, supplemental affidavit Motion for Summary Judgment, R. 81).

14. Prior to the time the Plant actually began operations, the United States advanced to respondent a large sum of money to defray anticipated operating expenses. As money was withdrawn from this fund, it was replenished by the Government. Respondent was not required to use any of its own money in the operation of Lone Star

Ordnance Plant (Paragraph 9, supplemental affidavit Motion for Summary Judgment, R. 81-82)

15. The Government contracted for electric power, gas, telephone, telegraph and teletype service at the Plant, and paid such bills directly. Respondent acted as an agent of the Government for the purpose of causing official business messages to be transmitted (Paragraph 10, supplemental affidavit Motion for Summary Judgment, R. 82).

16. In the operation of the Plant, the Ordnance Department specified the various items which it desired to have loaded and supplied production schedules which set forth the quantities of the various items that it desired loaded each month. The quantities specified in the production schedules were revised by the Ordnance Department from month to month, and it was a frequent and common occurrence that the schedule would be increased or decreased in the month, due to the fluidity of the war and resulting demand for different ordnance items, or for larger or smaller quantities of particular items. During the operation of the Plant, the indicated quantities of the particular ammunition items were loaded in the Plant's various load lines (Paragraph 29A, affidavit in support of Motion for Summary Judgment, R-II, 264)

17. The Plant was under the control and supervision of the Chief of Ordnance, United States Army. A commanding Officer appointed by the Chief of Ordnance was on duty at Lone Star Ordnance Plant at all times relevant hereto, and had complete control over the property and the installations thereon (Paragraph 11, supplemental affidavit Motion for Summary Judgment, R. 82)

18. By deed, Honorable Coke Stevenson, as Governor of the State of Texas, ceded jurisdiction over the Lone Star reservation to United States Government for all pur-

poses except the service of civil process upon respondent, and the United States Government had exclusive jurisdiction over the premises embracing the Lone Star Ordnance Plant (Paragraph 12, supplemental affidavit Motion for Summary Judgment, R. 82).

19. The Government retained the right to dismiss any employee at the Plant which the Contracting Officer should deem incompetent or whose retention was by him deemed not to be in the public interest (Paragraph 13, supplemental affidavit Motion for Summary Judgment, R. 82-83).

20. The Government approved all wage and salary rates. The Government also required that no key employees and their principal assistants be hired or assigned to service until there had been submitted and approved by the Contracting Officer a statement of the previous salary, proposed salary, qualifications and experience of the persons selected for such assignment (Paragraph 14, supplemental affidavit Motion for Summary Judgment, R. 83).

21. All munitions processed at the Plant were processed under the direct supervision and control of the Government (Paragraph 15, supplemental affidavit Motion for Summary Judgment, R. 83).

22. The Government specified the loading processes to be used. It directed the type and quantity of munitions, the specifications thereof, and the rate of production. Inspections were made by the Government during the various steps of their processing. Detailed rules and regulations governing safety and methods of production were promulgated by the Government. Respondent was required to comply with such rules and regulations and to meet specifications, and Government officers and employees were present to report on compliance (Paragraph 16, supplemental affidavit Motion for Summary Judgment, R. 83).

The Government, from time to time, sent to respondent production schedules directing respondent to produce munitions of certain designated specifications. Respondent was required to meet these schedules. It had no discretion as to the type of munitions to be made, the quantity thereof, or the method or process used in their manufacture, and respondent produced no munitions except as required by Government directive. (Paragraph 17, supplemental affidavit Motion for Summary Judgment, R. 83-84).

23. On occasions the Government transferred production schedules from other ordnance plants to the Lone Star Ordnance Plant for completion. In such cases, if the original plant had made any contracts for materials and supplies on account of such schedules, respondent was required to take over such supply contracts and to pay the vendors in accordance therewith from funds supplied to respondent by the Government (Paragraph 18, supplemental affidavit Motion for Summary Judgment, R. 84).

24. Respondent was not penalized if the materials processed at the Plant did not meet specifications and could not be used. Under the Contract between respondent and the Government, respondent was allowed all costs of reworking rejected munitions and all costs of material finally rejected (Paragraph 19, supplemental affidavit Motion for Summary Judgment, R. 84).

25. Of the direct materials used in the manufacture of munitions, the Government furnished materials of the approximate value of $503,393,000.00. Respondent purchased and paid for with Government money materials of the approximate value of $32,514,139.66. (Paragraph 20, supplemental affidavit Motion for Summary Judgment, R. 84).

26. Government employees employed by the Ordnance Department audited respondent's time cards and payrolls,

and during a part of the time, witnessed the actual payments to respondent's employees, and during the remainder of the time, witnessed actual payments to a sufficient number of the employees to satisfy the Government that their actual payments were being made, as indicated by respondent's payroll records (Paragraph 21, supplemental affidavit Motion for Summary Judgment, R. 85).

27. Respondent paid wages and salaries of employees by check against a bank account, the funds of which were furnished by the Government, and were subject to withdrawal by the Government (Paragraph 22, supplemental affidavit Motion for Summary Judgment, R. 85).

28. No sales tax was paid by respondent on materials purchased for use at Lone Star Ordnance Plant, no ad valorem taxes on real or personal property at Lone Star Ordnance Plant was paid to the State or the County, and no license or registration fees were paid on motor vehicles used in connection with the operation of the Plant (Paragraph 23, supplemental affidavit Motion for Summary Judgment, R. 84).

29. Under Article VII-B of the Management Service Contract under which respondent operated the Lone Star Ordnance Plant, provision was made for changes in it, the work to be performed, and the method for effecting such changes, following which was the following conclusion:

> "* * * but nothing provided in this Article shall excuse the Contractor from proceeding with the prosecution of the work so changed." (R-II, 318).

30. Article VII-E (4) of such contract provided that the Government should prescribe procedures to be followed by the Contractor in accounting, checking and auditing functions, and that "* * * if in the opinion of the Contract-

ing Officer, the number of employees engaged in checking, auditing and accounting work is excessive, the Contractor shall make such reductions in force as the Contracting Officer deems necessary" (R-II, 320).

31. Article VII-F (7) of such contract provides that the Contractor shall "at all times use its best efforts in all acts hereunder to protect and subserve the interest of the Government" (R-II, 321).

32. By Change Order No. 4, dated July 9, 1943, Section 4, of Article V-A, of Title 5, was changed to give the Government the right to pay directly to the persons concerned all sums due from the Contractor for labor, material, or other charges, which was reaffirmed by and incorporated in Supplement 8 to the Contract (R-II, 343).

33. By Change Order No. 7, dated October 12, 1943, respondent was directed to perform, at the Navajo Ordnance Depot, Bellemont, Arizona, all work necessary or incident to the reworking and renovating of certain ammunition, and these provisions were reaffirmed by and incorporated in Supplement 8 to the Contract (R-II, 347-348).

34. By Change Order No. 9, dated April 3, 1944, and Change Order No. 10, dated April 7, 1944, the terms of both of which were included in Supplement 11 dated June 30, 1944, it was provided that the Contractor "Shall, as directed, from time to time by the Contracting Officer, receive, inspect (including x-raying), assort, screen, segregate, load, renovate, recondition, rehabilitate * * * any ammunition (including components and containers), even though it is not specifically mentioned in this contract, *regardless of its origin*, in such quantities as may be directed by the Contracting Officer" (R-II, 368-369).

35. There were four phases of work to be performed under the Management Service Contract. The provisions

of the contract applicable to the operation of the Plant are found under Titles IV to VII, inclusive, and it is with these, and these only, that we are concerned in the present case.[2]

36. The Government reserved the right to have the final decision on all disputes concerning questions of fact arising under the contract (R-II, 323).

37. The claims of all petitioners all originated subsequent to the construction of the Plant, and during the time it was being operated.

Subsection 1, of Article VI-A, of Title VI, of the Management Service Contract, provides that "The Government may terminate this contract at any time by a notice in writing from the Contracting Officer to the Contractor. Such termination shall be effective in the manner and upon the date specified in said notice. * * * Upon receipt of such notice, the Contractor shall, unless the notice directs otherwise, immediately discontinue all work * * *" (R-II, 315-316).

Notice of termination of work under such Contract was given on behalf of the Government "for the convenience of the Government" by the Contracting Officer for the Chief of Ordnance on October 18, 1945, to be effective midnight October 6, 1945 (R-II, 401).

The substance of these facts was found by the Court of Appeals (R. 235-238).

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[2] It should be emphasized that Titles I through III, inclusive, have no bearing on the present case. Thus the provisions of Title I-E, by their express terms, are limited to the work done under that particular Title; that is to say, to the work of design, engineering and construction (R-II, 292-295); similarly the provisions of Article II-D and III-D have application only to work done in connection with the procurement of production equipment and the training of key personnel necessary for the operation of the Plant (R-II, 295-297).

Summary of the Argument

I.

The record here adequately presents the issues. The facts recited in the next preceding section of this brief were based upon extensive affidavits which were not controverted. The legal issues were argued and presented to the trial court; and they were argued and considered by the Court of Appeals in the light of *Kennedy v. Silas Mason Co.*, 334 U. S. 249 (1948).

II.

In the interest of brevity this respondent adopts point II of the Summary of Argument which will be found at p. 21 of the Brief of Respondent in the case of Aaron v. Ford, Bacon & Davis, Incorporated, No. 79, October Term, 1949.

III.

In the interest of brevity this respondent adopts point III of the Summary of Argument which will be found at p. 21 of the Brief of Respondent in the case of Aaron v. Ford, Bacon & Davis, Incorporated, No. 79, October Term, 1949.

IV.

In the interest of brevity this respondent adopts point IV of the Summary of Argument which will be found at p. 22 of the Brief of Respondent in the case of Aaron v. Ford, Bacon & Davis, Incorporated, No. 79, October Term, 1949.

V.

In the interest of brevity this respondent adopts point V of the Summary of Argument which will be found at p 23 of the Brief of Respondent in the case of Aaron v. Ford, Bacon & Davis, Incorporated, No. 79, October Term, 1949.

VI.

Respondent having paid petitioners base and overtime compensation under the Walsh-Healey Act a sum greater than if computed under the terms of the Fair Labor Standards Act, petitioners have received full payment and are not entitled to recover in this suit.

Argument

I.

THE RECORD ADEQUATELY PRESENTS THE ISSUES

Kennedy v. Silas Mason Co., 334 U. S. 249 (1948) came to this court under peculiar circumstances. The respondent in that case had filed a motion for summary judgment supported by a single affidavit only two printed pages in length. Aside from the motion and its supporting affidavit, the record consisted merely of the contract between the respondent and the government and the opinion of the lower courts. The record was wholly barren of any findings of fact. Moreover, in the Court of Appeals and again in this court, issues were argued which had not been considered below. For all of these reasons, this court declined on that record to pass on the questions sought to be presented.

The present case is wholly different. It is true that the grounds stated in support of respondent's Motion for Summary Judgment in the trial court made no reference to the National Defense Act of July 2, 1940, or to the Walsh-Healey Act, but in argument on respondent's Motion for Summary Judgment before the trial court, petitioners' counsel made the argument that the contract applied the Fair Labor Standards Act to the operation of the plant, and in the course of his argument read from that part of the contract applying the Walsh-Healey Act to respondent's operations, and respondent's counsel at that time called the trial court's

attention to the fact that it was the Walsh-Healey Act, and not the Fair Labor Standards Act, to which petitioners' counsel had reference, and to that extent, the application of the Walsh-Healey Act to respondent's operations was called to the attention of the trial court (R. 212). However that may be, the contention was made by respondent in the Court of Appeals that the Lone Star Ordnance Plant was operated by the Government through the agency of respondent pursuant to the Act of July 2, 1940, and that this Act, together with the Walsh-Healey Act, rather than the Fair Labor Standards Act, governed labor standards in respondent's operations.[3] Moreover, the Motion for Summary Judgment was supported by voluminous and informative affidavits of the Contracting Officer's Representative, the Ordnance Department's Field Auditor, and various officials and department heads of respondent, all of whom had personal knowledge of and were competent to give testimony to the truth of the facts sworn to by them (R-II, 253-285 and R. 79-87), and none of these facts were controverted by petitioners,[4] and these findings cover every aspect of

[3] Point IV of "Defendant's Contentions" was summarized in its brief filed in the Court of Appeals on page 7 as follows:

"The Lone Star Plant was operated by the Government through the agency of the defendant under a contract entered into pursuant to the Act of July 2, 1940 (c. 508, 54 Stat. 712), which Act, together with the related Walsh-Healey Public Contracts Act (49 Stat. 2036, 41 U. S. C. Secs. 35-45), rather than the Fair Labor Standards Act, fixed and determined the labor standards, hours of work, and overtime compensation for plaintiff-type employees."

[4] Under Rule 56 (e), Federal Rules of Civil Procedure, petitioners were required to serve opposing affidavits prior to the hearing on the Motion for Summary Judgment, and when, as in this case, they failed to do so, the facts stated in the affidavits supporting respondent's Motion for Summary Judgment were taken as confessed. The Court of Appeals rendered its decision in this case, having fully in mind the decision of this court in *Kennedy v. Silas Mason Company*, supra

the case and afford a solid basis to dispose of all of the issues presented by this appeal. Moreover, Judge Lemley's opinion in the case of *Barksdale v. Ford, Bacon & Davis*, 70 F. Supp. 690 (E. D. Ark., 1947) was handed down a very short time before a hearing in the trial court on respondent's Motion for Summary Judgment in this case; the opinion was presented to the trial court (R. 186) as controlling here; and in view of the identity of the uncontroverted facts involved

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The so-called response to the Motion for Summary Judgment was signed but not sworn to by petitioners' counsel, and it does not appear that they have personal knowledge of the facts set up in such response, nor that they were competent to give testimony as to the truth thereof. Vol. 3, Moore's Federal Practice, Page 3174, stating:

> "The Summary Judgment procedure prescribed in Rule 56 is a procedural device for promptly disposing of actions in which there is no genuine issue of fact although *such issue is raised by the formal pleadings*. The very object of a motion for summary judgment is to separate what is formal or pretended in denial or averment from what is genuine or substantial, so that only the latter may subject a suitor to the burden of a trial. To attain this end, the rule permits a party to *pierce the allegations of fact in the pleadings* and to obtain relief by a summary judgment where facts set forth in detail in affidavits, depositions and admissions on file show that there is no genuine issue of fact to be tried." (Emphasis supplied)

was approved by the Court of Appeals, Fifth Circuit, in *Wilkinson v. Powell, et al.*, 149 F. (2d) 335 (5 Cir., 1945); see also *Fletcher v. Krise* (D. C. Cir. 1941) 120 F. (2d) 809; *Geller v. Trans-American Corp.*, 53 F. Supp. 625 (D. Del., 1943) affirmed by Per Curiam Opinion expressly approving the reasoning and conclusions of the District Court, 151 Fed. (2d) 534 (3 Cir., 1945). A similar unverified reply to a motion for summary judgment supported by affidavits was held insufficient to controvert the facts stated in the supporting affidavit in *Board of Public Instruction v. Meredith*, 119 F. (2d) 712 (5 Cir., 1941) (certiorari denied 323 U. S. 774); see also *National War Labor Board v. Montgomery, Ward & Company*, 144 F. (2d) 528 (D. C. Cir. 1944). Of interest is the statement of Judge Walker in *Engel v. Aetna Life Ins. Co.*, 139 Fed. (2d) 469 (2 Cir., 1943): "We have often held that mere formal denial or general allegations which do not show the facts in detail and with precision are insufficient to prevent the award of summary judgment".

in the two cases, the trial court approved the conclusions reached and necessarily, by inference, found that there was no material difference between the uncontradicted facts involved in the two cases. Indeed, the trial court (R. 94) quoted certain of the facts and conclusions embodied in Judge Lemley's opinion (70 F. Supp. 693-694). All these and others were by brief and argument presented to and considered by the Court of Appeals; the Court of Appeals, in writing the opinion in the case at bar, meticulously pointed out that the record in this case supplied the deficiencies found by this court to exist in the record in *Kennedy v. Silas-Mason Company* and, in fact, at pages 237-238 of the record, enumerated extensive statements of fact not in the former record, but in the present record, and upon which the summary judgment of the trial court in the case at bar was affirmed.

II

The National Defense Act Set Up a Wholly New System of War Production Which Was Completely Outside the Scope of the Fair Labor Standards Act

In the interest of brevity, this respondent adopts the argument on this point which will be found at pages 25-44 of the brief of respondent in the case of *Aaron v. Ford, Bacon & Davis*.

It will be noted that every fact referred to in the argument contained in respondent's brief in the *Aaron* case which we have by this paragraph adopted as respondent's argument under this point, is not only supported by the uncontroverted affidavits and exhibits supporting the Motion for Summary Judgment in this case, but is also specifically found by the United States Court of Appeals in the case at bar (R. 235-241).

III.

The Walsh-Healey Act Applied to Employers of the Arkansas Ordnance Plant to the Exclusions of the Fair Labor Standards Act

In the interest of brevity, this respondent adopts the argument on this point which will be found at pages 44-61 of the brief of respondent in the case of *Aaron v. Ford, Bacon & Davis.*[4]

IV.

The Petitioners Were Not Engaged in the Production of Goods for Commerce

In the interest of brevity, this respondent adopts the argument on this point which will be found at pages 61-80 of the brief of respondent in the case of *Aaron v. Ford, Bacon & Davis.*[5]

V.

The Petitioners Were Employees of the United States

In the interest of brevity, this respondent adopts the argument on this point which will be found at pages 80-93 of the brief of respondent in the case of *Aaron v. Ford, Bacon & Davis.*[6]

VI.

Petitioners Were Paid in Full

This proposition is urged for consideration of this court only in the event it should determine that the decision of the Court of Appeals should not be affirmed upon any of the theories within the scope of the order of this court granting the writ of certiorari, in which event respondent

[4] See footnote 5 at page 21 of this brief.
[5] See footnote 5 at page 21 of this brief.
[6] See footnote 5 at page 21 of this brief.

presents that the case should be remanded to the Court of Appeals for a consideration and determination of respondent's plea of payment, a complete defense within itself, even under the terms of the Fair Labor Standards Act.

One defense presented in the answer and the Motion for Summary Judgment was that the sums of money paid to petitioners as compensation for all regular and overtime hours of work performed by them, each respectively, fully satisfied the requirements of the Fair Labor Standards Act, even if it could be held applicable, and in fact were greater in amount and in excess of the amount respondent would have been required to have paid them under and as computed by such Act (R. 16)." This defense was carried forward in respondent's Motion for Summary Judgment (Subdivision (c) of Par. 1, R-II, 251).

In petitioners' amended complaint on which they went to trial, they alleged in part "that neither they nor any of them have a complete record of the work and labor performed by them while employed by defendant; that defendant has an accurate and complete record of each and every hour worked by plaintiff, and by each employee, and the wages paid". (Par. 7, Plaintiff's Amended Complaint, R. 11-12)

That the aggregate of petitioners' wages for an administrative work week exceeded what the aggregate would have been had such wages been computed in accordance with the Fair Labor Standards Act, is explained by the fact that respondent, under its contract with the Government, was required to and did pay them under the provisions of the Walsh-Healey Act, which provided greater benefits in requiring the payment of a minimum of time and a half for all hours in excess of eight in one day, as also the payment of the same overtime rate for all hours in excess of forty in one week; moreover, following and pursuant to Executive Order 9240 (7 FR 7159), double time was paid to an employee working on the seventh consecutive day during the same administrative work week.

Mr. C. M. Kennedy, speaking as attorney for petitioners at one of the pre-trial conferences held in the trial court, admitted that respondent had kept an accurate record of the number of hours each petitioner worked each day during each administrative work week, his basic wage rate, any change in his basic wage rate, and the amount respondent paid petitioner for each administrative work week during the course of his employment (R. 120-122, and R. 140-141).

Petitioners having thus agreed that respondent's time-keeping and pay-roll records were correct as to time worked and wages paid, respondent presented with its Motion for Summary Judgment to sustain this particular ground of the motion, the affidavits of K. R. Huffman, Respondent's Comptroller and Assistant Treasurer, and William A. Bailey, Civilian Ordnance Department employee of the United States Government, working at this plant in the capacity of Field Auditor, which state that according to these records, each petitioner was paid at his regular base rate for the first forty hours during each and every work week, and time and a half for all hours in excess of forty. (Par. 46, Affidavit in Support of Motion for Summary Judgment, R. 276-279). The record in this case is further undisputed that these time-keeping and pay-roll procedures and records were standardized, and were submitted to and approved by the Government, were continuously audited and inspected by the Government Auditor and time checkers who, among other things, verified the amount of time worked by petitioners. (Par. 32, Affidavit in support of Motion for Summary Judgment, R-II, 266 and Paragraphs 34 and 35 of the Affidavit, R-II, 267-268).

In spite of the indefinite allegations of petitioners' complaint with respect to what each petitioner was suing for, and the particulars upon which each claim was based, they in one of the pre-trial conferences in the trial court com-

mitted themselves to the proposition that their claim was that the employees were on the premises eight and one-half hours and were paid for only eight hours of each work day. Mr. Kennedy, speaking for petitioners in this case, therefore stated that they were suing for thirty minutes overtime for each day each petitioner worked. R. 141. In other words, there were eight and one-half hours time elapsed from the beginning to the ending of their work day, and here again full payment is established, because thirty minutes of the eight and one-half hours elapsed time was consumed by petitioners in a scheduled lunch period which they were free to use as they chose, and enjoyed daily by each of them. Par. 22-A and 22-B, Affidavit in support of Motion for Summary Judgment, R. II, 261-262, leaving eight hours elapsed working or productive time for which each petitioner was, according to their own admissions in their pleadings and in the pre-trial conferences, fully paid in accordance with even the Fair Labor Standards Act. There were, of course, a few departments in which it was impracticable to assign a regular thirty minute lunch period, but in these instances, petitioners were permitted to eat their lunch on what was called a "snatch lunch" basis, that is, whenever they had free time to do so, and no deduction was made for a lunch period

It is interesting to note the statement of one of petitioners' attorneys in one of the pre-trial conferences where he said: "There is only one issue and that is employees engage in production work on company time. And that is the sole question in the law suits before Your Honor. * * * That condition is solely on the productive time. That is the only contention we make." R. 107-108. At this time the Court said: "Is the issue [illegible] at this stage now. As I understand your statement, speaking for all these plaintiffs in these suits that you are making no claim about walking time or dressing time or sleeping time or any other time except the individual man where engaged in actual productive [illegible]." Counsel replied: "That is correct, Your Honor."

with respect to petitioners in those departments. They were paid for all elapsed time, whatever it was, between actually going to work at the beginning of their shift, to the end of their shift. (Par. 22-A, Affidavit in support of Motion for Summary Judgment, R-II, 261-262).

Such of the petitioners as were paid upon a salary basis were not required to ring time clocks, but reported to their supervisor at their assigned work place. At the end of each work week, a "Salary Employee's Weekly Attendance Report", setting forth the number of hours worked each day, together with the total number of hours worked during that particular administrative work week, was presented to the employee, and if found by him to be correct, signed by him, and he was paid in full at proper base and overtime rates, if overtime rates were applicable to him, for all hours shown on said signed weekly attendance reports. (Par. 24, Affidavit in Support of Motion for Summary Judgment, R-II, 263).

In every instance where the question has been raised, the courts have held that the time consumed by an employee during a scheduled lunch period is not considered as working time, and is not compensable where, as in this case, the employee is free to spend such lunch period in any manner he desires. *Armour & Co. v. Wantock*, 323 U. S. 126 (1944); *Fox v. Summit King Mines, Ltd.*, 143 F. (2) 926 (9 Cir., 1944); *Schnapp v. Groceries Terminal Warehouse Co.*, 13 Labor Cases (C. C. H.) 63,875 (N. D. Ill., 1947); *Connell v. Delaware Air Craft Industries, Inc.* 13 Labor Cases (C. C. H.) 63,932 (Del. Supr. Ct., 1947); and this is true even though the employees choose to remain on the premises of the employer as a matter of convenience to themselves. *Thomas v. Peerless Carbon Co.*, 62 Fed. Supp. 154 (N. D. Tex., 1945).

Briefly summarized, petitioners' claims are based upon the fact that eight and one-half hours time elapsed between the beginning and ending of their day's shift. They admit that for eight of the eight and one-half hours of each day, they were paid compensation at least equal in amount to base and overtime wages, computed in accordance with the Fair Labor Standards Act; the other thirty minutes was consumed by them in a non-compensable scheduled lunch period, as to those who enjoyed a scheduled lunch period, and as to those who did not have a scheduled lunch period, the facts are likewise uncontroverted that they were paid in full for the entire eight and one-half hour period.

In all events, according to the uncontroverted facts, all petitioners, whatever their class or schedule of work, were paid in full.

Conclusion

It is therefore respectfully submitted that the decision of the court below should be affirmed on the ground that the activities of petitioners were not within the coverage of the Fair Labor Standards Act. If the decision should not be affirmed, however, the case should be remanded for consideration of other defenses.

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